Court File No. M42068

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

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 SINO-FOREST CORPORATION

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(Motion for Leave to Appeal from CCAA Plan Sanction Order)

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Court File No. M42068

COURT OF APPEAL OF ONTARIO

B E T W E E N:

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 SINO-FOREST CORPORATION

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INDEX

TAB

Case Name:

Timminco 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 Proposed Plan of Compromise or Arrangement with Respect to Timminco Limited and Becancour Silicon Inc., Applicants

[2012] O.J. No. 3931

2012 ONCA 552

Docket: M41062 and M41085

Ontario Court of Appeal
Toronto, Ontario

J.M. Simmons, R.G. Juriansz and G.J. Epstein JJ.A.

Heard: By written submissions.
Judgment: July 20, 2012.

(8 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Priority -- Application by two unions for leave to appeal from order granting DIP financing provider super priority charge over debtor's assets dismissed -- Debtor would cease operating but for DIP financing -- Financing would only be provided in exchange for super priority charge -- Proceeding with restructuring was in best interests of all parties.

Statutes, Regulations and Rules Cited:

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

Appeal From:

On leave to appeal from the order of Justice Geoffrey B. Morawetz of the Superior Court of Justice,

dated February 9, 2012.

Counsel:

Ashley J. Taylor and Erica Tait, for the applicants.

Douglas J. Wray and Jesse Kugler, for the Communications, Energy and Paperworkers Union of Canada.

Charles E. Sinclair, for the United Steelworkers.

ENDORSEMENT

The following judgment was delivered by

1 THE COURT:-- Leave to appeal is denied.

2 In the CCAA context, leave to appeal is to be granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties. In determining whether leave ought to be granted, this Court is required to consider the following four-part inquiry:

* whether the point on the proposed appeal is of significance to the practice;
* whether the point is of significance to the action;
* whether the proposed appeal is *prima facie* meritorious or frivolous; and
* whether the appeal will unduly hinder the progress of the action.

See *Re Stelco* (2005), 78 O.R. (3d) 241

3 In our view, the proposed appeals lack sufficient merit to meet this stringent test.

4 This court's decision in *Indalex Ltd. (Re)* (2011), 104 O.R. (3d) 641, affirms that a CCAA court may invoke the doctrine of paramountcy to override conflicting provisions of provincial statutes where the application of provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy.

5 Here, the motion judge recognized that in the circumstances of this case there was a conflict between the federal CCAA and the provincial PBA and SPPA. He found that, "[i]n the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated". Further, he concluded that "to ensure that the objectives of the CCAA are fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of the

QSPPA and the OPBA".

6 We see no basis on which this court could interfere with the motion judge's decision, including his unassailable findings of fact that: (1) without DIP financing, Timminco would be forced to cease operating; (2) bankruptcy would not be in the interests of anyone, including members of the pension plan; (3) if the DIP lender did not get super priority, it would not have agreed to provide financing; and (4) there was insufficient liquidity or unfavourable terms associated with the rejected DIP proposals. In short, he found that there was "no real alternative" to approving the DIP facility and DIP super priority charge.

7 The motion judge also addressed the union's fiduciary arguments, primarily in his earlier reasons released February 2, 2012, that are incorporated by reference into his February 9, 2012 reasons. He concluded that it was in the best interests of all parties to proceed with the restructuring. We see no basis on which this court could interfere with this finding.

8 Costs are to the responding parties on the motions on a partial indemnity scale fixed in the amount of $1,500 per motion inclusive of disbursements and applicable taxes.

J.M. SIMMONS J.A.
R.G. JURIANSZ J.A.
G.J. EPSTEIN J.A.

cp/e/qljel/qlpmg/qlmll

Case Name:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

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 and Arrangement involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 4446372 Canada Inc. and 6932819 Canada Inc., Trustees of the Conduits Listed In Schedule "A" Hereto

Between

The Investors represented on the Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper listed in Schedule "B" hereto, Applicants (Respondents in Appeal), and Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits listed in Schedule "A" hereto, Respondents (Respondents in Appeal), and Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal Inc., Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Domtar Inc., Domtar Pulp and Paper Products Inc., GIRO Inc., Vêtements de sports R.G.R. Inc., 131519 Canada Inc., Air Jazz LP, Petrifond Foundation Company Limited, Petrifond Foundation Midwest Limited, Services hypothécaires la patrimoniale Inc., TECSYS Inc., Société générale de financement du Québec, VibroSystM

Inc., Interquisa Canada L.P., Redcorp Ventures Ltd., Jura Energy Corporation, Ivanhoe Mines Ltd., WebTech Wireless Inc., Wynn Capital Corporation Inc., Hy Bloom Inc., Cardacian Mortgage Services, Inc., West Energy Ltd., Sabre Enerty Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd. and Standard Energy Inc., Respondents (Appellants)

[2008] O.J. No. 3164

2008 ONCA 587

45 C.B.R. (5th) 163

296 D.L.R. (4th) 135

2008 CarswellOnt 4811

168 A.C.W.S. (3d) 698

240 O.A.C. 245

47 B.L.R. (4th) 123

92 O.R. (3d) 513

Docket: C48969 (M36489)

Ontario Court of Appeal
Toronto, Ontario

J.I. Laskin, E.A. Cronk and R.A. Blair JJ.A.

Heard: June 25-26, 2008.
Judgment: August 18, 2008.

(121 paras.)

Bankruptcy and insolvency law -- Proceedings in bankruptcy and insolvency -- Practice and procedure -- General principles -- Legislation -- Interpretation -- Courts -- Jurisdiction -- Federal -- Companies' Creditors Arrangement Act -- Application by certain creditors opposed to a Plan of Compromise and Arrangement for leave to appeal sanctioning of that Plan -- Pan-Canadian Investors Committee was formed and ultimately put forward the creditor-initiated Plan of

Compromise and Arrangement that formed the subject matter of the proceedings -- Plan dealt with liquidity crisis threatening Canadian market in Asset Backed Commercial Paper -- Plan was sanctioned by court -- Leave to appeal allowed and appeal dismissed -- CCAA permitted the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court -- Companies' Creditors Arrangement Act, ss. 4, 6.

Application by certain creditors opposed to a Plan of Compromise and Arrangement for leave to appeal the sanctioning of that Plan. In August 2007, a liquidity crisis threatened the Canadian market in Asset Backed Commercial Paper (ABCP). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on US sub-prime mortgages. By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007, pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that formed the subject matter of the proceedings. The Plan was sanctioned on June 5, 2008. The applicants raised an important point regarding the permissible scope of restructuring under the Companies' Creditors Arrangement Act: could the court sanction a Plan that called for creditors to provide releases to third parties who were themselves insolvent and not creditors of the debtor company? They also argued that if the answer to that question was yes, the application judge erred in holding that the Plan, with its particular releases (which barred some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

HELD: Application for leave to appeal allowed and appeal dismissed. The appeal raised issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There were serious and arguable grounds of appeal and the appeal would not unduly delay the progress of the proceedings. In the circumstances, the criteria for granting leave to appeal were met. Respecting the appeal, the CCAA permitted the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where the releases were reasonably connected to the proposed restructuring. The wording of the CCAA, construed in light of the purpose, objects and scheme of the Act, supported the court's jurisdiction and authority to sanction the Plan proposed in this case, including the contested third-party releases contained in it. The Plan was fair and reasonable in all the circumstances.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 4, s. 6

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 91(21), s. 92(13)

Appeal From:

On appeal from the sanction order of Justice Colin L. Campbell of the Superior Court of Justice, dated June 5, 2008, with reasons reported at [2008] O.J. No. 2265.

Counsel:

See Schedule "A" for the list of counsel.

The judgment of the Court was delivered by

R.A. BLAIR J.A.:--

A. INTRODUCTION

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

2 By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

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

Leave to Appeal

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

5 The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and -- given the expedited time-table -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Re Cineplex Odeon Corp.* (2001), 24 C.B.R. (4th) 21 (Ont. C.A.), and *Re Country Style Food Services* (2002), 158 O.A.C. 30, are met. I would grant leave to appeal.

Appeal

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

B. FACTS

The Parties

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

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

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

The ABCP Market

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

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

12 The Canadian market for ABCP is significant and administratively complex. As of August

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

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

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

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

16 When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The Liquidity Crisis

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

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

Hence the "liquidity crisis" in the ABCP market.

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

The Montreal Protocol

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

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

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

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

The Plan

a) Plan Overview

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

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

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

27 The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1-million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders, and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABCP collapse.

b) The Releases

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

29 The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants -- in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" -- from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in

tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

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

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

a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;
b) Sponsors -- who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information -- give up their existing contracts;
c) The Canadian banks provide below-cost financing for the margin funding facility and,
d) Other parties make other contributions under the Plan.

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

The CCAA Proceedings to Date

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

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

35 Following the successful vote, the applicants sought court approval of the Plan under s. 6.

Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

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

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

38 The appellants attack both of these determinations.

C. LAW AND ANALYSIS

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

1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?
2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

(1) Legal Authority for the Releases

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

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the

directors of the debtor company.[1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

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

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

Interpretation, "Gap Filling" and Inherent Jurisdiction

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

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society (Re)* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.). As Farley J. noted in *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 at 111 (Ont. Gen. Div.), "[t]he history of CCAA law has been an evolution of judicial interpretation."

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

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

47 The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell Expressvu Ltd. Partnership v. R.*, [2002] 2 S.C.R. 559 at para. 26.

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

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the

> intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

49 I adopt these principles.

50 The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 at 318 (B.C.C.A.), Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

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

51 The CCAA was enacted in 1933 and was necessary -- as the then Secretary of State noted in introducing the Bill on First Reading -- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Elan Corp. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (C.A.), *per* Doherty J.A. in dissent; *Re Skydome Corp.* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div.); *Re Anvil Range Mining Corp.* (1998), 3 C.B.R. (4th) 93 (Ont. Gen. Div.).

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

> ... [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".[3] Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the*

> *individuals and organizations directly affected by the application, but also to the wider public interest*. [Emphasis added.]

Application of the Principles of Interpretation

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

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

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

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

56 The application judge did observe that "[t]he insolvency is of the ABCP market itself, the

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

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

The Statutory Wording

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

a) the skeletal nature of the CCAA;
b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

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

59 Sections 4 and 6 of the CCAA state:

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by

> proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (*a*) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (*b*) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or Arrangement

60 While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N para. 10. It has been said to be "a very wide and indefinite [word]": *Re Refund of Dues under Timber Regulations*, [1935] A.C. 184 at 197 (P.C.), affirming S.C.C. [1933] S.C.R. 616. See also, *Re Guardian Assur. Co.*, [1917] 1 Ch. 431 at 448, 450; *Re T&N Ltd. and Others (No. 3)*, [2007] 1 All E.R. 851 (Ch.).

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

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. Ltd. v. Ideal Petroleum* (1959) Ltd. [1978] 1 S.C.R. 230 at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 at para. 11 (C.A.). In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Re Air Canada* (2004), 2 C.B.R.

(5th) 4 at para. 6 (Ont. S.C.J.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 at 518 (Gen. Div.).

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

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

65 T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

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

> In my judgment it is not a necessary element of an arrangement for the purposes

> of s. 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s. 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party*. [Emphasis added.]

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

The Binding Mechanism

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

The Required Nexus

69 In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

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

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

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

72 Here, then -- as was the case in *T&N* -- there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

73 I am satisfied that the wording of the CCAA -- construed in light of the purpose, objects and

scheme of the Act and in accordance with the modern principles of statutory interpretation -- supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The Jurisprudence

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

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

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

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

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

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at

issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Michaud v. Steinberg, supra*; *NBD Bank, Canada v. Dofasco Inc.*, (1999), 46 O.R. (3d) 514 (C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C.S.C.); and *Re Stelco Inc.* (2005), 78 O.R. (3d) 241 (C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg* does not express a correct view of the law, and I decline to follow it.

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

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

81 This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

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

83 Nor is the decision of this Court in the *NBD Bank* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma

CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process -- in short, he was personally protected by the CCAA release.

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

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
>
> 54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

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

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

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]
>
> See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J.) at para. 7.

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

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Re Stelco Inc.*, (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) ("*Stelco II*").

The Court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

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

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

90 Some of the appellants -- particularly those represented by Mr. Woods -- rely heavily upon the decision of the Quebec Court of Appeal in *Michaud v. Steinberg, supra*. They say that it is determinative of the release issue. In *Steinberg*, the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 -- English translation):

> [42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> ...
>
> [54] The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> ...
>
> [58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

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

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

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

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

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

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

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

The 1997 Amendments

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

> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> Exception
>
> (2) A provision for the compromise of claims against directors may not include claims that
>
> (*a*) relate to contractual rights of one or more creditors; or
>
> (*b*) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> Powers of court
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
>
> Resignation or removal of directors

> (4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.
>
> 1997, c. 12, s. 122.

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

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

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

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden and Morawetz, vol. 1, *supra*, at 2-144, Es.11A; *Le Royal Penfield Inc. (Syndic de)*, [2003] R.J.Q. 2157 at paras. 44-46 (C.S.).

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

authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The Deprivation of Proprietary Rights

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

The Division of Powers and Paramountcy

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

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re: Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659. As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Royal Bank of Canada v. Larue* [1928] A.C. 187, "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

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

104 That is exactly the case here. The power to sanction a plan of compromise or arrangement

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

Conclusion With Respect to Legal Authority

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

(2) The Plan is "Fair and Reasonable"

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

107 Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Re Ravelston Corp. Ltd.* (2007), 31 C.B.R. (5th) 233 (Ont. C.A.).

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

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

110 The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be

protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

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

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

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

a) The parties to be released are necessary and essential to the restructuring of the debtor;
b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
c) The Plan cannot succeed without the releases;
d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
g) The releases are fair and reasonable and not overly broad or offensive to public policy.

114 These findings are all supported on the record. Contrary to the submission of some of the

appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

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

116 All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

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

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

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

134 that:

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

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

D. DISPOSITION

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

R.A. BLAIR J.A.
J.I. LASKIN J.A.:-- I agree.
E.A. CRONK J.A.:-- I agree.

* * * * *

SCHEDULE "A" - CONDUITS

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

* * * * *

SCHEDULE "B" - APPLICANTS

ATB Financial

Caisse de Dépôt et Placement du Québec

Canaccord Capital Corporation

Canada Post Corporation

Credit Union Central of Alberta Limited

Credit Union Central of British Columbia

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank Financial Inc./National Bank of Canada

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

* * * * *

SCHEDULE "A" - COUNSEL

1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee.
2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.
3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG.
4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.
5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals).
6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor.
7) Mario J. Forte for Caisse de Dépôt et Placement du Québec.
8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada.
9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al).
10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.
11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank.
12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees.
13) Usman Sheikh for Coventree Capital Inc.
14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
15) Neil C. Saxe for Dominion Bond Rating Service.
16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air

Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP.

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

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

cp/e/ln/qlkxl/qllkb/qlltl/qlrxg/qlhcs/qlcas/qlhcs/qlhcs

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

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

3 Citing Gibbs J.A. in *Chef Ready Foods, supra*, at pp. 319-320.

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

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

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

7 *Steinberg* was originally reported in French: [1993] R.J.Q. 1684 (C.A.). All paragraph references to *Steinberg* in this judgment are from the unofficial English translation available

at 1993 CarswellQue 2055.

8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp. 234-235, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

Indexed as:

Bisaillon v. Concordia University

Concordia University, Appellant
v.
Richard Bisaillon, Respondent, and
Régie des rentes du Québec, Respondent, and
Concordia University Faculty Association (CUFA), John Hall and Howard Fink, Respondents
And between
Concordia University Faculty Association (CUFA), Appellant
v.
Richard Bisaillon, Respondent, and
Régie des rentes du Québec, Respondent, and
Concordia University, John Hall and Howard Fink, Respondents

[2006] 1 S.C.R. 666

[2006] S.C.J. No. 19

2006 SCC 19

File No.: 30363.

Supreme Court of Canada

Heard: December 14, 2005;
Judgment: May 18, 2006.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Abella and Charron JJ.

(100 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

[page667]

Catchwords:

Labour relations -- Collective agreements -- Pension plan -- Jurisdiction of grievance arbitrator -- Collective agreements referring expressly to pension plan established by university -- Motion for authorization to institute class action filed in Superior Court by unionized employee disagreeing with decisions made by university respecting administration and use of pension fund -- Majority of members of class action group covered by one of collective agreements between university and unions -- Whether this dispute relating to pension plan within jurisdiction of Superior Court or of grievance arbitrator.

Summary:

In 1977, the appellant university established a pension plan for its employees. The vast majority of the plan's members are unionized employees covered by one of the nine collective agreements between the university and its nine certified unions. The respondent B, a unionized employee of the university, applied to the Superior Court for authorization to institute a class action against the university in order to contest a number of decisions made with respect to the administration and use of the pension fund. Before the application was filed, one union that had, following negotiations with the university, agreed to the measures now contested by B, tried to have the motion dismissed, submitting that the Superior Court lacked jurisdiction. The other eight unions supported and financed B's attempt to institute a class action. The Superior Court allowed the declinatory exception. It found that only a grievance arbitrator would have jurisdiction to hear the case, since the pension plan was a benefit provided for in the collective agreement and since the dispute therefore resulted from the application of that agreement. The Court of Appeal set aside that decision. It considered, on the one hand, that the instant case had nothing to do with the collective agreement that applied to B, since the pension plan existed independently of any collective agreement, and, on the other hand, that a grievance arbitrator would not have the necessary jurisdiction to hear all the claims raised in the class action, that is, that his or her jurisdiction would not extend to the claims of the employees covered by the other eight collective agreements or those of the non-unionized employees.

Held (McLachlin C.J. and Bastarache and Binnie JJ. dissenting): The appeal should be allowed. The decision of the Superior Court should be restored.

Per LeBel, Deschamps, Abella and Charron JJ.: The Superior Court was correct in allowing the declinatory exception to dismiss for lack of jurisdiction. The class action procedure cannot have the effect of conferring [page668] jurisdiction on the Superior Court over a group of cases that would otherwise fall within the subject-matter jurisdiction of another court or tribunal. Except as provided for by law, this procedure does not alter the jurisdiction of courts and tribunals. Nor does it create new substantive rights. In the circumstances of the instant case, B's class action is incompatible with the exclusive jurisdiction of grievance arbitrators and the representative function of certified unions.

The situation is certainly complex, but it does not justify disregarding the fundamental rules governing the law of collective labour relations. [para.2] [para.22] [para.45]

In the case at bar, B should have used the grievance procedure provided for in his collective agreement to resolve the dispute with his employer regarding the pension plan. For all the unionized members of the group covered by the class action, the disputes fall within the exclusive jurisdiction of grievance arbitrators appointed under the applicable collective agreements, as each arbitrator's *in personam* jurisdiction is limited to grievances of employees covered by the collective agreement in question. With regard to the subject-matter aspect of the dispute, each of the collective agreements in force at the time the motion was filed refers expressly to the pension plan. In the relevant provisions, the university made a commitment to the unions to offer the pension plan to the employees covered by the agreements in accordance with the conditions of the plan. The unions thus obtained certain assurances with respect to the maintenance of the plan and the eligibility of the employees they represented. In short, the parties decided to incorporate the conditions for applying the pension plan into the collective agreement. In this context, the employer appeared to retain effective control over the administration of the pension plan while committing itself, at least implicitly, to respect and fulfil various rights and obligations provided for in the plan or arising out of the legislation applicable to it. In so doing, it also recognized the *in personam* and subject-matter jurisdiction of the grievance arbitrator. This is not a case that would justify the Superior Court in exercising its exceptional residual jurisdiction. [paras.47-55]

To ascribe the status of representative to B by granting his motion for authorization to institute a class action would be incompatible with the legal mandates of representation accorded by the *Labour Code* to the nine certified unions representing the university's employees. The pension plan, having been negotiated and incorporated into the collective agreement, became a condition of employment in respect of which B lost his right to act on an individual basis. B accordingly does not have the power to apply to the ordinary courts [page669] to demand the application of provisions of this plan. [para.56]

The solution in the instant case is not free of procedural difficulties, particularly because of the multiplicity of possible proceedings and of potential conflicts between separate arbitration awards in respect of the different bargaining units. However, confirming the jurisdiction of grievance arbitrators would not automatically lead to multiple arbitration proceedings. Civil procedure includes a number of ways to resolve the problems caused by multiple proceedings. There is nothing from which to infer that arbitration could give rise to abuses of right through which the various unions would profit excessively from the procedure available to them. [paras.58-61]

Finally, the question whether a class action limited to non-unionized employees lies was not before this Court. The Court accordingly refrains from ruling on this subject. [para.63]

Per McLachlin C.J. and Bastarache and Binnie JJ. (dissenting): A labour arbitrator enjoys exclusive jurisdiction over matters whose essential character arises out of the interpretation, application,

administration or violation of a collective agreement, but his or her exclusive jurisdiction does not extend beyond that point. Since, in the instant case, the pension plan transcends any single collective agreement, the only forum with jurisdiction to hear this claim is the Superior Court. [para.67] [para.75] [para.99]

The fund associated with the pension plan is a single entity. It constitutes one patrimony in which employees covered by nine different collective agreements and hundreds of different employment contracts are entitled to share. Because of the multiplicity of collective agreements, the issues involved in B's claim are independent of the collective agreement and relate directly to the indivisible fund. They are not products of bilateral labour negotiations that resulted in the collective agreement, nor could they be, given that employees with different collective agreements and employment contracts all share in them equally. Consequently, the presence of a single fund, in contrast with the multiple collective agreements and employment contracts that were concluded well after it was created, helps establish that the essential character of B's claim arises out of the plan. Because the fund is indivisible, and because more than one collective agreement seeks to regulate access to the pre-existing fund, no single collective agreement could purport to alter or affect the fund itself. To allow one to do so would be to let the parties to that collective [page670] agreement dictate the content of the fund for all other beneficiaries. [paras.77-80]

The risk of contradictory rulings is inevitable, both in theory and in practice, if the essential character of the dispute is said to arise out of the collective agreement linking B to the university. This is so because the same issue must also be said to arise, in its essential character, out of each of the other collective agreements and employment contracts linking fund beneficiaries to the university. The result is that the same claim, shared by all fund beneficiaries but capable of being resolved in only one way, may be decided differently by different arbitrators, each of whom is acting within his or her own jurisdiction. There is no way of reconciling contradictory orders like this. Bringing B's claim before the superior court is the only way to avoid a multiplicity of proceedings and contradictory results. In the end, it is also the only principled and practical way for B's claim to be resolved. [paras.91-93] [para.96]

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By LeBel J.

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du Revenu), [1998] Q.J. No. 1600 (QL); *Noël v. Société d'énergie de la Baie James*, [2001] 2 S.C.R. 207, 2001 SCC 39; *Syndicat catholique des employés de magasins de Québec Inc. v. Compagnie Paquet Ltée*, [1959] S.C.R. 206; *Isidore Garon ltée v. Tremblay*, [2006] 1 S.C.R. 27, 2006 SCC 2; *Hémond v. Coopérative fédérée du Québec*, [1989] 2 S.C.R. 962; *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983; *R. v. Mills*, [1986] 1 S.C.R. 863; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14; [page671] *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42; *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704; *Allen v. Alberta*, [2003] 1 S.C.R. 128, 2003 SCC 13; *J.M. Asbestos Inc. v. Lemieux*, SOQUIJ AZ-85149091, rev'd [1986] Q.J. No. 613 (QL); *Union internationale des employés professionnels et de bureau, local 480 v. Albright & Wilson Amérique ltée* (2000), 28 C.C.P.B. 306; *Emerson Electric Canada ltée v. Foisy* (2006), 50 C.C.P.B. 287, 2006 QCCA 12; *Hydro-Québec v. Corbeil* (2005), 47 C.C.P.B. 200, 2005 QCCA 610; *Association provinciale des retraités d'Hydro-Québec v. Hydro-Québec*, [2005] R.J.Q. 927, 2005 QCCA 304; *Canadian Union of Public Employees v. Canadian Broadcasting Corp.*, [1992] 2 S.C.R. 7; *Syndicat des professionnelles et professionnels du gouvernement du Québec v. Paquet (Collège d'enseignement général et professionnel régional de Lanaudière et Syndicat des professionnelles et professionnels du gouvernement du Québec, section locale 8)*, [2005] Q.J. No. 678 (QL), 2005 QCCA 109; [page672] *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495.

By Bastarache J. (dissenting)

Weber v. Ontario Hydro, [1995] 2 S.C.R. 929; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14; *Noël v. Société d'énergie de la Baie James*, [2001] 2 S.C.R. 207, 2001 SCC 39; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, 2004 SCC 39; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14; *Lacroix v. Société Asbestos ltée* (2004), 43 C.C.P.B. 267; *J.M. Asbestos Inc. v. Lemieux*, [1986] Q.J. No. 613 (QL); *Union internationale des employés professionnels et de bureau, local 480 v. Albright & Wilson Amérique ltée* (2000), 28 C.C.P.B. 306; *Emerson Electric Canada ltée v. Foisy* (2006), 50 C.C.P.B. 287, 2006 QCCA 12, aff'g (2005), 50 C.C.P.B. 261; *Hydro-Québec v. Corbeil* (2005), 47 C.C.P.B. 200, 2005 QCCA 610; *Vidéotron ltée v. Turcotte*, [1998] Q.J. No. 2742 (QL); *London Life Insurance Co. v. Dubreuil Brothers Employees Assn.* (2000), 49 O.R. (3d) 766; *Elkview Coal Corp. v. U.S.W.A., Local 9346* (2001), 205 D.L.R. (4th) 80, 2001 BCCA 488; *Syndicat des professionnelles et professionnels du gouvernement du Québec v. Paquet (Collège d'enseignement général et professionnel régional de Lanaudière et Syndicat des professionnelles et professionnels du gouvernement du Québec, section locale 8)*, [2005] Q.J. No. 678 (QL), 2005 QCCA 109; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23.

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History and Disposition:

APPEAL from a judgment of the Quebec Court of Appeal (Baudouin, Morin and Rochon JJ.A.) (2004), 42 C.C.P.B. 161, 2004 CarswellQue 688, [2004] Q.J. No. 3238 (QL), setting aside a decision of Crépeau J. (2003), 36 C.C.P.B. 180, [2003] Q.J. No. 4279 (QL). Appeal allowed, McLachlin C.J. and Bastarache and Binnie JJ. dissenting.

Counsel:

Guy Du Pont, Nancy Boyle, Nick Rodrigo and Jean-Philippe Groleau, for the appellant/respondent Concordia University.

John T. Keenan and Harold C. Lehrer, for the respondent/appellant Concordia University Faculty Association.

Mario Évangéliste and Marie Pépin, for the respondent Richard Bisaillon.

No one appeared for the respondents Régie des rentes du Québec, John Hall and Howard Fink.

English version of the judgment of LeBel, Deschamps, Abella and Charron JJ. delivered by

LeBEL J.:--

I. Introduction

1 This appeal concerns an application for authorization to institute a class action filed by a unionized employee of Concordia University ("Concordia"). According to the class action, Concordia wrongfully used the fund of an employee pension plan to pay for contribution holidays and cover administrative costs, and to finance early retirement packages. This case raises sensitive legal issues connected with the relationships between civil remedies, the class action in particular, the jurisdiction of labour tribunals and the statutory framework governing supplemental pension plans.

2 In the case at bar, the class action is an inappropriate remedy. In the circumstances of the case, such an action is incompatible with the exclusive jurisdiction of grievance arbitrators and the representative function of certified unions. The Superior Court was therefore correct in allowing the declinatory exception to dismiss for lack of jurisdiction raised by the appellant, the Concordia University Faculty Association ("CUFA"), and dismissing the motion for authorization to institute a class action. For the reasons that follow, I would allow the appeal, set aside the Court of Appeal's decision [page674] reversing the judgment of the Superior Court and restore that judgment.

II. Origin of the Case

3 On January 1, 1977, Concordia established a supplemental pension plan for its employees ("Pension Plan"). This plan amended and replaced pension plans previously established by Sir

George Williams University and Loyola College, which had been merged to form Concordia.

4 The Pension Plan is governed by the *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1. As required under that Act, it has been registered with the Régie des rentes du Québec (s. 24). The Pension Plan is the only such plan offered to Concordia employees, and all eligible employees, unionized or not, may participate in it. It is a defined benefit pension plan to which the employer is required to contribute to ensure that members receive a fixed benefit amount upon retirement. Employees themselves may also contribute to the plan. These contributions and the income derived from them are paid into the pension fund, which is a trust patrimony appropriated to the payment of the benefits to which the beneficiaries are entitled.

5 According to the evidence, the Pension Plan has over 4,100 members. Approximately 350 of its active members are non-unionized professional employees or managers. The vast majority -- over 80 percent -- of the Pension Plan's members are unionized employees covered by one of the nine collective agreements between Concordia and its nine certified unions. Each of these collective agreements refers in one way or another to the Pension Plan. Seven of them specifically provide that the employees they cover are entitled to participate in Concordia's pension plan in accordance with the terms set out in the plan. In the collective agreement between Concordia and one union, CUPFA, Concordia agrees to maintain the existing Pension Plan for employees in its bargaining [page675] unit. Finally, the collective agreement applicable to another union, CULEU-Vanier, refers indirectly to the Pension Plan by specifying the ages at which employees become eligible for full retirement benefits or for early retirement.

6 The Pension Plan has been amended several times since being established in 1977. Some of the amendments led to disagreements between Concordia and most of the unions.

7 As a result of these disagreements, the respondent Bisaillon, claiming to represent all members of Concordia's pension plan, applied to the Superior Court for authorization to institute a class action against Concordia in order to contest a number of decisions made with respect to the administration and use of the pension fund. Mr. Bisaillon, who has been an employee of Concordia for many years, has been a member of several unions certified to negotiate with it. He has contributed to the Pension Plan since its establishment. At the time the motion for authorization was filed, he was a member, and president, of CUSSU-TS, a certified union. At the time the motion was heard, however, he had become a member of CUPFA.

8 In his motion for authorization, Mr. Bisaillon submitted that Concordia had made several changes to the Pension Plan without notifying the members or obtaining their consent. According to the respondent, Concordia first amended the Pension Plan in order to charge the plan's administrative costs to the pension fund, whereas Concordia itself had assumed those costs in the past. Concordia also changed certain provisions of the plan in order to grant itself contribution holidays and to reclaim part of the surplus in the event of termination of the plan. The respondent consequently submitted that, in so doing, Concordia had wrongfully subtracted from the pension

fund an estimated $41,626,800 in the form of contribution holidays, an estimated $15,000,000 by having the fund cover [page676] the plan's administrative costs and, finally, another $15,000,000 by using a portion of the Pension Plan's surplus in support of its downsizing program. According to the conclusions set out in his motion, Mr. Bisaillon's intention in seeking to institute this class action was to obtain a declaration that the changes made to the Pension Plan were null and to compel Concordia to pay back the money it had unlawfully taken from the pension fund. Concordia and CUFA contested the motion.

9 Before the application for authorization to institute a class action was filed, CUFA had, following negotiations with Concordia, agreed to the measures now contested by Mr. Bisaillon. The appellant CUFA represents nearly 30 percent of the Pension Plan's active members. The other eight unions had also tried, unsuccessfully, to negotiate with Concordia regarding these amendments, at the same time seeking a variety of improvements to the Pension Plan for their members. Despite this impasse, these eight unions filed no grievances under their respective collective agreements to contest the measures taken by Concordia. Instead, they supported and financed the respondent's attempt to institute a class action.

10 CUFA tried to have Mr. Bisaillon's motion to authorize the institution of a class action dismissed. To this end, it filed a motion in the Superior Court in which it raised a declinatory exception and asked that the respondent's application for authorization be dismissed. In its motion, CUFA, supported by Concordia, submitted that the Superior Court lacked jurisdiction. According to CUFA's submissions, the dispute concerned issues relating to collective bargaining and to the implementation of a collective agreement, which are within the exclusive jurisdiction of a grievance arbitrator. It added that the application by the respondent Bisaillon to be authorized to represent all the Pension Plan's members interfered unduly with the performance by the certified unions of their representative function in respect of most of these members. Finally, the appellant submitted that Mr. Bisaillon, who is [page677] bound by a collective agreement that incorporates the provisions of the Pension Plan by reference, must use the grievance procedure to resolve any dispute with his employer regarding the plan.

III. Judicial History

A. *Quebec Superior Court* (2003), 36 C.C.P.B. 180

11 On April 25, 2003, Crépeau J. of the Superior Court allowed CUFA's declinatory exception and accordingly dismissed the respondent Bisaillon's motion for authorization to institute a class action. According to Crépeau J., the Pension Plan was a benefit provided for in the collective agreement, and the dispute therefore resulted from the application of that agreement. Consequently, only a grievance arbitrator would have jurisdiction to hear the case. Crépeau J. noted that the respondent did not have an individual right distinct from those provided for in the collective agreement. He also pointed out that the conditions of employment of 80 percent of the plan members Mr. Bisaillon wished to represent had been established by agreements and that these conditions included the Pension Plan. Crépeau J. added that Mr. Bisaillon had conceded that this

class action was part of a negotiating strategy of the eight unions, which were dissatisfied with Concordia's refusal to negotiate improvements to the Pension Plan.

B. *Quebec Court of Appeal* (2004), 42 C.C.P.B. 161

12 According to the Court of Appeal, the instant case had nothing to do with the collective agreement that applied to the respondent Bisaillon. In its view, the Pension Plan existed independently of any collective agreement. Moreover, a grievance arbitrator appointed under a collective agreement would not have the necessary jurisdiction to hear all the claims raised in the class action, that is, his or her jurisdiction would not extend to the claims of the employees covered by the other eight collective agreements or those of the non-unionized employees. The Court of Appeal then expressed its [page678] concern about the chaos that could ensue if different arbitration tribunals were to render contradictory decisions. In light of this, the essential character of the dispute favoured having the Superior Court exercise its residual jurisdiction over all matters not falling within the jurisdiction of another court. This result was supported by the Superior Court's exclusive jurisdiction over class actions under art. 1000 of the *Code of Civil Procedure*, R.S.Q., c. C-25 ("*C.C.P.*"). For these reasons, the Court of Appeal allowed the appeal and dismissed CUFA's motion for declinatory exception.

IV. Analysis

A. *Issue*

13 This appeal raises the issue of the compatibility of the class action with collective representation mechanisms in labour law, with the system for applying collective agreements and with the procedure for resolving labour disputes through grievance arbitration. In short, can the class action be used to bypass the representation and grievance resolution mechanisms established under Quebec labour law?

14 To answer this question, I will begin by reviewing the legal framework governing the various aspects of the issue raised by this appeal. To this end, I will analyse the nature of the class action, the collective representation system in Quebec labour law, the jurisdiction of grievance arbitrators and the statutory framework governing supplemental pension plans.

B. *Legal Framework*

(1) Nature of the Class Action: A Procedural Vehicle

15 The class action, which is provided for in arts. 999 *et seq. C.C.P.*, is a procedure that enables one member of a group to sue, without a mandate, on behalf of all members of the group whose legal recourses raise similar questions (arts. 999(*d*) [page679] and 1003 *C.C.P.*). The procedure is commenced when one of the members of the group brings a motion for authorization to institute a class action (art. 1002 *C.C.P.*). If authorization is granted, the Superior Court ascribes the status of

group representative to the moving party. The representative must be in a position to represent all the group members adequately (art. 1003(*d*) *C.C.P.*). Article 1000 *C.C.P.* provides that the Superior Court has exclusive jurisdiction over class actions.

16 The class action has a social dimension. Its purpose is to facilitate access to justice for citizens who share common problems and would otherwise have little incentive to apply to the courts on an individual basis to assert their rights (*Nadon v. Anjou (Ville d')*, [1994] R.J.Q. 1823 (C.A.), at p. 1827; *Comité d'environnement de La Baie inc. v. Société d'électrolyse et de chimie Alcan ltée*, [1990] R.J.Q. 655 (C.A.); *Syndicat national des employés de l'Hôpital St-Charles Borromée v. Lapointe*, [1980] C.A. 568). This Court has already noted that legislation on class actions should be construed flexibly and generously: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68, at para. 14; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46, at para. 51.

17 The class action is nevertheless a procedural vehicle whose use neither modifies nor creates substantive rights (*Malhab v. Métromédia C.M.R. Montréal inc.*, [2003] R.J.Q. 1011 (C.A.), at paras. 57-58; *Tremaine v. A.H. Robins Canada Inc.*, [1990] R.D.J. 500 (C.A.), at p. 507; Y. Lauzon, *Le recours collectif* (2001), at pp. 5 and 9). It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so: D. Ferland and B. Emery, eds., *Précis de procédure civile du Québec* (4th ed. 2003), vol. 2, at pp. 876-77.

18 For example, in *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, this Court confirmed that the provisions of the *Code of Civil [page680] Procedure* pertaining to class actions did not change the substantive rules of evidence (paras. 31-36). Thus, unless otherwise provided, the substantive law continues to apply as it would in a traditional individual proceeding. L'Heureux-Dubé J. stated the following in this regard: "Those provisions certainly do not create new rules of evidence; rather, they adapt to class actions the methods by which a right, which previously could be claimed only by each person entitled to it, may be exercised" (para. 32).

19 Similarly, recourse to this procedural vehicle does not change the legal rules relating to subject-matter jurisdiction. The Quebec Court of Appeal discussed this question in, *inter alia*, *Carrier v. Québec (Ministre de la Santé et des Services sociaux)*, [2000] Q.J. No. 3048 (QL). In that case, the appellant, a medical specialist, had applied to the Superior Court for authorization to institute a class action to contest the legality of an agreement between the Minister of Health and the Federation of Medical Specialists of Quebec. The agreement, which provided for lower pay for certain physicians in their first few years of practice, had been negotiated under a special collective bargaining system established by the *Health Insurance Act*, R.S.Q., c. A-29. That Act gave a council of arbitration exclusive jurisdiction over disputes resulting from the interpretation or application of this type of agreement.

20 Having concluded that the case fell within the exclusive jurisdiction of the council of

arbitration, the Court of Appeal had no difficulty holding that the motion for authorization to institute a class action should be dismissed. Its focus on that occasion was on the procedural nature of the class action:

> [TRANSLATION] The provisions of the Code of Civil Procedure respecting class actions are purely procedural and do not create substantive law. It cannot therefore be concluded from the fact that a class action must by instituted in the Superior Court that a special scheme supplanting jurisdictional rules has been created. [para. 55]

[page681]

21 In *Hamer v. Québec (Sous-ministre du Revenu)*, [1998] Q.J. No. 1600 (QL), the purpose of the proposed class action was to have the court vacate notices of assessment that had been sent to a large number of taxpayers pursuant to the federal *Income Tax Act* and Quebec's *Taxation Act*. The Quebec Court of Appeal began by noting that the tax legislation applicable to the case had conferred special jurisdiction in such cases on the Court of Québec and the Tax Court of Canada. It then summarized and confirmed -- correctly, in my view -- the trial judge's opinion regarding the effect of the class action procedure on the jurisdiction of the courts:

> [TRANSLATION] The Superior Court concluded that commencing a suit by means of a representative proceeding, as in the case of this motion for authorization to institute a class action, did not in any way alter the Superior Court's subject-matter jurisdiction. Rather, it postulated that such jurisdiction already exists with respect to the matter in dispute. Consequently, the trial judge dismissed the appeal. This judgment contains no error of law subject to review by this Court. [para. 5]

22 In short, the class action procedure cannot have the effect of conferring jurisdiction on the Superior Court over a group of cases that would otherwise fall within the subject-matter jurisdiction of another court or tribunal. Except as provided for by law, this procedure does not alter the jurisdiction of courts and tribunals. Nor does it create new substantive rights. Determining whether such a proceeding lies in respect of issues relating *prima facie* to the law of collective labour relations thus requires a careful review of the institutions and fundamental rules specific to this branch of law. It is to this subject that I must now turn.

(2) Collective Representation System in Labour Law

23 The *Labour Code*, R.S.Q., c. C-27 ("*L.C.*"), recognizes that any association of employees having a representative character in relation to a separate group of employees within an employer's enterprise is entitled to be certified (s. 21 *L.C.*). This separate group -- the bargaining unit -- consists

of one or more employees whose association is [page682] deemed appropriate for collective bargaining purposes (R. P. Gagnon, *Le droit du travail du Québec* (5th ed. 2003), at p. 289). The certification of an association of employees produces a variety of legal consequences, both for the association itself and for the employees and the employer.

24 First, the *Labour Code* gives certified unions a set of rights, the most important of which is most certainly the monopoly on representation. When it is certified, a union acquires the exclusive power to negotiate conditions of employment with the employer for all members of the bargaining unit with a view to reaching a collective agreement. Once a collective agreement is in place, the union's monopoly on representation also extends to the implementation and application of the agreement. For example, a certified union holds a monopoly with respect to the choice of solutions for the implementation of the collective agreement. "The union's power to control the process includes the power to settle cases or bring cases to a conclusion in the course of the arbitration process, or to work out a solution with the employer, subject to compliance with the parameters of the legal duty of representation" (*Noël v. Société d'énergie de la Baie James*, [2001] 2 S.C.R. 207, 2001 SCC 39, at para. 45).

25 Second, the monopoly on representation also has a significant impact on employees' rights. Our system of collective representation proscribes the individual negotiation of conditions of employment. A screen is erected between the employer and the employees in the bargaining unit (*Noël*, at para. 42). This screen prevents the employer from negotiating directly with its employees and in so doing precludes the employees from negotiating their individual conditions of employment directly with their employer (*Syndicat catholique des employés de magasins de Québec Inc. v. Compagnie Paquet Ltée*, [1959] S.C.R. 206; *Noël*; *Isidore Garon ltée v. Tremblay*, [2006] 1 S.C.R. 27, 2006 SCC 2). Moreover, once a collective agreement is signed, it becomes the regulatory framework governing relations between the union and the employer, as well as the individual relationships between the employer and employees: [page683] *Hémond v. Coopérative fédérée du Québec*, [1989] 2 S.C.R. 962, at p. 975; *Noël*, at para. 43; *Isidore*, at para. 14.

26 The system of collective representation thus takes certain individual rights away from employees. In particular, employees are denied the possibility of negotiating their conditions of employment directly with their employer and also lose control over the application of those conditions. In return, by negotiating with the employer with one voice through their union, employees improve their position in the balance of power with the employer (*Isidore*, at para. 38). Moreover, the individual interests of each member of the bargaining unit are protected in a system of collective representation. For example, in order to be certified to represent employees, a union must obtain the support of a majority of the employees in the bargaining unit (s. 28 *L.C.*). Furthermore, having regard to the provisions of s. 21 *L.C.*, it follows from the case law that employees must, *inter alia*, have a certain commonality of interests where labour relations are concerned and that this helps to protect employees' individual interests. Lastly, while the monopoly on representation confers rights upon certified unions, it also imposes upon them a duty to act properly by, for example, taking into account the competing interests of all employees in the

bargaining unit: s. 47.2 *L.C.*; *Noël*, at paras. 46-55.

27 Finally, the collective representation system in labour law has a significant impact on the employer. It requires the employer to recognize the certified union and to enter into good-faith collective bargaining exclusively with it. However, the employer also derives various benefits from the collective representation system. In particular, employers acquire the right to industrial peace for the term of the collective agreement and can, in principle, expect that disagreements stemming from the implementation and application of the collective agreement will be negotiated with the union or settled through the grievance arbitration process. As I noted in *Noël*:

[page684]

> The impact of this system on the employer is sometimes overlooked. Although the scheme imposes obligations on the employer relating to the employees and the union, it offers employers, in return, the prospect of temporary peace in their companies. An employer can expect that the problems negotiated and resolved with the union will remain resolved and will not be reopened in an untimely manner on the initiative of a group of employees, or even a single employee. This means that, for the life of a collective agreement approved by the bargaining unit, the employer gains the right to stability and compliance with the conditions of employment in the company and to have the work performed continuously and properly. However reluctant the members of a dissenting or minority group of employees may be, they will be bound by the collective agreement and will have to abide by it.
>
> In administering collective agreements, the same rule will apply to the processing and disposition of grievances. Administering the collective agreement is one of the union's essential roles, and in this it acts as the employer's mandatory interlocutor. If the representation function is performed properly in this respect, the employer is entitled to compliance with the solutions agreed on. [paras. 44-45]

28 It is worth noting that the monopoly on collective representation is not limited to the context of the collective agreement but extends to all aspects of employee-employer relations (*Isidore*, at para. 41; *Noël*, at para. 57). The union's monopoly with respect to collective bargaining is based not only on the existence of a collective agreement, but also on the certification of the union (*Isidore*, at para. 38; *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, at pp. 1007-8). For this reason, any negotiations regarding conditions of employment that are not mentioned in the current

collective agreement must be conducted by the certified union.

(3) Jurisdiction of Grievance Arbitrators

29 As Robert P. Gagnon explains, [TRANSLATION] "A grievance arbitrator's jurisdiction depends on two factors. The first has to do with the subject or the nature of the dispute; this is the subject-matter aspect of the arbitrator's jurisdiction. The second factor relates to the persons who are parties to the dispute; this therefore is the personal aspect of the arbitrator's jurisdiction" (p. 506). It should be noted [page685] however that subject-matter jurisdiction includes the power to grant an appropriate remedy (*R. v. Mills*, [1986] 1 S.C.R. 863, at p. 890, and *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at paras. 63-66). Thus, in order to acquire jurisdiction in a given case, a grievance arbitrator must have jurisdiction over the essential subject matter of the dispute in order to ultimately grant an appropriate remedy.

(i) *Subject-Matter Jurisdiction of Grievance Arbitrators*

30 I will begin by reviewing the subject-matter aspect of the jurisdiction of grievance arbitrators. The *Labour Code* gives the grievance arbitrator exclusive jurisdiction over "any disagreement respecting the interpretation or application of a collective agreement" (ss. 1(*f*) and 100.1 *L.C.*). To determine whether a dispute arises out of a collective agreement, it is necessary to follow the analytical approach adopted by this Court in *Weber*. As McLachlin J. explained, "The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement" (*Weber*, at para. 52).

31 The first stage of this approach consists in identifying the essential character of the dispute. On this point, the Court has stressed that what must be done is not limited to determining the legal nature of the dispute. On the contrary, the analysis must also take into account all the facts surrounding the dispute between the parties: *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14, at paras. 25 and 29.

32 At the second stage, it must be determined whether the factual context so identified falls within the ambit of the collective agreement. In other words, it must be determined whether the collective agreement implicitly or explicitly applies to the facts in dispute. In *Regina Police*, this Court explained this second stage of the analysis as follows:

> Simply, the decision-maker must determine whether, having examined the factual context of the dispute, its [page686] essential character concerns a subject matter that is covered by the collective agreement. Upon determining the essential character of the dispute, the decision-maker must examine the provisions of the collective agreement to determine whether it contemplates such factual situations. It is clear that the collective agreement need not provide for the subject matter of the dispute explicitly. If the essential character of the dispute arises either explicitly, or implicitly, from the interpretation, application,

> administration or violation of the collective agreement, the dispute is within the sole jurisdiction of an arbitrator to decide ... . [para. 25]

33 This Court has considered the subject-matter jurisdiction of grievance arbitrators on several occasions, and it has clearly adopted a liberal position according to which grievance arbitrators have a broad exclusive jurisdiction over issues relating to conditions of employment, provided that those conditions can be shown to have an express or implicit connection to the collective agreement: *Regina Police*; *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42; *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704; *Allen v. Alberta*, [2003] 1 S.C.R. 128, 2003 SCC 13.

34 What can be said about issues involving the interpretation or application of provisions of collective agreements relating to pension plans? The Quebec Court of Appeal has on numerous occasions held such issues to be within the exclusive jurisdiction of the grievance arbitrator.

35 In *J.M. Asbestos Inc. v. Lemieux*, SOQUIJ AZ-85149091, the Superior Court held that a council of arbitration appointed pursuant to a collective agreement did not have jurisdiction to hear a dispute between a unionized employee and his employer regarding the interpretation of pension plan provisions. The complainant wanted the employer to recognize that he was disabled for the purposes of the pension plan. The Court of Appeal set aside the Superior Court's decision and confirmed that the council of arbitration had jurisdiction. In the Court of Appeal's view, the dispute arose out of the [page687] interpretation, application, performance or violation of the collective agreement. Article 22 of the agreement provided that the benefits plan, including the pension plan, existing at the time the agreement was signed should be maintained for the duration of the agreement. Even though the pension plan was in effect long before the collective agreement was signed, the Court of Appeal concluded that the inclusion of art. 22 in the agreement had transformed the obligations arising out of the plan into obligations to the union (*J.M. Asbestos Inc. v. Lemieux*, [1986] Q.J. No. 613 (QL), at para. 8).

36 Subsequently, in *Union internationale des employés professionnels et de bureau, local 480 v. Albright & Wilson Amérique ltée* (2000), 28 C.C.P.B. 306, the Quebec Court of Appeal held that a grievance arbitrator had jurisdiction to decide whether a contribution holiday the employer had granted itself was valid. The collective agreement provided that the employer was to continue contributing to the pension plan throughout the term of the collective agreement and that no changes could be made to the plan without the union's consent (para. 24).

37 Lastly, in *Emerson Electric Canada ltée v. Foisy* (2006), 50 C.C.P.B. 287, 2006 QCCA 12, the Court of Appeal accepted the prevailing line of authority, according to which issues relating to a pension plan that has been incorporated into a collective agreement arise, at least implicitly, out of the collective agreement (para. 4). In that case, as in the cases I mentioned in the preceding paragraphs, the collective agreement provided, *inter alia*, that the employer was to continue offering

the pension plan for a specified term. A provision or reference of this nature in a collective agreement is sufficient to establish the arbitrator's jurisdiction over a dispute respecting the interpretation or application of a pension plan.

38 Another approach, one even more favourable to finding that a grievance arbitrator has jurisdiction, appears to be being developed in decisions of the Quebec Court of Appeal. For example, in [page688] *Hydro-Québec v. Corbeil* (2005), 47 C.C.P.B. 200, 2005 QCCA 610, the Court of Appeal held that an arbitrator had jurisdiction without relying on the existence in the collective agreement of any reference to the pension plan. In that case, the Court found the pension plan to form part of the employees' remuneration and conditions of employment and, on that basis, to be an integral part of the collective agreement. (See also *Association provinciale des retraités d'Hydro-Québec v. Hydro-Québec*, [2005] R.J.Q. 927, 2005 QCCA 304.) Since practically all collective agreements address employee remuneration, grievance arbitrators would, under this approach, almost automatically have jurisdiction in such cases. Similarly, M. Savard and A. Violette have expressed the view that the inclusion in a collective agreement of very general clauses, such as the classic clause recognizing the employer's management rights, could confer jurisdiction over issues regarding the application and implementation of benefits plans, including pension plans. A grievance arbitrator would thus have jurisdiction over such issues even in the absence of an express reference to the pension plan in the collective agreement ("Les affaires *Weber*, *O'Leary*, et *Canadien Pacifique Ltée*: que reste-t-il pour les cours de justice?", in *Développements récents en droit du travail (1997)*, 49, at pp. 72-73). In the case at bar, however, there is no need to rule on the validity of this approach, since, as I will explain, the collective agreements in question make express reference to the Pension Plan.

(ii) *In Personam Jurisdiction of Grievance Arbitrators*

39 I will now turn to the *in personam* jurisdiction of grievance arbitrators. It is true that the courts generally focus on the subject-matter aspect of the grievance arbitrator's jurisdiction, which I have just discussed. However, as the Court of Appeal concluded in the instant case, [TRANSLATION] "the arbitrator responsible for hearing grievances [page689] arising out of the collective agreement between the respondent and the intervener has no jurisdiction to hear claims of persons to whom the agreement does not apply" (para. 14). In my view, there is no disputing this conclusion. R. Blouin and F. Morin refer to this dual aspect of the arbitrator's jurisdiction:

> [TRANSLATION] In fact, if there is a collective agreement, a grievance is possible if the dispute can be resolved based on the collective agreement. However, it must be added that a grievance will be possible only to the extent that the disagreement involves parties with a connection to the agreement in question, that is, the employer and the certified union or the employees to whom the collective agreement applies.

(*Droit de l'arbitrage de grief* (5th ed. 2000), at p. 149)

40 When a grievance arbitrator finds it impossible to resolve a dispute or a part of a dispute because he or she does not have jurisdiction over the parties, the ordinary courts retain jurisdiction over the dispute (Gagnon, at p. 547). Such situations are likely to arise where the grievance arbitrator cannot claim to have authority over persons considered to be third parties in relation to the collective agreement and cannot render decisions against them. However, there is nothing to prevent third parties from voluntarily and expressly submitting to a grievance arbitrator's jurisdiction, thereby bestowing jurisdiction upon him or her: *Canadian Union of Public Employees v. Canadian Broadcasting Corp.*, [1992] 2 S.C.R. 7.

41 The inherent limits on their *in personam* jurisdiction do not mean that grievance arbitrators have to ensure that their decisions have no effect on third parties. It is possible for third parties who do not belong to the bargaining unit, such as company managers, to be directly or indirectly affected by an arbitration award. However, these third parties will not be legally bound by the award: [page690] *Syndicat des professionnelles et professionnels du gouvernement du Québec v. Paquet (Collège d'enseignement général et professionnel régional de Lanaudière et Syndicat des professionnelles et professionnels du gouvernement du Québec, section locale 8)*, [2005] Q.J. No. 678 (QL), 2005 QCCA 109, at para. 40. As we shall see, the mere fact that the same issue arises in the collective agreements of several different bargaining units with a single employer does not oust the jurisdiction of the grievance arbitrator in favour of the ordinary courts.

(iii) *Residual Jurisdiction of the Superior Court*

42 Grievance arbitrators have very broad powers, both explicit and implicit, so as to be able to grant any remedies needed to implement the collective agreement: see, *inter alia*, s. 100.12 *L.C.* and R. P. Gagnon, L. LeBel and P. Verge, *Droit du travail* (2nd ed. 1991), at p. 710. Despite this broad arbitral jurisdiction, the ordinary courts retain a residual inherent jurisdiction in any exceptional cases in which a grievance arbitrator might lack the powers he or she needs to grant the remedy required to resolve a dispute: *Weber*, at para. 57; *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495. This residual jurisdiction would be useful, if not essential, if, for example, an arbitration tribunal were unable to adopt needed provisional measures in a timely manner (Gagnon, at pp. 546-47). This special jurisdiction of the Superior Court is not in issue in the case at bar.

(4) Statutory Framework Governing Supplemental Pension Plans

43 To complete this review of the legal framework of this appeal, brief consideration must now be given to the statutory framework governing supplemental pension plans in Quebec. Under the *Supplemental Pension Plans Act*, the Régie des rentes du Québec has a general mandate to ensure that pension plans are administered and operated in compliance with that Act. The Régie des rentes [page691] does not, however, act as an administrative tribunal with the power to resolve disagreements over the interpretation of pension plans (R. Crête, "Les régimes complémentaires de

retraite au Québec: une institution à découvrir en droit civil" (1989), 49 *R. du B.* 177, at p. 209; Régie des rentes du Québec, *Loi sur les régimes complémentaires de retraite: annotations et commentaires* (loose-leaf), at pp. 245-1 and 245-2). The Act does not provide generally for a special forum to which the parties to a pension plan might apply to resolve contractual disputes between them. It does, however, provide for a few exceptions. First, it establishes a consensual arbitration procedure for cases in which there is disagreement over an amendment to a pension plan that confirms the employer's right to appropriate surplus assets to the payment of employer contributions (s. 146.5). The employer, each of the certified unions concerned, and all active plan members not represented by a union must agree to submit to private arbitration. This arbitration procedure is the one provided for in arts. 940 *et seq. C.C.P.* Furthermore, s. 243.2 of the Act provides that "[a]ny matter relating to the allocation of a surplus of assets determined upon the termination of a pension plan comes under the exclusive jurisdiction of the arbitrators", in accordance with the specific provisions of the Act (ss. 243.1 to 243.19).

44 The case at bar does not correspond to any of these situations provided for in the Act. On the one hand, the dispute is outside the ambit of s. 146.5, and the parties have not agreed to use the arbitration procedure from the *Code of Civil Procedure.* On the other hand, since the Pension Plan is still effective, the dispute in the instant case does not concern the termination or winding-up of the plan. To determine the appropriate forum for this dispute and, in so doing, to rule on the merits of the respondent Bisaillon's motion for authorization to institute a class action, it is therefore necessary to refer to the general rules governing the jurisdiction of grievance arbitrators.

[page692]

C. *Bar to the Class Action*

45 The situation before the Court is certainly complex. It concerns interrelationships involving Concordia, several bargaining units and their respective collective agreements, and non-unionized staff. However, this complexity does not justify disregarding institutions and fundamental rules governing the law of collective labour relations, such as the jurisdiction of grievance arbitrators. Yet the authorization of a class action on behalf of the group the respondent Bisaillon claims to represent would have just that result in the circumstances of the instant case.

(1) Incompatibility of the Class Action With the Mechanisms of Collective Representation and of Implementation of the Collective Agreement

46 The respondent's position undermines two pillars of our collective labour relations system: the exclusivity of the arbitrator's jurisdiction and the collective representation system. Although these principles overlap in their application to the case at bar, I will deal with them separately.

(i) *Exclusivity of the Arbitrator's Jurisdiction*

47 The Superior Court lacks subject-matter jurisdiction with respect to both the dispute between Mr. Bisaillon and Concordia and most of the disputes concerning the other members of the group covered by the class action. These various disputes fall within the exclusive jurisdiction of the grievance arbitrators appointed under the applicable collective agreements.

48 I will begin by discussing the *in personam* jurisdiction of grievance arbitrators. In the instant case, the Court of Appeal rejected the arbitration option adopted by the Superior Court, because, *inter alia*, it felt that a grievance arbitrator did not have the required jurisdiction to rule on the issues raised in respect of all the members of the group covered by the class action (para. 12). In my view, the Court of Appeal erred in adopting this position.

[page693]

49 The Court of Appeal should not have focussed on determining whether the grievance arbitrator under one agreement had jurisdiction over every potential member of the group covered by the class action. Instead, it should have begun by determining whether a grievance arbitrator had jurisdiction to rule on the individual proceeding between Mr. Bisaillon and Concordia. It should then have enquired into the nature of the individual claims of the majority of the other members of the group and into the *in personam* jurisdiction of the arbitrator with regard to those claims. Absent such an analysis, the Court of Appeal's position removed individual proceedings, over which the arbitrator had jurisdiction, from the grievance arbitration process and assigned them to the Superior Court -- which otherwise had no jurisdiction over the parties or the subject matter -- simply because a motion for authorization to institute a class action had been filed. This position disregards both the principles applicable to class actions and the nature of this procedure.

50 Furthermore, with regard to the subject-matter aspect of the dispute, the jurisdiction of the arbitrator under each of Concordia's collective agreements has been established in the case at bar. The facts alleged in the respondent Bisaillon's motion, namely, the unilateral amendments made by the employer to the Pension Plan and the question of their validity, are at least implicitly, and perhaps even explicitly, linked to the collective agreements and to the application thereof.

51 As I mentioned above, each of the collective agreements in force at the time the motion was filed refers in one way or another to the Pension Plan. This was true, more specifically, of the collective agreement that originally applied to the respondent Bisaillon. On this subject, a degree of uncertainty remains as to which collective agreement is applicable to the respondent Bisaillon for the purposes of this appeal. The issue is not determinative, however, since the relevant provisions appear to be similar.

[page694]

52 The collective agreement applicable to Mr. Bisaillon at the time his motion for authorization was filed contained the following provisions:

> 32.01:
>
> Employees covered by this collective agreement are eligible for the University benefits program, in accordance with the conditions stipulated therein.
>
> 32.02:
>
> The Benefits Program consists of the following:
>
> Life Insurance;
>
> Health Insurance;
>
> Salary Insurance;
>
> Pension Plan. [Emphasis added.]

53 As for the collective agreement applicable to Mr. Bisaillon at the time the judge heard the application, it provided as follows:

> 15.03
>
> Pension Plan
>
> (a) The Employer agrees to maintain the Pension Plan currently in use for employees at the coverage and benefit levels and under the terms and conditions set by the Pension Committee and the Board of Governors. [Emphasis added.]

54 In these provisions, Concordia made a commitment to the unions to offer the Pension Plan to the employees covered by the agreements in accordance with the conditions of the plan. The unions

thus obtained certain assurances with respect to the maintenance of the plan and the eligibility of the employees they represented. In effect, the parties decided to incorporate the conditions for applying the Pension Plan into the collective agreement. In this context, the employer was not in the position of a third person, such as an insurer providing insurance benefits proposed by the parties to the collective agreement. On the contrary, Concordia appeared to retain effective control over the administration of the Pension Plan while committing itself, at least implicitly, to respect and fulfil various rights and obligations [page695] provided for in the plan or arising out of the legislation applicable to it. In so doing, it also recognized the *in personam* and subject-matter jurisdiction of the grievance arbitrator.

55 This is not a case that would justify the Superior Court in exercising its exceptional residual jurisdiction. If the respondent's allegations proved to have merit, the grievance arbitrator would have the necessary jurisdiction in a grievance proceeding to declare the employer's decisions to be null, and to decide on an appropriate remedy. Accordingly, the Superior Court did not err in declaring that it lacked jurisdiction to hear the case on the basis that the grievance arbitrator had exclusive jurisdiction in the matter.

(ii) *Union's Monopoly on Representation*

56 To ascribe the status of representative to the respondent Bisaillon by granting his motion for authorization to institute a class action would be incompatible with the legal mandates of representation accorded by the *Labour Code* to the nine certified unions representing Concordia employees. The Pension Plan, having been negotiated and incorporated into the collective agreement, became a condition of employment in respect of which the employees lost their right to act on individual basis, independently of the union representing them. As confirmed in *Noël*, the employees no longer have the power to apply to the ordinary courts to demand the application of provisions of the plan. Contrary to all these principles, a class action in the case at bar would jeopardize an explicit agreement -- entered into within the framework set out in the *Labour Code* -- between CUFA and Concordia with respect to the very subjects to which it applies.

57 If the eight unions that disagreed with Concordia felt that their collective agreements had been violated, it was up to them to assert the rights of the employees they represent. As the disagreement arose, at least implicitly, out of the collective agreement, the unions should have pursued the collective bargaining process begun with the employer [page696] or filed a grievance with an arbitrator to defend the rights of their bargaining units. Their tactical decision to yield their power of representation to Mr. Bisaillon disregarded the legal mandates the *Labour Code* attributes to them as certified unions and the obligations it imposes on them in respect of the employees and the employer.

(2) Problems Resulting From the Arbitration Solution

58 Although I am of the view that the trial judge correctly concluded that the Superior Court lacked jurisdiction in the instant case, I must admit that this solution is not free of procedural

difficulties, particularly because of the multiplicity of possible proceedings and of potential conflicts between separate arbitration awards in respect of the different bargaining units. However, the potential difficulties are not sufficient to justify referring the matter to the Superior Court and holding that it has jurisdiction.

59 Since the grievance arbitrator derives his or her jurisdiction from the collective agreement for a particular bargaining unit, each of the unions involved in the case at bar could of course, pursuant to its own agreement, file a grievance alleging the unlawfulness of the employer's amendments to the Pension Plan. The filing of such grievances could give rise to a series of parallel arbitration proceedings.

60 The Court of Appeal was accordingly concerned about the chaos that could ensue if contradictory decisions were to result. The respondent has not demonstrated that a real possibility of such procedural chaos exists. It is not a foregone conclusion that confirming the jurisdiction of grievance arbitrators would automatically lead to multiple arbitration proceedings. Various options remain open under the fundamental rules of labour law. Thus, it is possible in such situations that all, or at least a large number of, the unions would decide to come to an agreement with the employer to submit the various grievances to a single arbitrator. In the [page697] instant case, it would be hard for the employer to oppose this approach, which I feel should have been the preferred one for all the parties involved. Moreover, should one arbitrator decide a grievance filed by one of the unions in the union's favour, all the employees would benefit indirectly from this award, since all the money wrongfully taken from the pension fund would be returned. Any grievances filed by the other unions would, in practice, become moot. Assuming the worst, if there were contradictory or incompatible arbitration awards, Concordia could probably, subject to the limited possible grounds for judicial review by the Superior Court, resolve any conflict by complying with the award least favourable to it.

61 Does the solution adopted in the case at bar effectively give the unions nine kicks at the can, allowing each one in turn to file a grievance, with the ultimate aim of requiring the employer to abide by the award most unfavourable to it? I think not. There are a number of tools of civil procedure that can be used to resolve the problems caused by multiple proceedings. I see nothing from which to infer that arbitration could give rise to abuses of right through which the various unions would profit excessively from the procedure available to them.

62 Furthermore, the problems associated with multiple proceedings are not unique to arbitration. If the motion for authorization to institute a class action had been granted in the instant case, nothing would have prevented some members, whether unionized or not, from requesting exclusion from the class action in order to pursue individual recourses (art. 1007 *C.C.P.*).

63 What then can be said about the rights of non-unionized members? To begin with, they too would benefit indirectly from an arbitration award in favour of one of the unions but would not be legally bound by such an award. In the instant case, this Court did not have to rule on the validity of

a [page698] civil suit undertaken by the non-unionized employees to assert their own rights, be it by means of a declaratory action, an action in nullity or a class action. The question whether a class action limited to non-unionized employees lies was not before this Court, so I will refrain from expressing an opinion on the subject. I will simply note that modern civil procedure is flexible and would not leave these employees without effective recourse, and that this Court need not rule on the form and nature of that recourse at this time.

64 In short, despite the fear that procedural difficulties -- which, I might add, would not be insurmountable -- might result from a decision in favour of arbitration, the class action option cannot be accepted. To authorize a class action in the case at bar would be to deny the principles of the exclusivity of the grievance arbitrator's jurisdiction and of the union's monopoly on employee representation. The Superior Court was thus correct in granting the motion for declinatory exception and dismissing the respondent Bisaillon's motion for authorization to institute a class action.

V. Disposition

65 I would therefore allow the appeal, set aside the judgment of the Court of Appeal and restore the decision of the Superior Court, with costs throughout.

The reasons of McLachlin C.J. and Bastarache and Binnie JJ. were delivered by

BASTARACHE J. (dissenting):--

1. Introduction

66 I have had the opportunity to read the reasons of my colleague Justice LeBel, and I agree with many of the arguments raised in his analysis. Thus, we agree that, although the respondent Bisaillon started this case as a class action, this cannot affect the substantive rights of those implicated therein. [page699] Accordingly, we agree that the crux of this appeal lies in considering the proper jurisdiction of the labour arbitrator. We further agree that, once established, the exclusive jurisdiction of arbitrators must continue to be protected by this Court, and that employees cannot sidestep the exclusive representation of their bargaining agents. Finally, we are in agreement on the specific point that pension plans form part of employees' conditions of employment and are often vigorously negotiated as part of the collective bargaining process.

67 Where I part ways with LeBel J. is the specific conclusion, on the facts of this case, that this pension dispute can be traced back to the collective agreement that binds the respondent to the appellant university -- or that it can be said to arise out of *any* collective agreement involving the appellant university, for that matter. Far from constituting a departure from the general principles elaborated by my colleague, my conclusion recognizes that the role of labour arbitrators and labour unions must be respected. But *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, demands a nuanced and contextual analysis animated by the relevant factual matrix before a decision on jurisdiction can be reached (paras. 52-53); see also *Regina Police Assn. Inc. v. Regina (City) Board of Police*

Commissioners, [2000] 1 S.C.R. 360, 2000 SCC 14, at para. 25. In the present appeal, this analysis leads to the conclusion that the pension plan at issue (the "Plan") transcends any single collective agreement or employment contract and, therefore, falls outside the exclusive jurisdiction of the labour arbitrator.

68 The claim advanced by the respondent centres around the financing of the Plan itself. It is unaffected by the particular agreement binding a given member of the Plan to the appellant university. Thus, while I agree that pension plans may sometimes be "swallowed up" by collective agreements that incorporate them, this cannot be what happened here. In this case, unlike those cited by [page700] LeBel J., the indivisible nature of the Plan patrimony contrasts directly with the *nine* distinct collective agreements and *hundreds* of distinct employment contracts that bind the Plan members to the appellant university. Put simply, the Plan transcends any one collective agreement. To state otherwise -- in other words, to state that the Plan does indeed arise out of a given collective agreement -- implies that the parties to that collective agreement, and the arbitration that results therefrom, effectively have the power to bind all other persons who have an interest in the Plan.

69 Because the Plan cannot be reduced to a single collective agreement, it should be expected that problems will result if a labour arbitrator is given exclusive jurisdiction by virtue of one such agreement. As LeBel J. acknowledges, these problems indeed loom large if his approach is accepted. For instance, one can anticipate that different courts and arbitrators, all gaining jurisdiction from different collective agreements and employment contracts, could come to mutually incompatible decisions on how the appellant university should administer the Plan. If this was an unfortunate consequence of the correct application of *Weber*, and a necessary evil in guarding the rightful territory of labour unions and arbitrators, then I, like my colleague, would be willing to accept it. With respect, however, I believe the risk of inconsistent decisions is symptomatic of a misapplication of *Weber*. I cannot agree that *Weber* allows for the same party to be bound by inconsistent directions from different courts and arbitrators, all claiming -- rightfully, according to my colleague -- to have jurisdiction over the essential character of the dispute. The fact that this possibility exists here confirms that the essential character of this appeal arises out of something other than the collective agreement: the Plan itself.

70 In my reasons I will follow this Court's jurisprudence suggesting that employees can have [page701] employment-related rights that do not give rise to a labour arbitrator's exclusive jurisdiction. I will then apply the *Weber* framework to determine that the present dispute is one of those situations. Finally, I will conclude by discussing the implications of adopting an approach that does not conform to the principles of *Weber*.

2. A Labour Arbitrator's Exclusive Jurisdiction Is Not Unlimited

71 As my colleague LeBel J. observes, there are two "exclusivities" implicated in this dispute. The first is the exclusive right that unions have to represent the members of the relevant collective bargaining unit. The second is the exclusive right that labour arbitrators have to decide disputes that

arise out of the collective agreement. While the first exclusivity may be relevant in determining who has a sufficient interest to bring forth the pension claim, it is the second exclusivity that will determine which forum has jurisdiction to hear it. Because these two exclusivities do not necessarily have the same scope, the first exclusivity must not be used as a proxy for the second. The fact that a union can act pursuant to its monopoly over representation does not imply that the labour arbitrator has the exclusive jurisdiction to hear its argument. Conversely, a decision that the labour arbitrator does not possess exclusive jurisdiction over a matter will not necessarily mean that an employee, personally, has a sufficient interest to by-pass his/her union and apply for a remedy: compare *Noël v. Société d'énergie de la Baie James*, [2001] 2 S.C.R. 207, 2001 SCC 39, at para. 70. Jurisdiction must be established first. Only then will it fall upon the decision-maker, properly seized of the dispute, to determine if it should proceed as pleaded.

72 Without detracting from the importance of the first exclusivity, then, it is most relevant to the present appeal to recognize the limits that exist [page702] with respect to the second. On this point, the jurisprudence admits of no doubt. An employee may have any number of rights related to his/her employer, even relating to his/her employment, that fall outside the exclusive jurisdiction of the labour arbitrator: see *Weber*, at para. 54; *Regina Police Assn.*, at para. 24. This Court had the opportunity to consider such a situation in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, 2004 SCC 39 ("*Morin*"). That case involved a claim that certain employees were discriminated against by the addition of a new term to the collective agreement. The majority held that the labour arbitrator did not have exclusive jurisdiction on application of the principles discussed in *Weber*. In no uncertain terms, McLachlin C.J. wrote that *Weber* "does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes" (para. 11). While I disagreed with the majority's conclusion that the essential character of that dispute was one of human rights, I agree completely with this comment. Once it was determined that the dispute, in its essential character, did not arise out of the collective agreement, it clearly followed that the appellant's recourse to the Quebec Human Rights Tribunal was to be preserved.

73 *Morin* confirms that the simple fact a dispute arises out of an employee's conditions of employment is insufficient to trigger the exclusive jurisdiction of the labour arbitrator. What is more, even where elements in a dispute arise specifically out of the collective agreement, the exclusive jurisdiction of the labour arbitrator will not arise unless the *essential character* of the claim arises out of the collective agreement. It is not enough to say that the employee would not be here *but for* this collective agreement. If the appellants are to succeed in the present appeal, they will need to go further than showing a mere connection between the respondent's claim and the provisions of the collective agreement.

[page703]

3. The Labour Arbitrator Does Not Have Exclusive Jurisdiction Over the Respondent's Claim

74 The claim advanced by the respondent concerns the financing of the fund associated with the Plan (the "Fund"). Specifically, and as my colleague ably describes (at para. 8), this dispute concerns the legality of various actions taken by the appellant university that served, according to the respondent, to deprive the Fund beneficiaries of more than $70,000,000. The respondent wants these actions to be declared null, with the appropriate amounts being returned to the Fund.

75 This is not a straightforward situation. Nobody contests that unions can and do negotiate various provisions of a pension plan as part of their collective bargaining strategies. The appellant university has been able to identify a few such issues in its own negotiations with unions -- but they do not include the financing issues at the heart of the respondent's claim. Further, all parties recognize that a given union could negotiate pension benefits that would apply to its members exclusively and that, in such a case, it would be the responsibility of the employer to deliver those benefits in a way that did not run afoul of its agreements with other unions. At the same time, however, it is beyond doubt that the only forum with jurisdiction to hear this claim by the non-unionized employees interested therein is the Quebec Superior Court.

76 The question before us is therefore whether this particular dispute implicates collective agreement issues that would necessitate dividing jurisdiction between the courts and labour arbitrators, or whether it is more principled to locate the essence of this particular pension dispute outside the collective agreement. According to *Weber*, the labour arbitrator will enjoy exclusive jurisdiction only if the essential character of the respondent's claim can properly be reduced to a matter arising out of a single collective agreement, concluded between a single union and the employer. I conclude that this is not the case for the respondent's claim.

[page704]

3.1 *The Respondent's Claim Implicates the Fund as an Indivisible Patrimony*

77 The Fund itself is a single entity. It constitutes one patrimony from which all beneficiaries are entitled to benefit: see s. 6 of the *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1; art. 1261 of the *Civil Code of Québec*, S.Q. 1991, c. 64. Neither in fact nor in law can it be understood as the amalgam of various parts, each one associated with a particular employment agreement. It is one indivisible whole.

78 The indivisibility of the Fund is central to an understanding of the respondent's claim against the appellant university. To be precise, it explains why the respondent's claim is shared by every other beneficiary of the Fund. After all, there are nine different unions and hundreds of different employees who are interested in this claim. There are nine different collective agreements and

hundreds of different employment contracts that entitle beneficiaries to a share in the Fund. But when it comes to the respondent's claim against the appellant university, these differences all disappear. It is not simply that the other beneficiaries have an interest in the respondent's claim, in the way that a manager may have an interest in how labour disputes get resolved (see LeBel J.'s reasons, at para. 41). All Fund beneficiaries share the *same claim*. This is because the claim arises out of the single Fund, not the diverse employment relationships and union affiliations of the beneficiaries. If the Fund is under financed, regardless of their collective agreement or employment contract, the beneficiaries are all affected in the same way. Equally, a decision on the respondent's claim affects all Fund beneficiaries: as my colleague notes,

> should one arbitrator decide a grievance filed by one of the unions in the union's favour, all the employees would benefit indirectly from this award, since all the money wrongfully taken from the pension fund would be returned. [para. 60]

[page705]

In my view, this confirms that the respondent's claim transcends the specific collective agreement or employment contract that forms the basis of an employee's entitlement.

79 The conclusion I reach does not ignore the role that the respondent's collective agreement plays in his claim. I recognize that the respondent's relationship to the appellant university is the reason why he cares about the Fund: *but for* his employment, he would not have any interest in the financing of the Fund. Yet, his collective agreement means nothing more to this claim; it is hardly its essential character. The issues involved in the respondent's claim are completely independent of the collective agreement and relate directly to the indivisible Fund. They are not the product of the bilateral labour negotiations that resulted in the collective agreement, nor could they be, given that employees with different collective agreements and employment contracts all share in them equally. As Binnie J. wrote in *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14, where this Court held a pre-employment agreement to be outside the jurisdiction of the labour arbitrator, "[s]uch disputes are foreign to the collective agreement and are not embraced by the legislative intent favouring arbitration" (para. 24).

80 On the facts before us, the presence of a single Fund, in contrast with the multiple collective agreements and employment contracts that were concluded well after it was created, helps identify that the essential character of the respondent's claim arises out of the Plan. Because the Fund is indivisible, and because more than one collective agreement seeks to regulate access to the pre-existing Fund, no single collective agreement could purport to alter or affect the Fund itself. To do so would be to let the parties to that collective agreement dictate the content of the Fund for all other beneficiaries. Likewise, to find jurisdiction for the respondent's claim on the basis of his collective agreement would be to let the labour arbitrator dictate the content of the Fund for

beneficiaries beyond his/her jurisdiction. A dispute that transcends the [page706] collective agreement cannot be dealt with as if it affected only the one union. This insight, of course, is nothing new. It is merely an application of the holding in *Weber*.

3.2 *Recourse to the Labour Arbitrator Presumes the Simplicity of a Single Union Situation or the Specificity of the Dispute to a Single Collective Agreement Negotiation*

81 The respondent's claim against the appellant university cannot be reframed as a bilateral labour dispute that conforms to the paradigm of labour arbitration.

82 This is not to suggest that pension disputes will necessarily, or even usually, fall outside the exclusive jurisdiction of the labour arbitrator. I agree with my colleague that the jurisprudence in Quebec and elsewhere in Canada supports the notion that pension disputes are often arbitrable. However, this will only be the case where the pension dispute does not transcend the collective agreement in question. Each case must be analyzed on its facts because it is always possible for a pension dispute to arise independently of the collective agreement: compare *Lacroix v. Société Asbestos ltée* (2004), 43 C.C.P.B. 267 (Que. C.A.).

83 Where there is one pension plan that applies wholly and uniquely to a single bargaining unit, it will be comparatively easy to contend that the pension dispute arises out of the collective agreement between the employer and the union. The union, after all, represents all the members of the pension plan and bargains for the content of this plan on their behalf. To say the labour arbitrator lacks jurisdiction simply because the totality of the plan is not found on the paper labelled "Collective Agreement" would be unduly formalistic, and would ignore this Court's instruction that the essential character of [page707] the dispute need only "implicitly" arise out of the collective agreement to bestow exclusive jurisdiction on the labour arbitrator: see *Regina Police Assn.*, at para. 25.

84 Additionally, even if the pension plan in question has some other elements that transcend a single union's negotiations, a labour arbitrator will possess exclusive jurisdiction over a dispute that concerns an issue specific to a given collective agreement. For instance, an employer may have negotiated access to the pension plan differently with one union than with another. A dispute surrounding this unique provision, being rooted in the discrete collective agreement that binds the parties, can be considered in isolation without affecting the rights of those persons not bound by that collective agreement. The labour arbitrator will enjoy exclusive jurisdiction over this issue.

85 These two situations where pension matters often fall to the labour arbitrator -- i.e., where there is a single union involved and where the issues in dispute are unique to a single collective agreement negotiation -- are merely instances of the rule in *Weber*. They are situations where the pension matters in dispute may properly be said to fall within the ambit of negotiations between the unions and the employers and the collective agreements that resulted therefrom. This is precisely what happened in those cases cited by my colleague LeBel J. In *J.M. Asbestos inc. v. Lemieux*, [1986] Q.J. No. 613 (QL) (C.A.), *Union internationale des employés professionnels et de bureau, local 480 v. Albright & Wilson Amérique ltée* (2000), 28 C.C.P.B. 306 (Que. C.A.), *Emerson*

Electric Canada ltée v. Foisy (2006), 50 C.C.P.B. 287, 2006 QCCA 12, and *Hydro-Québec v. Corbeil* (2005), 47 C.C.P.B. 200, 2005 QCCA 610, the scope of the disputes was restricted to issues arising out of, and thus the persons bound by, the applicable collective agreements. The same cannot be said about the respondent's claim, where the essential character of the dispute transcends the collective agreement. In fact, this difference has not escaped the [page708] Quebec courts: both the Quebec Court of Appeal, in the *Hydro-Québec* appeal (at paras. 31-32) cited by LeBel J., and the Quebec Superior Court, in the *Foisy* decision ((2005), 50 C.C.P.B. 261, at para. 83) that was affirmed in the brief appeal judgment cited by LeBel J., explicitly made this distinction part of their rulings.

86 The present situation is more closely analogous to one where a collective agreement includes a benefit for employees that is external to that agreement -- for example, where an insurance policy is incorporated into the collective agreement. In both situations, *but for* the collective agreement, the employee would not have the benefit. But in both situations, despite the fact that entitlement to the benefit is tailored to the collective agreement, the contours of the benefit itself have been determined elsewhere. Accordingly, appellate courts have held that even where insurance policies are referenced in a collective agreement, this fact does not transform the insurance dispute into one that arises out of the collective agreement, and does not serve to create jurisdiction for the labour arbitrator over the third-party insurer: see *Vidéotron ltée v. Turcotte*, [1998] Q.J. No. 2742 (QL) (C.A.); *London Life Insurance Co. v. Dubreuil Brothers Employees Assn.* (2000), 49 O.R. (3d) 766 (C.A.); *Elkview Coal Corp. v. U.S.W.A., Local 9346* (2001), 205 D.L.R. (4th) 80, 2001 BCCA 488. Put differently, the union and employer may arbitrate disputes relating to the insurance provisions of the collective agreement; but scrutiny of the insurance policy itself, which implicates broader interests and individuals beyond the collective agreement, is another matter entirely. The same can be said about the Plan. The collective agreements in question may confirm the availability of the Plan for employees, but they do not -- and cannot -- go so far as to affect the substance of the Plan itself. Nothing prevents a labour arbitrator from claiming exclusive jurisdiction over those matters that arise out of the collective agreement. But nothing justifies this jurisdiction extending beyond that point, [page709] either, where the dispute would concern matters and parties that fall well outside the scope of the collective agreement's application. Again, this is nothing more than an application of *Weber*.

3.3 *Conclusion on Jurisdiction*

87 Based on the foregoing, it is clear to me that the respondent's claim against the appellant university is not one over which the labour arbitrator could enjoy exclusive jurisdiction.

88 The essential character of the dispute transcends any collective agreement based on which the labour arbitrator could assert exclusive jurisdiction. Any attempt by a labour arbitrator to decide the respondent's claim would call upon the arbitrator to determine issues and bind parties that reach far beyond the individual collective agreement properly in front of him/her. This unique characteristic of the respondent's claim was not present in any of the jurisprudence canvassed by my colleague.

89 The labour arbitrator does not have jurisdiction over the parties to this dispute either. While LeBel J. restricts the scope of the claim to the respondent and the appellant university (at paras. 47 and 49), with respect, I cannot accede to this reasoning. One cannot simply declare that the labour arbitrator has jurisdiction over the relevant parties by artificially restricting who qualifies as a party. In this pension dispute, all Fund beneficiaries share in this claim and should be involved. The labour arbitrator's jurisdiction does not extend that far.

4. Contradictory Rulings as a Result of the Misapplication of *Weber*

90 I will conclude my reasons by referring to the possibility of contradictory rulings mentioned by my colleague LeBel J. While he characterizes this [page710] possibility as an unfortunate consequence of the statutory scheme, I respectfully believe it is a direct consequence of his misapplication of *Weber* to the present facts. I endeavour to show that this risk is inevitable, both in practice and in theory, based on his reasoning.

91 That the risk of contradictory rulings is inevitable in practice should be clear from my colleague's reasons. While he suggests that unions might agree to be bound by a singular arbitration, and while other claims might be discarded as abusive, he also emphasizes that persons not party to the arbitration could not be legally bound by the arbitration (paras. 41, 60-61 and 63). In fact, LeBel J. himself raises the great incentive that employees would have for bringing multiple claims: "Concordia could probably, subject to the limited possible grounds for judicial review by the Superior Court, resolve any conflict by complying with the award least favourable to it" (para. 60 (emphasis added)). With regard to the respondent's claim, so long as the arbitrator renders a decision that is unsatisfactory to one of the remaining eight unions or approximately 350 employees covered by the Plan, one could expect the dispute to be reopened.

92 That the risk of contradictory rulings is inevitable in theory is even more worrisome in my view. This risk arises because LeBel J.'s application of *Weber* yields too many forums with jurisdiction. On the issue "Did the appellant university illegally take money from the Fund?", my colleague decides that its essential character arises out of the collective agreement linking the respondent to the appellant university. But by the same token, the *same issue* must also be said to arise, in its essential character, out of each one of the other collective agreements and employment contracts linking Fund beneficiaries to the appellant university. The result is that the same claim, shared by all Fund beneficiaries but capable of being resolved in only one way, may be decided differently by different [page711] arbitrators, each of whom is acting within his/her jurisdiction.

93 Let me be clear: this is not akin to a situation where different arbitrators interpret a legislative provision differently, or where different arbitrators apply the same legislative provision differently to similar sets of facts. It is not even akin to a situation where the same section of a collective agreement is interpreted one way by an arbitrator seized of one set of facts, and another way by another arbitrator seized of a different set of facts. This would be a situation where the same indivisible Fund would be said to contain a certain amount of money according to one arbitrator,

and a different amount of money according to another. Thus, the inconsistency that would plague the respondent's claim is not the kind of inconsistency that troubles courts but still gives litigants clear guidance; it is the kind of inconsistency that purports to resolve *the same, singular claim* in different ways. There is no way of reconciling contradictory orders like this.

94 An arbitrator faced with deciding the respondent's claim would therefore be confronted with a truly absurd situation. Because his/her jurisdiction would be restricted to the collective agreement before him/her, his/her decision could only bind the persons affected by that collective agreement: *Syndicat des professionnelles et professionnels du gouvernement du Québec v. Paquet (Collège d'enseignement général et professionnel régional de Lanaudière et Syndicat des professionnelles et professionnels du gouvernement du Québec, section locale 8)*, [2005] Q.J. No. 678 (QL), 2005 QCCA 109, at paras. 38-40; s. 101 of the *Labour Code*, R.S.Q., c. C-27. Yet, because his/her decision would determine the status of an indivisible Fund that affects parties beyond the collective agreement, his/her decision would effectively bind them as well -- unless they chose to seek another [page712] determination from another arbitrator, at which point the parties that the original arbitrator sought to bind would be thrust into limbo. This situation is made even worse by two additional facts. First, the appellant university would be a party to all these arbitrations, and thus would be legally bound by all of them. Second, without engaging in a thorough analysis of the applicable standard of review, I would expect that the arbitrators' decisions would be entitled to some deference: compare *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at paras. 34-40; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, at paras. 12-16; *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23, at paras. 15-30. This means that mutually incompatible decisions that emerge from the arbitrators could not be reconciled on review so long as each one is reasonable (or, perhaps, so long as each one is not patently unreasonable).

95 With respect, I believe a proper application of *Weber* necessarily precludes such a result. By focussing on *the essential* character of the dispute, this Court established that a dispute can only be framed in one way, and jurisdiction is to be decided on that basis. No doubt, this exercise can be artificial at times: the respondent's claim implicates labour interests just as it implicates pension rights. But this exercise is nonetheless absolutely necessary. So long as the essential character of a dispute arises out of a collective agreement, the effect of any one arbitrator's decision can be confined to that collective agreement without giving rise to concerns about contradiction. But if "essential character" is given the broad meaning adopted by my colleague, such that the essential character of a single dispute can be said to arise out of many different sources simultaneously, with each yielding jurisdiction for different forums, the insight of *Weber* is defeated.

96 In my view, the absurd multiplicity of proceedings associated with the respondent's claim is [page713] symptomatic of a misapplication of the *Weber* test. Bringing the claim in front of the Quebec Superior Court's inherent jurisdiction is the only way to avoid this result because it is the only solution that recognizes that the essential character of this dispute transcends any one collective agreement, and thus the exclusive jurisdiction of any labour arbitrator. It is the only

principled and practical way for the respondent's claim to finally be resolved. At the same time, and for the same reason this claim escapes the labour arbitrator's exclusive jurisdiction in the first place, a decision by the Quebec Superior Court will not imperil any of the terms negotiated individually by any of the unions involved. Such matters remain the exclusive domain of the labour arbitrator.

97 In reaching this conclusion, I do not comment on whether the respondent's proposed class action should be certified as such. That is a matter for the Quebec Superior Court to decide. Accordingly, the possibility that some litigants may opt out of the class action and begin their own court proceedings is irrelevant at this stage. The respondent's claim may be argued individually, authorized as a class action, or joined with independent actions by other beneficiaries; it may even need to be resolved by an appellate court. But whichever of these options ultimately materializes, an application to the Quebec Superior Court is still the only procedure that offers the hope of conclusively settling how the appellant university should finance the Fund.

98 I also do not purport to decide whether the respondent has a "sufficient interest" to proceed with this claim independently of his union: see art. 55 of the *Code of Civil Procedure*, R.S.Q., c. C-25. This Court has only been asked to determine whether the Quebec Superior Court has jurisdiction. Now that this has been established, though, that court may still refuse to render judgment if it is not convinced of the sufficiency of the respondent's interest in the claim: see art. 462 of the *Code [page714] of Civil Procedure*. Again, any uncertainty concerning the answer to this question cannot serve to remove jurisdiction from the Quebec Superior Court. To the contrary, the Quebec Superior Court is the only forum vested with the jurisdiction to hear this claim whomever may be most suited to advance it.

Conclusion

99 While a labour arbitrator enjoys exclusive jurisdiction over matters whose essential character arises out of the interpretation, application, administration or violation of a collective agreement, his/her exclusive jurisdiction does not extend beyond that point. Rather, in such a situation, the inherent jurisdiction of the superior court will be engaged. In the present appeal, the respondent's claim transcends the collective agreement binding him to the appellant university and directly implicates the Fund of which he is but one of many beneficiaries. The essential character of this dispute cannot be said to arise out of a collective agreement.

100 I would dismiss the appeal.

Solicitors:

Appeal allowed with costs, McLachlin C.J. and Bastarache and Binnie JJ. dissenting.

Solicitors for the appellant/respondent Concordia University: Desjardins Ducharme Stein Monast, Montréal; Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the respondent/appellant Concordia University Faculty Association: Keenan Lehrer, Montréal.

Solicitors for the respondent Richard Bisaillon: Pépin & Roy, Montréal.

cp/e/qw/qlplh

Indexed as:

Resurgence Asset Management LLC v. Canadian Airlines Corp.

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended;
AND IN THE MATTER OF the Business Corporations Act (Alberta) S.A. 1981, c. B-15, as amended, Section 185;
AND IN THE MATTER OF Canadian Airlines Corporation and Canadian Airlines International Ltd.
Between
Resurgence Asset Management LLC, applicant, and Canadian Airlines Corporation and Canadian Airlines International Ltd., respondents

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84 Alta. L.R. (3d) 52

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9 B.L.R. (3d) 86

20 C.B.R. (4th) 46

99 A.C.W.S. (3d) 533

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Docket: 00-08901

Alberta Court of Appeal
Calgary, Alberta

Wittmann J.A.
(In Chambers)

Heard: August 3, 2000.
Judgment: filed August 29, 2000.

(57 paras.)

Application for leave to appeal from the order of Paperny J. Dated June 27, 2000.

Counsel:

D.R. Haigh, Q.C., D.S. Nishimura and A.Z.A. Campbell, for the applicant.
H.M. Kay, Q.C., A.L. Friend, Q.C. and L.A. Goldbach, for the respondents.
S.F. Dunphy, for Air Canada.
F.R. Foran, Q.C., for the monitor, Pricewaterhouse Coopers.

MEMORANDUM OF DECISION NO. 2

WITTMANN J.:--

INTRODUCTION

1 This is an application by Resurgence Asset Management LLC ("Resurgence") for leave to appeal the order of Paperny, J., dated June 27, 2000, pursuant to proceedings under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, ("CCAA"). The order sanctioned a plan of compromise and arrangement ("the Plan") proposed by Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") (together, "Canadian") and dismissed an application by Resurgence for a declaration that Resurgence was an unaffected creditor under the Plan.

BACKGROUND

2 Resurgence was the holder of 58.2 per cent of $100,000,000.00 (U.S.) of the unsecured notes issued by CAC.

3 CAC was a publicly traded Alberta corporation which, prior to the June 27 order of Paperny, J., owned 100 per cent of the common shares of CAIL, the operating company of Canadian Airlines.

4 Air Canada is a publicly traded Canadian corporation. Air Canada owned 10 per cent of the shares of 853350 Alberta Ltd. ("853350"), which prior to the June 27 order of Paperny, J., owned all the preferred shares of CAIL.

5 As described in detail by the learned chambers judge in her reasons, Canadian had been searching for a decade for a solution to its ongoing, significant financial difficulties. By December 1999, it was on the brink of bankruptcy. In a series of transactions including 853350's acquisition of the preferred shares of CAIL, Air Canada infused capital into Canadian and assisted in debt restructuring.

6 Canadian came to the conclusion that it must conclude its debt restructuring to permit the completion of a full merger between Canadian and Air Canada. On February 1, 2000, to secure liquidity to continue operating until debt restructuring was achieved, Canadian announced a moratorium on payments to lessors and lenders. CAIL, Air Canada and lessors of 59 aircraft reached an agreement in principle on a restructuring plan. They also reached agreement with other secured creditors and several major unsecured creditors with respect to restructuring.

7 Canadian still faced threats of proceedings by secured creditors. It commenced proceedings under the CCAA on March 24, 2000. Pricewaterhouse Coopers Inc. was appointed as Monitor by court order.

8 Arrangements with various aircraft lessors, lenders and conditional vendors which would benefit Canadian by reducing rates and other terms were approved by court orders dated April 14, 2000 and May 10, 2000.

9 On April 25, 2000, in accordance with the March 24 court order, Canadian filed the Plan which was described as having three principal objectives:

(a) To provide near term liquidity so that Canadian can sustain operations;
(b) To allow for the return of aircraft not required by Canadian; and
(c) To permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset value and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

10 The Plan generally provided for stakeholders by category as follows:

(a) Affected unsecured creditors, which included unsecured noteholders, aircraft claimants, executory contract claimants, tax claimants and various litigation claimants, would receive 12 cents per dollar (later changed to 14 cents per dollar) of approved claims;
(b) Affected secured creditors, the senior secured noteholders, would receive 97 per cent of the principal amount of their claim plus interest and costs in respect of their secured claim, and a deficiency claim as unsecured creditors for the remainder;
(c) Unaffected unsecured creditors, which included Canadian's employees, customers and suppliers of goods and services, would be unaffected by the Plan;
(d) Unaffected secured creditor, the Royal Bank, CAIL's operating lender, would not

be affected by the Plan.

11 The Plan also proposed share capital reorganization by having all CAIL common shares held by CAC converted into a single retractable share, which would then be retracted by CAIL for $1.00, and all CAIL preferred shares held by 853350 converted into CAIL common shares. The Plan provided for amendments to CAIL's articles of incorporation to effect the proposed reorganization.

12 On May 26, 2000, in accordance with the orders and directions of the court, two classes of creditors, the senior secured noteholders and the affected unsecured creditors voted on the Plan as amended. Both classes approved the Plan by the majorities required by ss. 4 and 5 of the CCAA.

13 On May 29, 2000, by notice of motion, Canadian sought court sanction of the Plan under s. 6 of the CCAA and an order for reorganization pursuant to s. 185 of the Business Corporations Act (Alberta), S.A. 1981, c. B-15 as amended ("ABCA"). Resurgence was among those who opposed the Plan. Its application, along with that of four shareholders of CAC, was ordered to be tried during a hearing to consider the fairness and reasonableness of the Plan ("the fairness hearing").

14 Resurgence sought declarations that the actions of Canadian, Air Canada and 853350 constitute an amalgamation, consolidation or merger with or into Air Canada or a conveyance or transfer of all or substantially all of Canadian's assets to Air Canada; that any plan of arrangement involving Canadian will not affect Resurgence and directing the repurchase of their notes pursuant to provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 were oppressive and unfairly prejudicial to it pursuant to s. 234 of the ABCA.

15 The fairness hearing lasted two weeks during which viva voce evidence of six witnesses was heard, including testimony of the chief financial officers of Canadian and Air Canada. Submissions by counsel were made on behalf of the federal government, the Calgary and Edmonton airport authorities, unions representing employees of Canadian and various creditors of Canadian. The court also received two special reports from the Monitor.

16 As part of assessing the fairness of the Plan, the learned chambers judge received a liquidation analysis of CAIL, prepared by the Monitor, in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event that CAIL's assets were disposed of by a receiver or trustee. The Monitor concluded that liquidation would result in a shortfall to certain secured creditors, that recovery by unsecured creditors would be between one and three cents on the dollar, and that there would be no recovery by shareholders.

17 The learned chambers judge stated that she agreed with the parties opposing the Plan that it was not perfect, but it was neither illegal, nor oppressive, and therefore, dismissed the requested declarations and relief sought by Resurgence. Further, she held that the Plan was the only alternative to bankruptcy as ten years of struggle and failed creative attempts at restructuring clearly demonstrated. She ruled that the Plan was fair and reasonable and deserving of the sanction of the court. She granted the order sanctioning the Plan, and the application pursuant to s. 185 of the

ABCA to reorganize the corporation.

LEAVE TO APPEAL UNDER THE CCAA

18 The CCAA provides for appeals to this Court as follows:

> 13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge or the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

19 As set out in Resurgence Asset Management LLC v. Canadian Airlines Corporation, 2000 ABCA 149 (Online: Alberta Courts)("Resurgence No. 1"), a decision on a leave application sought earlier in this action, and as conceded by all the parties to this application, the criterion to be applied in an application for leave to appeal is that there must be serious and arguable grounds that are of real and significant interest to the parties. This criterion subsumes four factors to be considered by the court:

> (1) whether the point on appeal is of significance to the practice;
> (2) whether the point raised is of significance to the action itself;
> (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
> (4) whether the appeal will unduly hinder the progress of the action.

20 The respondents argue that apart from the test for leave, mootness is an additional overriding factor in the present case which is dispositive against the granting of leave to appeal.

MOOTNESS

21 In Galcor Hotel Managers Ltd. v. Imperial Financial Services Ltd. (1993), 81 B.C.L.R. (2) 142 (C.A.), an order authorizing the distribution of substantially all the assets of a limited partnership had been fully performed. The appellants appealed, seeking to have the order vacated. The appellants had unsuccessfully applied for a stay of the order. In deciding whether to allow the appeal to be presented, Gibbs, J.A., for the court, said there was no merit, substance or prospective benefit that could accrue to the appellants, and that the appeal was therefore moot.

22 In Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342, Sopinka, J. for the court, held that where there is no longer a live controversy or concrete dispute, an appeal is moot.

23 No stay of the June 27 order was obtained or even sought. In reliance on that order, most of the transactions contemplated by the Plan have been completed. According to the Affidavit of Paul Brotto, sworn July 6, 2000, filed July 7, 2000, the following occurred:

> 5. The transactions contemplated by the Plan have been completed in reliance upon

the Sanction Order. The completion of the transactions has involved, among other things, the following steps:

(a) Effective July 4, 2000, all of the depreciable property of CAIL was transferred to a wholly-owned subsidiary of CAIL and leased back from such subsidiary by CAIL;
(b) Articles of Reorganization of CAIL, being Schedule "D" to the Plan (which is Exhibit "A" to the Sanction Order), were filed and a Certificate of Amendment and Registration of Restated Articles was issued by the Registrar of Corporations pursuant to the Sanction Order, and in accordance with sections 185 and 255 of the Business Corporations Act (Alberta) (the "Certificate") on July 5, 2000. Pursuant to the Articles of Reorganization, the common shares of CAIL formerly held by CAC were converted to retractable preferred shares and the same were retracted. All preferred shares of CAIL held by 853350 Alberta Ltd. ("853350") were converted into CAIL common shares;
(c) The "Section 80.04 Agreement" referred to in the Plan between CAIL and CAC, pursuant to which certain forgiveness of debt obligations under s. 80 of the Income Tax Act were transferred from CAIL to CAC, has been entered into as of July 5, 2000;
(d) Payment of $185,973,411 (US funds) has been made to the Trustee on behalf of all holders of Senior Secured Notes as provided for in the Plan and 853350 has acquired the Amended Secured Intercompany Note; and
(e) Payments have been made to Affected Unsecured Creditors holding Unsecured Proven Claims and further payments will be made upon the resolution of disputed claims by the Claims officer; and
(f) It is expected that payment will be made within several days of the date of this Affidavit to the Trustee, on behalf of the Unsecured Notes, in the amount 14 percent of approximately $160,000,000.

24 In Norcan Oils Ltd. v. Fogler, [1965] S.C.R. 36, it was held that the Alberta Supreme Court Appellate Division could not set aside or revoke a certificate of amalgamation after the registrar of companies had issued the certificate in accordance with a valid court order and the corporations legislation. A notice appealing the order had been served but no stay had been obtained. Absent express legislative authority to reverse the process once the certificate had been issued, the majority of the Supreme Court of Canada held the amalgamation could not be unwound and therefore, an appellate court ought not to make an order which could have no effect.

25 Courts following Norcan have recognized that any right to appeal will be lost if a party does not obtain a stay of the filing of an amalgamation approval order: Re Universal Explorations Ltd. and Petrol Oil & Gas Company Limited (1982), 35 A.R. 71 (Q.B.) and Re Gibbex Mines Ltd. et al.,

[1975] 2 W.W.R. 10 (B.C.S.C.).

26 Norcan applies to bind this Court in the present action where CAIL's articles of reorganization were filed with the Registrar of Corporations on July 5, 2000 and pursuant to the provisions of the ABCA, a certificate amending the articles was issued. The certificate cannot now be rescinded. There is no provision in the ABCA for reversing a reorganization.

27 The respondents point out that there are other irreversible changes which have occurred since the date of the June 27, 2000 order. They include changes in share structure, changes in management personnel, implementation of a restructuring plan that included a repayment agreement with its principal lender and other creditors and payments to third parties. [Affidavit of Paul Brotto, paras. 6, 7, 8, 9, 10, 11, 12.]

28 The applicant relies on Re Blue Range Resource Corp. (1999), 244 A.R. 103, (C.A.), to argue that leave to appeal can be granted after a CCAA plan has been implemented. In that case, as noted by Fruman, J.A. at 106, a plan was in place and an appeal of the issues which were before her would not unduly hinder the progress of restructuring.

29 In this case, however, the proposed appeal by Resurgence would interfere with the restructuring since the remedies it seeks requires that the Plan be set aside. One proposed ground of appeal attacks the fairness and reasonableness of the Plan itself when the Plan has been almost fully implemented. It cannot be said that the proposed appeal would not unduly hinder the progress of restructuring.

30 If the proposed appeal were allowed, this Court cannot rewrite the Plan; nor could it remit the matter back to the CCAA supervising judge for such purpose. It must either uphold or set aside the approval of the Plan granted by the court below. In effect, if Resurgence succeeded on appeal, the Plan would be vacated. However, that remedy is no longer possible, at minimum, because the certificate issued by the Registrar cannot be revoked. As stated in Norcan, an appellate court cannot order a remedy which could have no effect. This Court cannot order that the Plan be undone in its entirety.

31 Similarly, the other ground of Resurgence's proposed appeal, oppression under s. 234 of the ABCA, cannot be allowed since that remedy must be granted within the context of the CCAA proceedings. As recognized by the learned chambers judge, allegations of oppression were considered in the test for fairness when seeking judicial sanction of the Plan. As she discussed at paragraphs 140-145 of her reasons, the starting point in any determination of oppression under the ABCA requires an understanding of the rights, interests and reasonable expectations which must be objectively assessed. In this action, the rights, interests and reasonable expectations of both shareholders and creditors must be considered through the lens of CCAA insolvency legislation. The complaints of Resurgence, that its rights under its trust indenture have been ignored or eliminated, are to be seen as the function of the insolvency, and not of oppressive conduct. As a consequence, even if Resurgence were to successfully appeal on the ground of oppression, the

remedy would not be to give effect to the terms of the trust indenture. This Court could only hold that the fairness test for the court's sanction was not met and therefore, the approval of the Plan should be set aside. Again, as explained above, reversing the Plan is no longer possible.

32 The applicant was unable to point to any issue where this Court could grant a remedy and yet leave the Plan unaffected. It proposed on appeal to seek a declaration that it be declared an unaffected unsecured creditor. That is not a ground of appeal but is rather a remedy. As the respondents argued, the designation of Resurgence as an affected unsecured creditor was part of the Plan. To declare it an unaffected unsecured creditor requires vacating the Plan. On every ground proposed by the applicant, it appears that the response of this Court can only be to either uphold or set aside the approval of the court below. Setting aside the approval is no longer possible since essential elements of the Plan have been implemented and are now irreversible. Thus, the applicant cannot be granted the remedy it seeks. No prospective benefit can accrue to the applicant even if it succeeded on appeal. The appeal, therefore, is moot.

DISCRETION TO HEAR MOOT APPEALS

33 Even if an appeal could provide no benefit to the applicants, should leave be granted?

34 In Borowski, supra, Sopinka, J. described the doctrine of mootness at 353. He said that, as an aspect of a general policy or practice, a court may decline to decide a case which raises merely a hypothetical or abstract questions and will apply the doctrine when the decision of the court will have no practical effect of resolving some controversy affecting the rights of parties.

35 After discussing the principles involved in deciding whether an issue was moot, Sopinka, J. continued at 358 to describe the second stage of the analysis by examining the basis upon which a court should exercise its discretion either to hear or decline to hear a moot appeal. He examined three underlying factors in the rationale for the exercise of discretion in departing from the usual practice. The first is the requirement of an adversarial context which helps guarantee that issues are well and fully argued when resolving legal disputes. He suggested the presence of collateral consequences may provide the necessary adversarial context. Second is the concern for judicial economy which requires that special circumstances exist in a case to make it worthwhile to apply scare judicial resources to resolve it. Third is the need for the court to demonstrate a measure of awareness of its proper law-making function as the adjudicative branch in the political framework. Judgments in the absence of a dispute may be viewed as intruding into the role of the legislative branch. He concluded at 363:

> In exercising its discretion in an appeal which is moot, the court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third and vice versa.

36 The third factor underlying the rationale does not apply in this case. As for the first criterion, the circumstances of this case do not reveal any collateral consequences, although, it may be assumed that the necessary adversarial context could be present. However, there are no special circumstances making it worthwhile for this Court to ration scarce judicial resources to the resolution of this dispute. This outweighs the other two factors in concluding that the mootness doctrine should be enforced.

37 On the ground of mootness, leave to appeal should not be granted.

38 I am supported in this conclusion by similar cases before the British Columbia Court of Appeal, Sparling v. Northwest Digital Ltd. (1991), 47 C.P.C. (2d) 124 and Galcor, supra.

39 In Sparling, a company sought to restructure its financial basis and called a special meeting of shareholders. A court order permitted the voting of certain shares at the shareholders' meeting. A director sought to appeal that order. On the basis of the initial order, the meeting was held, the shares were voted and some significant changes to the company occurred as a result. Hollinrake, J.A. for the court described these as substantial changes which are irreversible. He found that the appeal was moot because there was no longer a live controversy. After considering Borowski, he also concluded that the court should not exercise its discretion to depart from the usual practice of declining to hear moot appeals.

40 In Galcor, as stated earlier, an order authorizing the distribution of certain monies to limited partners was appealed. A stay was sought but the application was dismissed. An injunction to restrain the distribution of monies was also sought and refused. The monies were distributed. The B.C. Court of Appeal held there was no merit, no substance and no prospective benefit to the appellants nor could they find any merit in the argument that there would be a collateral advantage if the appeal were heard and allowed. None of the criteria in Borowski were of assistance as there was no issue of public importance and no precedent value to other cases. Gibbs, J.A. was of the opinion it would not be prudent to use judicial time to hear a moot case as the rationing of scarce judicial resources was of importance and concern to the court.

APPLICATION OF THE CRITERIA FOR LEAVE

41 In any event, consideration of the usual factors in granting leave to appeal does not result in the granting of leave.

42 In particular, the applicant has not established prima facie meritorious grounds. The issue in the proposed appeal must be whether the learned chambers judge erred in determining that the Plan was fair and reasonable. As discussed in Resurgence No. 1, regard must be given to the standard of review this Court would apply on appeal when considering a leave application. The applicant has been unable to point to an error on a question of law, or an overriding and palpable error in the findings of fact, or an error in the learned chambers judge's exercise of discretion.

43 Resurgence submits that serious and arguable grounds surround the following issues: (a) Should Resurgence be treated as an unaffected creditor under the Plan? and (b) Should the Plan have been sanctioned under s. 6 of the CCAA? The applicant cannot show that either issue is based on an appealable error.

44 On the second issue, the main argument of the applicant is that the learned chambers judge failed to appreciate that the vote in favour of the Plan was not fair. At bottom, most of the submissions Resurgence made on this issue are directed at the learned chambers judge's conclusion that shareholders and creditors of Canadian would not be better off in bankruptcy than under the Plan. To appeal this conclusion, based on the findings of fact and exercise of discretion, Resurgence must establish that it has a prima facie meritorious argument that the learned chambers judge's error was overriding and palpable, or created an unreasonable result. This, it has not done.

45 Resurgence also argues that the acceptance of the valuations given by the Monitor to certain assets, in particular, Canadian Regional Airlines Limited ("CRAL"), the pension surplus and the international routes was in error. The Monitor did not attribute value to these assets when it prepared the liquidation analysis. Resurgence argued that the learned chambers judge erred when she held that the Monitor was justified in making these omissions.

46 Resurgence argued that CRAL was worth as much as $260 million to Air Canada. The Monitor valued CRAL on a distressed sale basis. It assumed that without CAIL's national and international network to feed traffic and considering the negative publicity which the failure of CAIL would cause, CRAL would immediately stop operations.

47 The learned chambers judge found that there was no evidence of a potential purchaser for CRAL. She held that CRAL had a value to CAIL and could provide value of Air Canada, but this was attributable to CRAL's ability to feed traffic to and take traffic from the national and international service of CAIL. She held that the Monitor properly considered these factors. The $260 million dollar value was based on CRAL as a going concern which was a completely different scenario than a liquidation analysis. She accepted the liquidation analysis on the basis that if CAIL were to cease operations, CRAL would be obliged to do so as well and that would leave no going concern for Air Canada to acquire.

48 CRAL may have some value, but even assuming that, Resurgence has not shown that it has a prima facie meritorious argument that the learned chambers judge committed an overriding and palpable error in finding that the Monitor was justified in concluding CRAL would not have any value assuming a windup of CAIL. She found that there was no evidence of a market for CRAL as a going concern. Her preference for the liquidation analysis was a proper exercise of her discretion and cannot be said to have been unreasonable.

49 Resurgence also argued that the pension plan surplus must be given value and included in the liquidation analysis because the surplus may revert to the company depending upon the terms of the plan. There was some evidence that in the two pension plans, with assets over $2 billion, there may

be a surplus of $40 million. The Monitor attributed no value because of concerns about contingent liabilities which made the true amount of any available surplus indefinite and also because of the uncertainty of the entitlement of Canadian to any such amount.

50 The learned chambers judge found that no basis had been established for any surplus being available to be withdrawn from an ongoing pension plan. She also found that the evidence showed the potential for significant contingencies. Upon termination of the plan, further reductions for contingent benefits payable in accordance with the plans, any wind up costs, contribution holidays and litigation costs would affect a determination of whether there was a true surplus. The evidence before the learned chambers judge included that of the unionized employees who expected to dispute all the calculations of the pension plan surplus and the entitlement to the surplus. The learned chambers judge observed also that the surplus could quickly disappear with relatively minor changes in the market value of the securities held or in the calculation of liabilities. She concluded that given all variables, the existence of any surplus was doubtful at best and held that ascribing a zero value was reasonable in the circumstances.

51 In addition to the evidence upon which the learned chambers judge based her conclusion, she is also supported by the case law which demonstrates that even if a pension surplus existed and was accessible, entitlement is a complex question: Schmidt v. Air Products of Canada Ltd., [1994] 2 S.C.R. 611 (S.C.C.).

52 Resurgence argued that the international routes of Canadian should have been treated as valuable assets. The Monitor took the position that the international routes were unassignable licences in control of the Government of Canada and not property rights to be treated as assets by the airlines. Resurgence argues that the Monitor's conclusion was wrong because there was evidence that the international routes had value. In December 1999, CAIL sold its Toronto - Tokyo route to Air Canada for $25 million. Resurgence also pointed to statements made by Canadian's former president and CEO in mid-1999 that the value of its international routes was $2 billion. It further noted that in the United States, where the government similarly grants licences to airlines for international routes, many are bought and sold.

53 The learned chambers judge found the evidence indicated that the $25 million paid for the Toronto-Tokyo route was not an amount derived from a valuation but was the amount CAIL needed for its cash flow requirements at the time of the transaction in order to survive. She found that the statements that CAIL's international routes were worth $2 billion reflected the amount CAIL needed to sustain liquidity without its international routes and was not the market value of what could realistically be obtained from an arm's length purchaser. She found there was no evidence of the existence of an arm's length purchaser. As the respondents pointed out, the Canadian market cannot be compared to the United States. Here in Canada, there is no other airline which would purchase international routes, except Air Canada. Air Canada argued that it is pure speculation to suggest it would have paid for the routes when it could have obtained the routes in any event if Canadian went into liquidation.

54 Even accepting Resurgence's argument that those assets should have been given some value, the applicant has not established a prima facie meritorious argument that the learned chambers judge was unreasonable to have accepted the valuations based on a liquidation analysis rather than a market value or going concern analysis nor that she lacked any evidence upon which to base her conclusions. She found that the evidence was overwhelming that all other options had been exhausted and have resulted in failure. As described above, she had evidence upon which to accept the Monitor's valuations of the disputed assets. It is not the role of this Court to review the evidence and substitute its opinion for that of the learned chambers judge. She properly exercised her discretion and she had evidence upon which to support her conclusions. The applicant, therefore, has not established that its appeal is prima facie meritorious.

55 On the first issue, Resurgence argues that it should be an unaffected creditor to pursue its oppression remedy. As discussed above, the oppression remedy cannot be considered outside the context of the CCAA proceedings. The learned chambers judge concluded that the complaints of Resurgence were the result of the insolvency of Canadian and not from any oppressive conduct. The applicant has not established any prima facie error committed by the learned chambers judge in reaching that conclusion.

56 Thus, were this appeal not moot, leave would not be granted as the applicant has not met the threshold for leave to appeal.

CONCLUSION

57 The application for leave to appeal is dismissed because it is moot, and in any event, no serious and arguable grounds have been established upon which to found the basis for granting leave.

WITTMANN J.A.

cp/i/qljpn/qlcal

Indexed as:

Algoma Steel Corp. v. Royal Bank of Canada

Algoma Steel Corp. v. Royal Bank of Canada and Montreal Trust Co. as trustee of debentures issued by Algoma Steel Corp. under a trust indenture, and Royal Bank of Canada, Canadian Imperial Bank of Commerce, Hongkong Bank of Canada and the Toronto-Dominion Bank in their capacity as holders of debentures issued pursuant to the trust indenture

[1992] O.J. No. 889

8 O.R. (3d) 449

93 D.L.R. (4th) 98

55 O.A.C. 303

11 C.B.R. (3d) 11

34 A.C.W.S. (3d) 1109

Action No. C11707

Court of Appeal for Ontario,

Krever, McKinlay and Labrosse JJ.A.

April 30, 1992

Counsel:

D.J.T. Mungovan and Debbie A. Campbell, for Kelsey-Hayes Canada Ltd. and Kelsey-Hayes Co.

M.E. Royce and M.E. Barrack, for Algoma Steel Corp.

W.L.N. Somerville, Q.C., and B.H. Bresner, for Royal Insurance Co. of Canada.

R.N. Robertson, Q.C., and W. Alfred Apps, for Dofasco Inc.

1 THE COURT:-- This is a motion for leave to appeal and, if leave is granted, an appeal, under the provisions of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (CCAA), from the order of Farley J. dismissing a motion for the valuation of the claim of Kelsey-Hayes Canada Limited (Kelsey-Hayes) and for leave to bring proceedings against the Algoma Steel Corporation Limited (Algoma), the subject of a plan of arrangement under the CCAA.

2 Kelsey-Hayes is involved in product liability litigation in Missouri as a result of serious personal injuries suffered by a child when a wheel broke away from a Dodge truck and struck him. The wheel was manufactured by Kelsey-Hayes against whom a Missouri jury awarded a verdict in excess of four million dollars (U.S.). That verdict was set aside by the trial judge on the basis that Chrysler Corporation, the truck's manufacturer, had been improperly dismissed from the action at an earlier stage. The setting aside of the verdict was appealed to the Missouri Court of Appeals, but judgment on the appeal has been reserved. Kelsey-Hayes, the defendant in the Missouri litigation, alleges that the steel used for the manufacture of the errant wheel was a defective product of Algoma and seeks to claim contribution or indemnity from Algoma in order to be able to pursue, under s. 132 of the Insurance Act, R.S.O. 1990, c. I.8, the proceeds of a product liability insurance policy by which Algoma is insured by the Royal Insurance Company of Canada (Royal). It also seeks relief under the plan of arrangement in respect of the amount of any liability Algoma may have to it in excess of the policy limits.

3 In the CCAA proceedings an order was made by Montgomery J. in the terms of s. 11(c) of the CCAA that no action or other proceeding may be proceeded with or commenced against Algoma except with the leave of the court. It is common ground that Kelsey-Hayes, by reason of its claim against Algoma, is a known designated unsecured creditor of Algoma, as defined in the plan of arrangement. The plan of arrangement, which has been voted on by all classes of affected creditors, and sanctioned, subject to the outcome of this appeal, by an order of Farley J. dated April 26, 1992, provides that upon payment by Algoma to a trustee of a certain sum in payment of the claims of the specified unsecured creditors, "all Claims of Specified Unsecured Creditors will be released, discharged and cancelled".

4 After Kelsey-Hayes notified Algoma of the litigation in Missouri, of its allegation of defective steel against Algoma, and of its claim in the amount of the Missouri verdict, Algoma responded by valuing the claim at the sum of one dollar. Kelsey-Hayes thereupon applied to the court, under the provisions of s. 12(2)(iii) of the CCAA , for the determination of the amount of its claim. Before the application was heard, Kelsey-Hayes enlarged the relief sought to include that described above and Royal was brought into the proceedings. Mr. Justice Farley held that he had no authority to permit Kelsey-Hayes to proceed against Algoma and went on to confirm the valuation of the claim at one dollar. The essential issue in this appeal is whether, under the CCAA, the fact that the plan of

arrangement now exists prevents the court from permitting Algoma from being proceeded against by Kelsey-Hayes even to the limited extent of the insurance proceeds.

5 We are of the view that, however weak the evidence available on the application may have been with respect to the origin of the steel used in the manufacture of the wheel, and thus the case against Algoma, it cannot be said that the case is without any foundation or is frivolous. The fact that s. 12(2)(iii) provides that the amount of a creditor's claim, if not admitted by the company, "shall be determined by the court on summary application by the company or by the creditor", does not compel the court to determine the valuation summarily. The provision simply authorizes the proceedings to be brought summarily, that is, by way of originating notice of motion or application rather than by the lengthier, and more complicated, procedure of an action. In an appropriate case, therefore, there is no reason why the determination cannot be made after a trial either of an issue or an action, in the course of which production and discovery would be available. In the absence of such a trial, it cannot be said, in our view, that the valuation of the claim of Kelsey-Hayes against Algoma in the sum of one dollar is correct.

6 The more difficult question is whether the court has jurisdiction to authorize proceedings now that the plan of arrangement is in place. It is submitted that it does not because of the need for commercial certainty and because to do so would be to amend the plan of arrangement (which extinguishes the claims of all designated unsecured creditors of which Kelsey-Hayes is certainly one). The plan of arrangement is a matter of contract, it is argued, and the court's jurisdiction is limited to sanctioning or refusing to sanction the arrangement arrived at contractually. There is much merit in this argument but, in our view, it is not a complete answer.

7 Kelsey-Hayes does not deny that if the language of the plan of arrangement quoted above, extinguishing the claims of designated unsecured creditors, is unambiguous, as we believe it is, to grant the relief which it seeks would require an amendment by the court of the plan of arrangement. We accept the submission that, generally speaking, the plan of arrangement is consensual and the result of agreement and that if it is fair and reasonable (an issue for the court to decide) it is not to be interfered with by the court unless (a) the Act authorizes the court to affect the plan and (b) there are compelling reasons justifying the court's action. Generally speaking again, the court ought not to interfere where to do so would prejudice the interests of the company or the creditors. But where no prejudice would result and the needs of justice are to be met, the court may act if the CCAA, properly interpreted, authorizes intervention. In this connection, it may be relevant that, although it is hardly conclusive, Algoma's management information circular to creditors, shareholders and employees, which accompanied the proposed plan of arrangement, advised those persons, under the heading "Court Approval of the Plan" as follows:

> The authority of the Court is very broad under both the CCAA and the OBCA -- Algoma has been advised by counsel that the Court will consider, among other things, the fairness and reasonableness of the Plan. The Court may approve the Plan as proposed or as amended in any manner that the Court may direct and

> subject to compliance with such terms and conditions, if any, as the Court thinks fit.

(Emphasis added)

We agree that the circular's statement that the court may direct an amendment of the plan does not, as a matter of law, make it so. The CCAA must be the authority for the jurisdiction and the critical issue is whether there is any provision in the Act that fairly gives rise to a power in the court to amend. In our view there is such a provision and that provision, s. 11(c), depending on the language of the plan itself, may by necessary inference, in an appropriate case, enable the court to make an order, the technical effect of which is that the plan is amended. The relevant portion of the section reads as follows:

> . . . whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> . . . . .
>
> (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

(Emphasis added)

8 As we have already pointed out, an order in the terms of this provision was made early in the proceedings by Montgomery J. The effect of the enactment and the order is to empower the court to grant leave to take proceedings against Algoma in appropriate circumstances. It was submitted that this power, having regard to the commercial realities reflected by the CCAA, is one that may be exercised only before the creditors have voted to accept the plan of arrangement. No authority could be cited to support such a circumscription of the court's jurisdiction, unqualifiedly conferred by the statute. Nor, as a matter of principle, is there any reason to suggest that the scheme created by the CCAA contemplates a role for the court as a mere rubber stamp or one that is simply administrative rather than judicial. On the other hand, we have no doubt that, given the primacy accorded by the Act to agreement among the affected actors, the jurisdiction of the court is to be exercised sparingly and in exceptional circumstances only, if the result of the exercise is to amend the plan, even in merely a technical way. In this case, for example, it would be an unacceptable exercise of jurisdiction if the effect of granting leave to Kelsey-Hayes to proceed against Algoma would be to render vulnerable to possible execution any assets other than insurance proceeds, if any, that may be available under the policy by which Royal insured Algoma against product liability. If the leave granted could be so limited, and that is the difficulty that must be addressed, the plan of arrangement which, in its terms, extinguishes the claims of designated unsecured creditors, would undergo amendment in an insignificant and technical way only, as far as the other creditors are

concerned.

9 The concern of prejudice must now be considered and the question asked whether any interests would be affected detrimentally if Kelsey-Hayes were permitted to claim against Algoma to the extent only of recourse to the insurance proceeds. If to give leave had the effect of giving potential access to assets over and above the policy limits, there would indeed be prejudice to several interests and, moreover, the plan of arrangement would be significantly amended. On the premise that only the insurance proceeds were to be made potentially available to satisfy any judgment that Kelsey-Hayes may be awarded in its claim over against Algoma, it cannot be said that any interest is affected adversely except possibly that of Royal and that of Dofasco Inc. (Dofasco). It is to that issue that we now turn.

10 The potential liability of Royal to Kelsey-Hayes as insurer of Algoma arises out of the provisions of s. 132(1) of the Insurance Act, which read as follows:

> 132.(1) Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against the person in respect of the person's liability, and an execution against the person in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

Royal is potentially answerable to Kelsey-Hayes, a third party with respect to Algoma's policy of insurance only by virtue of this statutory provision but, in any third-party claim against it, its liability is "subject to the same equities as the insurer would have if the judgment had been satisfied". Prejudice, in a legal sense, as far as Royal is concerned is non-existent.

11 The question of prejudice to Dofasco is more difficult. Its interest arises in this way. As part of the comprehensive restructuring scheme of which the plan of arrangement is the central part, Algoma's assets are to be transferred to a new corporate entity, referred to in argument as New Algoma, in which Algoma's shareholders and creditors (whose claims are being compromised and otherwise discharged) are to receive shares. The funds to make this possible are to be supplied by Dofasco in the sum of 30 million dollars. In return, Dofasco is to obtain Algoma's tax loss in the sum of $150 million. The result of these transactions as contemplated by the comprehensive scheme is that Algoma is to become devoid of assets and creditors, in short, that Algoma is to be made a "clean corporation", or a mere shell with a tax loss carry-forward. Dofasco filed no material and, on the appeal filed no factum, showing any prejudice which it might suffer if leave to proceed is granted. Instead, in oral argument, it submitted that any such order would impair the integrity of the plan of arrangement and reduce the certainty that was necessary for the plan's success. In our view, no impairment will occur if an order is made subject to sufficient safeguards to limit any possible recovery to the insurance proceeds. We think a safeguard can be provided. The difficulty is in the

language of s. 132 of the Insurance Act which requires, as a condition precedent to a direct action against the insurer, that an execution against the insured be returned unsatisfied.

12 This very requirement makes the purpose of the section clear. It is to provide direct access to an insurer, by a person incurring the liability referred to in the section, in a situation where the insured is judgment-proof, thus circumventing the normal operation of insurance contracts, which is solely to indemnify the insured against loss. To interpret the section in such a way as to apply only in the narrow situation where the insured is judgment-proof (and therefore almost certainly insolvent), but not in situations where either the insured or its creditors have taken proceedings pursuant to federal insolvency statutes, would be to frustrate its objectives in a large percentage of situations where it would otherwise apply.

13 If the plaintiff in this case were successful in the Missouri action against Kelsey-Hayes and Kelsey-Hayes were successful in a permitted claim over for indemnity or contribution from Algoma, there could be no question that, notionally, the condition precedent of an unsatisfied judgment would be met because, prior to the plan Algoma was insolvent and the commencement of proceedings under the CCAA rendered it judgment-proof. To secure the certainty of the integrity of the plan, which Dofasco argues it needs in order to discharge its role in the scheme, we make clear our intention that only any insurance proceeds that may become available to Algoma are to be the subject of any recovery against Algoma that Kelsey-Hayes may prove that it is entitled to. That is to be accomplished by providing in our order that neither the assets of Algoma (other than the insurance proceeds) nor the assets of any other corporation which may become responsible in any way for any liabilities of Algoma by virtue of the operation of the plan of arrangement or the more comprehensive scheme of restructuring, or any condition precedent thereto, shall be available to satisfy any judgment obtained as a result of any proceedings by Kelsey-Hayes against Algoma.

14 The justice of permitting an amendment to the plan as inconsequential as the one we permit in these exceptional circumstances is illustrated by the hypothetical case put in argument. Suppose a visitor had become quadriplegic as a result of an injury on the premises of Algoma under circumstances in which Algoma as occupier might be liable and suppose Algoma's potential liability was insured against by an appropriate insurance policy. To restrict the injured person, a known designated unsecured creditor under the terms of the plan of arrangement, to his or her compromised claim valued, without a trial, in a summary proceeding, would, in our view, be unacceptable. The actual situation before the court is analogous.

15 For these reasons, we grant leave to appeal, allow the appeal, set aside the order of Farley J. dated April 9, 1992, and grant leave to Kelsey-Hayes to proceed as it may be advised in the terms set out above.

Order accordingly.

Case Name:

Pine Valley Mining Corp. (Re)

Between
IN THE MATTER OF The Companies' Creditors Arrangement Act R.S.C. 1985, c. c-36 as amended
AND IN THE MATTER OF The Business Corporation Act, S.B.C. 2002 c. 57, as amended
AND IN THE MATTER OF Pine Valley Mining Corporation, Falls Mountain Coal Inc., Pine Valley Coal Inc., and Globaltex Gold Mining Corporation, Petitioners

[2007] B.C.J. No. 1395

2007 BCSC 926

35 C.B.R. (5th) 279

159 A.C.W.S. (3d) 213

74 B.C.L.R. (4th) 317

[2008] 6 W.W.R. 771

2007 CarswellBC 1477

Vancouver Registry No. S-066791

British Columbia Supreme Court
Vancouver, British Columbia

Garson J.

Heard: June 22, 2007.
Oral judgment: June 22, 2007.
Released: June 26, 2007.

(61 paras.)

Insolvency law -- Proposals -- Court approval -- The court approved the plan of arrangement and compromise for the mining company under the Companies' Creditors Arrangement Act -- The plan was a compromise where time was of the essence, and the creditors' approval of the plan ought not to be overridden in favour of the creditor CN's application when the court had not been satisfied that there was merit to the challenge to the secured creditor's loan.

The petitioners, who operated a mine in northern British Columbia, and who obtained protection from their creditors under the Companies' Creditors Arrangement Act, applied for a sanction order approving its plan of arrangement and compromise (which had been approved by 98 per cent of its creditors) -- Meanwhile, three creditors sought an order appointing a monitor to make enquiries into the claim made by the only secured creditor The Rockside Foundation, arguing that the $12 million secured loan was ultra vires Rockside, and that it should be treated as a general creditor or not be repaid at all -- HELD: The plan was approved, and the creditors' application was dismissed -- The suggested amendment to the plan, so as to hold Rockside's funds in trust, was a significant matter and not one that the court ought to make on its own -- The facts on which the petitioning creditor CN challenged the legality of the loan did not amount to the type of fraudulent conduct on which the application of the doctrine of equitable subordination seemed to be based -- No authority suggested that a loan from a charitable organization to benefit a company, controlled by shareholders who were related to the charity, was illegal -- CN had not discharged its burden to raise a triable issue -- The plan was a compromise where time was of the essence, and the creditors' approval of the plan ought not to be overridden in favour of CN's application when the court had not been satisfied that there was merit to the challenge to the Rockside loan.

Statutes, Regulations and Rules Cited:

Business Corporation Act, S.B.C. 2002, c. 57

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

Counsel:

Counsel for Petitioners, Pine Valley Mining Corporation, Falls Mountain Coal Inc., Pine Valley Coal Inc., and Globaltex Gold Mining Corporation: E.J. Milton.

Independent counsel for Pine Valley Mining Corporation: J. Sandrelli.

Counsel for Cambrian Mining PLC and Western Canadian Coal: H. Ferris.

Counsel for Canada Revenue Agency: D. Nygard.

Counsel for the Monitor, Ernst & Young Inc.: D.E. Gruber.

Counsel for Petro-Canada: D. Garner.

Counsel for Neptune Bulk Terminals (Canada) Ltd.: J.G. Shatford.

Counsel for Canadian National Railway Company: R. Watson.

Counsel for Rockside Foundation: P.J. Reardon.

Counsel for Maruben Corporation: S. Fitzpatrick.

Counsel for Tercan Mining PV Ltd.: B. McLean.

Counsel for Sedgman Canada: S.R. Ross.

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1 **GARSON J.** (orally):-- The two applications before me concern the ***Companies' Creditors Arrangement Act***, R.S., 1985, c. C-36 ("***CCAA***") proceedings of the petitioners who operate the Willow Creek Mine in north eastern British Columbia. The mine has been in commercial production since July, 2004. On October 20, 2006, the petitioners filed for, and obtained, protection from their creditors under the ***CCAA*** pursuant to an order of this Court.

2 The first application before me is the petitioners' application for a sanction order approving its Plan of Arrangement and Compromise (the "Plan"), dated June 19, 2007, pursuant to s. 6 of the ***CCAA***. The Plan has been approved by about 98% of the number of creditors, having about 97% of the total value of the claims, at the meeting of creditors held on June 19, 2007.

3 The second application before me is the application of CN Rail ("CN"), a creditor, with the support of two other creditors, Neptune Bulk Terminals (Canada) Ltd. ("Neptune") and Petro-Canada, for an order that I approve the Plan, but also order the court appointed monitor to make enquiries into the claim made by the petitioners' only secured creditor, The Rockside Foundation ("Rockside"). CN says, *inter alia*, that the $12 million secured loan is *ultra vires* Rockside, and Rockside should be treated as a general creditor, or should possibly not be repaid at all. CN says that the order it seeks is not an amendment to the Plan already approved by the creditors, and that such an enquiry into the claim of a creditor is contemplated by provisions of the plan, to which I shall refer below.

4 Rockside says that the Plan expressly contemplates payment to it of its entire claim upon the closing of the sale made between Pine Valley Mining Corporation and Cambrian Mining PLC ("Cambrian"), which sale is to close on June 26, 2007. Rockside says that I cannot amend the Plan in such a substantial way. Rockside also says that there is no merit to, or no arguable case for, the

challenge made by CN to the validity of the Rockside loan.

5 The petitioners support Rockside and, in particular, take the position that to make the order CN requests is an amendment to the Plan of such significance that I could not grant the sanction order, as requested, with the amendment. The petitioners say that if the Plan is not approved today, the sale to Cambrian will be in jeopardy.

6 Cambrian is entitled to a break fee if the sale does not complete on June 26, 2007 - and I assume it will not complete on that date if I do not approve the Plan - and Cambrian will likely be entitled, at its option, to resile from the agreement and take the break fee. Cambrian could agree to extend the closing date of the agreement, but the nature of the enquiry and examination into the Rockside loan requested by CN is a searching one that will not be accomplished in a short time period. If the Plan is not approved now, a new meeting of creditors may be required and Cambrian may choose not to extend the closing date

7 I note that although the petitioners seek an order sanctioning the Plan, the definitive plan settling each creditor's claim will not be determined at this time. All that is contemplated by the Plan is replacement of the claim against Falls Mountain Coal Inc., with part of the sale proceeds from the sale to Cambrian.

8 The issues raised by these applications are the following:

1. Would the granting of the order sought by CN be one that could be made within the Plan already approved by the creditors, or would the order necessarily involve a rejection of the Plan by this court?

2

Is there a triable issue raised by the submissions of CN as to the validity of Rockside's security for its loan of Cdn. $12 million? I have decided that the burden of proof on CN is to raise a triable issue.

3. Should this court sanction or approve the Plan, even if CN has raised a triable issue about the validity of the Rockside security?

9 I should mention that there is no objection by any creditor to the Plan, on any ground, other than on the basis of the allegations made by CN.

10 The test that this Court ought to apply in making a sanction order under s. 6 is described by Paperny J. (as she then was) in ***Canadian Airlines Corp. (Re)***, 2000 ABQB 442, 265 A.R. 201 at [paragraph] 60:

> Prior to sanctioning a plan under the *CCAA*, the court must be satisfied in regard

to each of the following criteria:

(1) there must be compliance with all statutory requirements;
(2) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the *CCAA*; and

(3) the plan must be fair and reasonable.

11 As noted by Paperny J., the function of this Court is not to be considered as "a rubber stamp". In this case, apart from the question of Rockside's security for its loan, which I will discuss in a moment, I am satisfied that all three criteria set out in the ***Canadian Airlines*** decision are met by the terms of the Plan.

Would the granting of the order sought by CN be one that could be made within the Plan, already approved by the creditors, or would the order sought necessarily involve a rejection of the Plan by this court?

12 Mr. Shatford, counsel for Neptune, contends that the effect of the order sought by CN does not mean that the Plan needs to be amended or rejected. He says that section 5.2 of the Plan provides as follows:

Under the Plan, the Creditors will be dealt with as follows:

(a) Secured Creditors: each Secured Creditor will be paid in full in accordance with its Proven Claim.

13 In other words, he contends that Rockside should be treated like every other creditor whose claims are not accepted by the monitor, in which case they will be required to prove them. I agree there is nothing objectionable about such a procedure, except that there are other provisions of the Plan already agreed to by all the creditors, including Rockside, that mandate immediate payment to Rockside. Here I refer to Articles 2.2, 3.1, 3.1(a), and 4.1, 5.2(a).

14 The Plan requires payment of the Secured Creditor immediately following closing. Article 2.2 (Summary of Plan) states that the proceeds will be used to pay, among others, the Secured Creditors, with the balance after those payments being held for General Creditors.

15 The scheme of the Plan is to pay out the secured creditor and other amounts mentioned in Article 2.2, and then to create a fund that is used to settle the Replacement Claims of the General Creditors. It is known that some of those claims, particularly the inter-corporate debt claim of Pine Valley Mining Corporation, are not yet settled and that there is a mechanism in place to settle those

claims. That mechanism does not include, according to Article 2.2, the secured claim.

16 Article 3.1 requires that the "Initial Net Sales Proceeds" will be received from Cambrian, and the "Definitive Plan Proceeds" will be remitted to Pine Valley Mining Corporation to be dealt with in accordance with the ***CCAA*** and the Definitive Plan. The "Definitive Plan Proceeds" is defined in the Amended Plan to be the balance remaining after payment of the amounts required under Article 2.2, including the amounts to Secured Creditors.

17 There appears to be no provision of the Plan to deal with Secured Creditors after the closing of the sale to Cambrian.

18 I conclude that the Plan expressly contemplates payment of Rockside's claim immediately upon the closing of the sale to Cambrian. CN requests an amount, equivalent to Rockside's claim, be held in trust and not paid out to Rockside pending resolution of the validity of its claim. In other words, that Rockside should be treated in the same manner as the general creditors whose claims are not accepted by the monitor. I do not agree with CN that the monitor could ignore the express provision in the Plan, calling for immediate payment out of Rockside's claim in reliance on Article 5.2. Accordingly, for the monitor to hold Rockside's loan proceeds in trust, would require an amendment to the Plan that is substantive. I say this because, although holding Rockside's funds in trust may be a matter of indifference to most of the creditors, to Rockside it would be significant and may well lead Rockside to vote against the Plan. As noted by Rockside, a negative vote by it could defeat the Plan. I conclude, therefore, that the suggested amendment to the Plan, so as to hold Rockside's funds in trust, is a significant matter and not one that this Court should make on its own.

19 Authority for the proposition that this Court ought not to make significant amendment to Plans of Arrangement that are already approved by creditors, is found in ***Algoma Steel Corp. v. Royal Bank of Canada*** (1992), 11 C.B.R. (3d) 11, 8.O.R. (3d) 449 at [paragraph] 8 (C.A.); ***Keddy Motor Inns Ltd. (Re)*** (1992), 13 C.B.R. (3d) 245, 90 D.L.R. (4th) 175 at [paragraph] 48 (N.S.S.C. App. Div.); ***Wandlyn Inns Ltd. (Re)*** (1992), 15 C.B.R. (3d) 316 at [paragraph] 12 (N.B.Q.B.).

20 I conclude that for CN's application to succeed, I must also decide that the Plan cannot be sanctioned.

Is there a triable issue raised by the submissions of CN as to the validity of Rockside's security for its loan of Cdn $12 million?

21 The challenge to the validity of the loan to Rockside is based on the following allegations of fact. It is unnecessary on this application for me to make any findings of fact, and I do not do so.

22 Pine Valley Mining Corporation is a public company.

23 Falls Mountain Coal Inc. is a subsidiary of Pine Valley Mining Corporation.

24 Rockside is a charitable corporation under the non-profit corporation law of Ohio, c. 1702 of the ***Ohio Revised Code***. Mark T. Smith is the donor member of Rockside. Counsel for CN conducted a number of searches of publicly available information, from which it appears that Rockside has about U.S. $77 million of assets. Its only loan is the loan in issue in this proceeding.

25 The Articles of Incorporation of Rockside provide that it is incorporated for charitable, educational and religious purposes in support of the Woodlawn foundation, with the right and power to use, apply, invest and reinvest principal and/or income from bequests. No part of the net earnings of Rockside will be used for the benefit of, or distributed to members, trustees, etc. It is intended that Rockside will be exempt from tax.

26 The R. Templeton Smith Foundation ("Templeton") is a related party to the Rockside Foundation and Mark T. Smith.

27 Mark T. Smith is a director of Pine Valley Mining Corporation.

28 Mark T. Smith, Rockside and Templeton, together, are controlling shareholders of Pine Valley Mining Corporation.

29 Pine Valley Mining Corporation's 2004 audited financial statements state that the ability of the company to continue is dependent on its ability to raise additional financing. Mr. Watson, counsel for CN, says Pine Valley Mining Corporation was then technically insolvent.

30 On November 10, 2004, Pine Valley Mining Corporation announced that it had agreed with Rockside to borrow up to US $7,000,000, with interest at 10%, and a bonus of shares equalling 10% of the principal amount of the loan advanced. The loan was to be secured over all of the assets and undertaking of Pine Valley Mining Corporation and its subsidiaries, Falls Mountain and Pine Valley Coal, ranking in priority behind security granted to Mitsui and Marubeni that has since been repaid. The funds were advanced, according to Rockside, in the principal amount of US$8.85 million. With interest, the amount owing now is in excess of Cdn. $12 million.

31 According to the monitor in this proceeding, the company, Pine Valley Mining Corporation, began to operate the coal mine in 2004 and continued to do so until this proceeding was commenced in October, 2006. Subsequent to the Rockside loan advance, Pine Valley Mining Corporation also arranged a secured working capital loan of up to $20 million from the Royal Bank that has since been repaid.

32 As a director of Pine Valley Mining Corporation, Mark T. Smith abstained from voting in respect to the Rockside loan, and an independent committee of the board of Pine Valley Mining Corporation, with a legal opinion, approved the loan.

33 It is alleged by CN that the loan was *ultra vires* and contrary to the powers of Rockside, and was made for the purpose of protecting its own and Mark T. Smith's personal investment in Pine

Valley Mining Corporation. Mr. Watson says that if the impugned loan had not been made, the creditors might not have advanced credit to an otherwise insolvent entity, and the "propping up" of Pine Valley Mining Corporation by Rockside may have prejudiced the creditors. He says that there is no charitable purpose to Rockside granting a loan to Pine Valley Mining Corporation, and that the loan inured to the benefit of Mark T. Smith personally.

34 What Mr. Watson says, in essence, is that the loan had a colourable purpose, that is, that Mr. Smith used his position as a trustee of his own charitable foundation to stabilize a company in which he had a sizeable personal investment. Mr. Watson says that the monitor has obtained a legal opinion that the security is in order, but that the legal opinion was based on the assumption that the lender had the power and capacity to make the loan. Mr. Watson says that Rockside did not have the power or capacity to make the loan and, therefore, its security is invalid.

35 I conclude that, for the purposes of this analysis, my task is to determine if there is a triable issue raised by CN's submissions. The burden of proof is on CN. In doing so, I will assume that the facts alleged by Mr. Watson are true because there is some evidentiary foundation to the factual allegations. In other words, the facts are not speculative and there is a possibility that all these facts may be proven to be true. Most, if not all, these facts are not disputed by Rockside.

36 On the other hand, Mr. Watson also challenges Rockside's claim on the grounds that, according to Mr. Watson,

it is not clear whether or not the advances were in fact made. This last assertion, seems to me, to be a somewhat inconsistent position with CN's assertion that Mr. Smith made the loan to prop up the company to protect his equity position. I consider that there is no factual foundation to such an assertion. I am advised by counsel that the monitor says he has satisfied himself the loan proceeds were received, and that the audited financial statements of Pine Valley Mining Corporation are good evidence that the loan proceeds were received by Pine Valley Mining Corporation.

37 Mr. Watson argues that there are three legal grounds that would invalidate at least the security, if not the right to repayment, of the loan itself.

38 CN alleges that, as a result of the relationship of Smith with Rockside, Templeton, and Pine Valley Mining Corporation, all of those entities are acting as partners. Section 2 of the ***Partnership Act***, R.S.B.C. 1996, c. 348, defines partnership as "the relation which subsists between persons carrying on business in common with a view of profits". He says that if they are partners, then s. 47(b)(i) of the ***Partnership Act*** requires that the debts and liabilities of persons who are not partners must be paid before any debts or liabilities owed to partners. According to CN, this would mean that the claims of Rockside would be postponed until the creditors of Pine Valley Mining Corporation were satisfied.

39 Mr. Watson says that the "view of profit" part of the definition of partner is satisfied by the fact that Smith, Rockside, and Templeton are all shareholders in Pine Valley Mining Corporation.

Section 3 of the ***Partnership Act*** specifically provides that members of a company are not partners within the meaning of that ***Act***. The rule in ***Salamon v. A. Salamon and Company, Ltd.***, [1897] A.C. 22, holds that shareholders and directors of a company, and the company itself, are separate entities. I conclude that this argument advanced by CN is unlikely to succeed if there were a trial of this issue and CN has not raised a triable issue on this point.

40 CN also argues that the doctrine of equitable subordination should be applied against the claims of Rockside.

41 There are three criteria for the application of what is an American doctrine called "equitable subordination". Those criteria are outlined in ***Canada Deposit Insurance Corp. v. Canadian Commercial Bank***, [1992] 3 S.C.R. 558, 16 C.B.R. (3d) 154 at [paragraph] 91:

> (i) the claimant must have engaged in some type of inequitable conduct;
> (ii) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and
> (iii) the equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Statute.

42 Although the doctrine has been described in some Canadian jurisprudence, no case authority was brought to my attention in which it has been applied. In any event, the facts on which CN challenges the legality of the loan do not amount to the type of fraudulent conduct on which the application of the doctrine seems to be based. (***CC Petroleum Ltd. v. Allen*** (2003), 46 C.B.R. (4th) 221 (Ont. C.A.) reversing 35 C.B.R. (4th) 22).

43 Moreover, it is doubtful in my view if the second criteria of the test could be met in this case. CN alleges that it would have recovered more of its debt owed by Pine Valley Mining Corporation if the Rockside loan had never been granted. I agree with Rockside's submission that CN could not prove that the creditors would have recovered more if the Rockside loan had never been granted. Such an argument is quite speculative and the proof of such a proposition would require an enormously complicated and lengthy trial. I conclude that the equitable subordination doctrine, as a ground to challenge the loan, is unlikely to succeed if there is a trial of this issue and that CN has not raised a triable issue on this point.

44 I now turn to consider the main argument advanced by CN, namely, that the loan is *ultra vires* Rockside and, therefore, its security is invalid.

45 CN cited several American authorities in support of its argument that the Rockside loan is *ultra vires* Rockside. Those American authorities, ***Airlie Foundation v. USA***, 826 F. Supp. 537 (D.D.C. 1993); ***Western Catholic Church v.***Commissioner, 73 T.C. 196 (1979); ***International Postgraduate Medical Foundation v. CIR***, T.C. Memo. 1989 - 36; and ***Orange County Agricultural Society v. CIR***, (893) F. 2d 529 (2d Cir. 1990), are all cases in which the not-for-profit society challenged rulings of the taxing authority revoking its tax exempt status. The cases all hold

that when a for-profit organization or an individual benefits substantially from the activities of a not-for-profit organization, then the not-for-profit cannot be said to operate exclusively for exempt purposes.

46 All these cases are apparently obvious examples of a dubious charity with close links to the donor who profited from the charity. I do not find them helpful to determine if there is an arguable case that, under American law, Rockside lacked the capacity to make the loan because of its' and Mark T. Smith's shareholdings in Rockside and, if that is so, is the security invalid.

47 CN correctly notes that, although the *ultra vires* doctrine was abolished by Canadian corporate statutes, the doctrine still exists pursuant to the ***Society Act***, R.S.B.C. 1996, c. 433, in British Columbia. CN says that the ***Ohio Revised Code*** applicable to Ohio Non-Profit Corporations does not abolish the *ultra vires* doctrine. I was not provided with this authority, but for the purposes of this application I shall accept Mr. Watson's assertion as correct. It was not challenged by any other party at this hearing.

48 The third article of incorporation of Rockside provides, in part, as follows:

> The Corporation is organized and shall be operated exclusively for charitable, educational or religious purposes by conducting or supporting activities exclusively for the benefit of ...
>
> Solely for the above purposes, the Corporation is empowered to exercise all rights and powers conferred by the laws of the State of Ohio upon non-profit corporations, including, but without limitation thereon, the right and power to receive gifts ... and to use, apply, invest and reinvest the principal and/or income therefrom or to distribute the same for the above purposes.

49 Is there an arguable case that Rockside's loan to Pine Valley Mining Corporation is outside its corporate powers or purposes? The loan is an investment. There is no evidence to suggest that Rockside used its profits or earnings for a non-charitable purpose. Clearly, Rockside is entitled to invest and reinvest its assets. Is this investment illegal because Rockside and Mark T. Smith are shareholders of Pine Valley Mining Corporation? Rockside says that the only benefit prohibited by the Articles of the Foundation is that net earnings may not be used for the benefit of members, trustees, officers or private individuals.

50 I was not provided with any authority, American or Canadian, that suggests Rockside is precluded from investing in enterprises in which a member, trustee officer or private individual has a share interest. Rockside and Mark T. Smith were, at the time the loan was made, shareholders of Pine Valley Mining Corporation. Rockside apparently chose to lend Pine Valley Mining Corporation funds to enable it to develop or operate the coal mine. In doing so, I would infer that Rockside wished to stabilize or secure its equity investment in Rockside. Not-for-profit societies

are, subject to their Articles and governing legislation, entitled to invest their assets. Those investment activities are separate from the charitable use to which the society puts its earnings.

51 Rockside also says that section 5.01(c)(3) of the Internal Revenue Code describes organizations that are exempt from taxation under that section. The wording in section 5.01(c)(3) is much the same as the wording in the Articles of Rockside. It prohibits the use of any part of the net earnings to benefit a private shareholder or individual. Rockside says there is no evidence that any such benefit from the net earnings has been given to Mark T. Smith or Rockside.

52 I am being asked to decide if there is a triable issue of American law. No American legal opinion or authority, for the proposition advanced, has been provided to me. By that I mean, I have not been directed to any American authority that suggests a loan from a charitable organization to benefit a company, controlled by shareholders who are also related to the charity, is illegal. I have been provided with authority for the proposition that transactions outside the power and capacity of a society may be *ultra vires*.

53 But those authorities are not determinative of the issue concerning the investment activities of a society. The burden of proof on CN is to prove that there is a triable issue. It has not discharged its burden to raise a triable issue but, even if I am wrong about that, the application of CN must be examined within the larger context of the ***CCAA*** application to approve the Plan.

Should this court sanction or approve the Plan, even if CN has raised a triable issue about the validity of the Rockside security?

54 My jurisdiction to sanction the Plan under the ***CCAA*** is found in that ***Act*** and also in this Court's judicial discretion given by s. 6, to approve a plan which appears to be reasonable and fair, and to be in accord with the requirements and objects of the statute. (***Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*** (2003), 13 B.C.L.R. (4th) 236, 2003 BCCA 344).

55 Mr. McLean, for Tercon Mining, says that he listened carefully to the submissions of CN but cannot support CN's application. Tercon is the largest single creditor (the mining contractor) who is owed about $12 Million, apart that is, from the intercorporate claim of Pine Valley Mining Corporation. He says that his client does not want to bear the cost of the monitor pursuing such an investigation to its conclusion, which could be a trial of that issue. I infer from his submission that his client's interests are best served by the sanctioning of the Plan.

56 As already noted, Mr. Shatford, for Neptune, also contends that the loan is *ultra vires*. The support of Neptune for CN's application is also based on the proposition that the Plan should be approved without immediate payment to Rockside.

57 Mr. Gardner, for Petro-Canada, supports CN's application.

58 As I understand the submissions of CN, Neptune and Petro-Canada, they are all of the view

that I could order the investigation sought into the legality of the loan without amending the Plan. As I noted already, I do not agree that the monitor could withhold payment to Rockside without an amendment to the Plan. Counsel for the monitor, Mr. Gruber, says that CN should not have waited until the last minute before raising this objection. CN could have earlier applied to vary the claims procedure order, so that the issues it has now raised could have been dealt with in a timely way.

59 The creditors of the company, including Neptune and Petro-Canada, overwhelmingly supported the Plan of Arrangement. CN was the only dissenting vote. If I do not approve the Plan on account of CN's application, there is no way of knowing if Cambrian would agree to extend the purchase closing date. Commodity prices are volatile and, months down the road, Cambrian may withdraw from this transaction. In earlier proceedings, the efforts to sell the shares or assets of the mine were explained to me. I was then satisfied that the company and the monitor had pursued a sale (on terms that would be acceptable to the creditors) with vigour and diligence. I remain of that view and I remain of the view, as I assume do the creditors, that this is their best hope of recovery of at least part of their claims.

60 In a perfect world, the objection of CN could perhaps be pursued to its conclusion, but this Plan is a compromise and it is the best the company could do. Time is of the essence. Balancing the interests of all the stakeholders, I am of the view that the creditors approval of the Plan should not be overridden in favour of CN's application, in particular, when I have not been satisfied that there is merit to CN's challenge to the Rockside loan.

61 Applying the test earlier articulated from the ***Canadian Airlines*** case, I conclude all statutory requirements have been met. All that has been done is authorized by the ***CCAA*** and the Plan is fair and reasonable. The Plan is approved on the terms sought by the petitioners. CN's application is dismissed.

GARSON J.

cp/e/qlemo/qlmxt/qlbrl/qlrxg

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 SINO-FOREST CORPORATION

Court File No. M42068

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE CLASS ACTION PLAINTIFFS

(Motion For Leave to Appeal from CCAA Plan Sanction Order)

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