Court of Appeal File Number: M42399
Superior Court File No. CV-12-9667-00CL

# COURT OF APPEAL FOR ONTARIO

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 of Appeal File Number: M42399
Superior Court File No. CV-11-431153-00CP

# COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA and THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO

Plaintiffs

-and-

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUN MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD. and MAISON PLACEMENTS CANADA INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

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**RESPONDING BOOK OF AUTHORITIES OF SINO-FOREST CORPORATION**

**(Motion for Leave to Appeal the Ernst & Young LLP Settlement Order and Representation Dismissal Order)**

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Dated: May 17, 2013

**BENNETT JONES LLP**
3400 One First Canadian Place
P.O. Box 130
Toronto ON M5X 1A4

Robert W. Staley (LSUC #27115J)
Derek J. Bell (LSUC #43420J)
Jonathan Bell (LSUC #55457P)

Tel: 416-863-1200
Fax: 416-863-1716

Lawyers for Sino-Forest Corporation

TO: THE APPEALS SERVICE LIST

# Index

**INDEX**

# Tab 1

*Case Name:*

# Nortel Networks Corp. (Re)

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

**[2010] O.J. No. 1232**

**2010 ONSC 1708**

**63 C.B.R. (5th) 44**

**81 C.C.P.B. 56**

**2010 CarswellOnt 1754**

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

**G.B. Morawetz J.**

Heard: March 3-5, 2010.
Judgment: March 26, 2010.

(106 paras.)

*Bankruptcy and insolvency law -- Property of bankrupt -- Pensions and benefits -- Motion by the applicant Nortel corporations for approval of a settlement agreement dismissed -- The settlement agreement contained a clause that stating that no party was precluded from arguing the applicability of any amendment to the Bankruptcy and Insolvency Act that changed the priority of claims -- The clause was not fair and reasonable -- The clause resulted in an agreement that did not provide certainty and did not provide finality of a fundamental priority issue -- Companies' Creditors Arrangement Act, s. 5.1(2).*

*Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Sanction by court -- Motion by the applicant Nortel corporations for approval of a settlement agreement dismissed -- The settlement agreement contained a clause that stating that no party was precluded from arguing the applicability of any amendment to the Bankruptcy and Insolvency Act that changed the priority of claims -- The clause was not fair and reasonable -- The clause resulted in an agreement that did not provide certainty and did not provide finality of a fundamental priority issue -- Companies' Creditors Arrangement Act, s. 5.1(2).*

Motion by the applicant Nortel corporations for approval of a settlement agreement. The settlement agreement provided for the termination of pension payments and the termination of benefits paid through Nortel's Health and Welfare Trust (HWT). The applicants were granted a stay of proceedings on January 14, 2009, pursuant to the Companies' Creditors Arrangement Act, but had continued to provide the HWT benefits and had continued contributions and special payments to the pension plans. The opposing long-term disability employees opposed the settlement agreement, principally as a result of the inclusion of a release of Nortel and its successors, advisors, directors and officers, from all future claims regarding the pension plans and the HWT in the absence of fraud. The Official Committee of Unsecured Creditors of Nortel Networks Inc. ("UCC"), and the informal Nortel Noteholder Group (the "Noteholders") opposed Clause H.2 of the settlement agreement. Clause H.2 stated that no party was precluded from arguing the applicability of any amendment to the Bankruptcy and Insolvency Act that changed the priority of claims. The Monitor supported the Settlement Agreement, submitting that it was necessary to allow the Applicants to wind down operations and to develop a plan of arrangement. The CAW and Board of Directors of Nortel also supported the settlement agreement.

HELD: Motion dismissed. Cause H.2 was not fair and reasonable. Clause H.2 resulted in an agreement that did not provide certainty and did not provide finality of a fundamental priority issue. The third party releases were necessary and connected to a resolution of the claims against the applicants, benefited creditors generally and were not overly broad or offensive to public policy.

**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. 5.1(2)

**Counsel:**

Derrick Tay, Jennifer Stam and Suzanne Wood, for the Applicants.

Lyndon Barnes and Adam Hirsh, for the Nortel Directors.

Benjamin Zarnett, Gale Rubenstein, C. Armstrong and Melaney Wagner, for Ernst & Young Inc., Monitor.

Arthur O. Jacques, for the Nortel Canada Current Employees.

Deborah McPhail, for the Superintendent of Financial Services (non-PBGF).

Mark Zigler and Susan Philpott, for the Former and Long-Term Disability Employees.

Ken Rosenberg and M. Starnino, for the Superintendent of Financial Services in its capacity as Administrator of the Pension Benefit Guarantee Fund.

S. Richard Orzy and Richard B. Swan, for the Informal Nortel Noteholder Group.

Alex MacFarlane and Mark Dunsmuir, for the Unsecured Creditors' Committee of Nortel Networks Inc.

Leanne Williams, for Flextronics Inc.

Barry Wadsworth, for the CAW-Canada.

Pamela Huff, for the Northern Trust Company, Canada.

Joel P. Rochon and Sakie Tambakos, for the Opposing Former and Long-Term Disability Employees.

Robin B. Schwill, for the Nortel Networks UK Limited (In Administration).

Sorin Gabriel Radulescu, In Person.

Guy Martin, In Person, on behalf of Marie Josee Perrault.

Peter Burns, In Person.

Stan and Barbara Arnelien, In Person.

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**ENDORSEMENT**

G.B. MORAWETZ J.:--

**INTRODUCTION**

**1** On January 14, 2009, Nortel Networks Corporation ("NNC"), Nortel Networks Limited "(NNL"), Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (collectively, the "Applicants") were granted a stay of proceedings pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") and Ernst & Young Inc. was appointed as Monitor.

**2** The Applicants have historically operated a number of pension, benefit and other plans (both funded and unfunded) for their employees and pensioners, including:

(i) Pension benefits through two registered pension plans, the Nortel Networks Limited Managerial and Non-Negotiated Pension Plan and the Nortel Networks Negotiated Pension Plan (the "Pension Plans"); and

(ii) Medical, dental, life insurance, long-term disability and survivor income and transition benefits paid, except for survivor termination benefits, through Nortel's Health and Welfare Trust (the "HWT").

**3** Since the CCAA filing, the Applicants have continued to provide medical, dental and other benefits, through the HWT, to pensioners and employees on long-term disability ("Former and LTD

Employees") and active employees ("HWT Payments") and have continued all current service contributions and special payments to the Pension Plans ("Pension Payments").

**4** Pension Payments and HWT Payments made by the Applicants to the Former and LTD Employees while under CCAA protection are largely discretionary. As a result of Nortel's insolvency and the significant reduction in the size of Nortel's operations, the unfortunate reality is that, at some point, cessation of such payments is inevitable. The Applicants have attempted to address this situation by entering into a settlement agreement (the "Settlement Agreement") dated as of February 8, 2010, among the Applicants, the Monitor, the Former Employees' Representatives (on their own behalf and on behalf of the parties they represent), the LTD Representative (on her own behalf and on behalf of the parties she represents), Representative Settlement Counsel and the CAW-Canada (the "Settlement Parties").

**5** The Applicants have brought this motion for approval of the Settlement Agreement. From the standpoint of the Applicants, the purpose of the Settlement Agreement is to provide for a smooth transition for the termination of Pension Payments and HWT Payments. The Applicants take the position that the Settlement Agreement represents the best efforts of the Settlement Parties to negotiate an agreement and is consistent with the spirit and purpose of the CCAA.

**6** The essential terms of the Settlement Agreement are as follows:

(a) until December 31, 2010, medical, dental and life insurance benefits will be funded on a pay-as-you-go basis to the Former and LTD Employees;

(b) until December 31, 2010, LTD Employees and those entitled to receive survivor income benefits will receive income benefits on a pay-as-you-go basis;

(c) the Applicants will continue to make current service payments and special payments to the Pension Plans in the same manner as they have been doing over the course of the proceedings under the CCAA, through to March 31, 2010, in the aggregate amount of $2,216,254 per month and that thereafter and through to September 30, 2010, the Applicants shall make only current service payments to the Pension Plans, in the aggregate amount of $379,837 per month;

(d) any allowable pension claims, in these or subsequent proceedings, concerning any Nortel Worldwide Entity, including the Applicants, shall rank *pari passu* with ordinary, unsecured creditors of Nortel, and no part of any such HWT claims shall rank as a preferential or priority claim or shall be the subject of a constructive trust or trust of any nature or kind;

(e) proofs of claim asserting priority already filed by any of the Settlement Parties, or the Superintendent on behalf of the Pension Benefits Guarantee Fund are disallowed in regard to the claim for priority;

(f) any allowable HWT claims made in these or subsequent proceedings shall rank *pari passu* with ordinary unsecured creditors of Nortel;

(g) the Settlement Agreement does not extinguish the claims of the Former and LTD Employees;

(h) Nortel and, *inter alia*, its successors, advisors, directors and officers, are released from all future claims regarding Pension Plans and the HWT, provided that nothing in the release shall release a director of the Applicants

from any matter referred to in subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only;

(i) upon the expiry of all appeals and rights of appeal in respect thereof, Representative Settlement Counsel will withdraw their application for leave to appeal the decision of the Court of Appeal, dated November 26, 2009, to the Supreme Court of Canada on a with prejudice basis;[1]

(j) a CCAA plan of arrangement in the Nortel proceedings will not be proposed or approved if that plan does not treat the Pension and HWT claimants *pari passu* to the other ordinary, unsecured creditors ("Clause H.1"); and

(k) if there is a subsequent amendment to the *Bankruptcy and Insolvency Act* ("BIA") that "changes the current, relative priorities of the claims against Nortel, no party is precluded by this Settlement Agreement from arguing the applicability" of that amendment to the claims ceded in this Agreement ("Clause H.2").

**7** The Settlement Agreement does *not* relate to a distribution of the HWT as the Settlement Parties have agreed to work towards developing a Court-approved distribution of the HWT corpus in 2010.

**8** The Applicants' motion is supported by the Settlement Parties and by the Board of Directors of Nortel.

**9** The Official Committee of Unsecured Creditors of Nortel Networks Inc. ("UCC"), the informal Nortel Noteholder Group (the "Noteholders"), and a group of 37 LTD Employees (the "Opposing LTD Employees") oppose the Settlement Agreement.

**10** The UCC and Noteholders oppose the Settlement Agreement, principally as a result of the inclusion of Clause H.2.

**11** The Opposing LTD Employees oppose the Settlement Agreement, principally as a result of the inclusion of the third party releases referenced in [6h] above.

## THE FACTS

### A. Status of Nortel's Restructuring

**12** Although it was originally hoped that the Applicants would be able to restructure their business, in June 2009 the decision was made to change direction and pursue sales of Nortel's various businesses.

**13** In response to Nortel's change in strategic direction and the impending sales, Nortel announced on August 14, 2009 a number of organizational updates and changes including the creation of groups to support transitional services and management during the sales process.

**14** Since June 2009, Nortel has closed two major sales and announced a third. As a result of those transactions, approximately 13,000 Nortel employees have been or will be transferred to purchaser companies. That includes approximately 3,500 Canadian employees.

**15** Due to the ongoing sales of Nortel's business units and the streamlining of Nortel's operations, it is expected that by the close of 2010, the Applicants' workforce will be reduced to only 475 employees. There is a need to wind-down and rationalize benefits and pension processes.

**16** Given Nortel's insolvency, the significant reduction in Nortel's operations and the complexity and size of the Pension Plans, both Nortel and the Monitor believe that the continuation and funding of the Pension Plans and continued funding of medical, dental and other benefits is not a viable option.

**B. The Settlement Agreement**

**17** On February 8, 2010 the Applicants announced that a settlement had been reached on issues related to the Pension Plans, and the HWT and certain employment related issues.

**18** Recognizing the importance of providing notice to those who will be impacted by the Settlement Agreement, including the Former Employees, the LTD Employees, unionized employees, continuing employees and the provincial pension plan regulators ("Affected Parties"), Nortel brought a motion to this Court seeking the approval of an extensive notice and opposition process.

**19** On February 9, 2010, this Court approved the notice program for the announcement and disclosure of the Settlement (the "Notice Order").

**20** As more fully described in the Monitor's Thirty-Sixth, Thirty-Ninth and Thirty-Ninth Supplementary Reports, the Settlement Parties have taken a number of steps to notify the Affected Parties about the Settlement.

**21** In addition to the Settlement Agreement, the Applicants, the Monitor and the Superintendent, in his capacity as administrator of the Pension Benefits Guarantee Fund, entered into a letter agreement on February 8, 2010, with respect to certain matters pertaining to the Pension Plans (the "Letter Agreement").

**22** The Letter Agreement provides that the Superintendent will not oppose an order approving the Settlement Agreement ("Settlement Approval Order"). Additionally, the Monitor and the Applicants will take steps to complete an orderly transfer of the Pension Plans to a new administrator to be appointed by the Superintendent effective October 1, 2010. Finally, the Superintendent will not oppose any employee incentive program that the Monitor deems reasonable and necessary or the creation of a trust with respect to claims or potential claims against persons who accept directorships of a Nortel Worldwide Entity in order to facilitate the restructuring.

**POSITIONS OF THE PARTIES ON THE SETTLEMENT AGREEMENT**

**The Applicants**

**23** The Applicants take the position that the Settlement is fair and reasonable and balances the interests of the parties and other affected constituencies equitably. In this regard, counsel submits that the Settlement:

(a) eliminates uncertainty about the continuation and termination of benefits to pensioners, LTD Employees and survivors, thereby reducing hardship and disruption;

(b) eliminates the risk of costly and protracted litigation regarding Pension Claims and HWT Claims, leading to reduced costs, uncertainty and potential disruption to the development of a Plan;
(c) prevents disruption in the transition of benefits for current employees;
(d) provides early payments to terminated employees in respect of their termination and severance claims where such employees would otherwise have had to wait for the completion of a claims process and distribution out of the estates;
(e) assists with the commitment and retention of remaining employees essential to complete the Applicants' restructuring; and
(f) does not eliminate Pension Claims or HWT Claims against the Applicants, but maintains their quantum and validity as ordinary and unsecured claims.

**24** Alternatively, absent the approval of the Settlement Agreement, counsel to the Applicants submits that the Applicants are not required to honour such benefits or make such payments and such benefits could cease immediately. This would cause undue hardship to beneficiaries and increased uncertainty for the Applicants and other stakeholders.

**25** The Applicants state that a central objective in the Settlement Agreement is to allow the Former and LTD Employees to transition to other sources of support.

**26** In the absence of the approval of the Settlement Agreement or some other agreement, a cessation of benefits will occur on March 31, 2010 which would have an immediate negative impact on Former and LTD Employees. The Applicants submit that extending payments to the end of 2010 is the best available option to allow recipients to order their affairs.

**27** Counsel to the Applicants submits that the Settlement Agreement brings Nortel closer to finalizing a plan of arrangement, which is consistent with the sprit and purpose of the CCAA. The Settlement Agreement resolves uncertainties associated with the outstanding Former and LTD Employee claims. The Settlement Agreement balances certainty with clarity, removing litigation risk over priority of claims, which properly balances the interests of the parties, including both creditors and debtors.

**28** Regarding the priority of claims going forward, the Applicants submit that because a deemed trust, such as the HWT, is not enforceable in bankruptcy, the Former and LTD Employees are by default *pari passu* with other unsecured creditors.

**29** In response to the Noteholders' concern that bankruptcy prior to October 2010 would create pension liabilities on the estate, the Applicants committed that they would not voluntarily enter into bankruptcy proceedings prior to October 2010. Further, counsel to the Applicants submits the court determines whether a bankruptcy order should be made if involuntary proceedings are commenced.

**30** Further, counsel to the Applicants submits that the court has the jurisdiction to release third parties under a Settlement Agreement where the releases (1) are connected to a resolution of the debtor's claims, (2) will benefit creditors generally and (3) are not overly broad or offensive to public policy. See *Re Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (C.A.), [*Metcalfe*] at para. 71, leave to appeal refused, [2008] S.C.C.A. No. 337 and *Re Grace* [2008] O.J. No. 4208 (S.C.J.) [*Grace 2008*] at para. 40.

**31** The Applicants submit that a settlement of the type put forward should be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all the circumstances. Elements of fairness and reasonableness include balancing the interests of parties, including any objecting creditor or creditors, equitably (although not necessarily equally); and ensuring that the agreement is beneficial to the debtor and its stakeholders generally, as per *Re Air Canada*, [2003] O.J. No. 5319 (S.C.J.) [*Air Canada*]. The Applicants assert that this test is met.

**The Monitor**

**32** The Monitor supports the Settlement Agreement, submitting that it is necessary to allow the Applicants to wind down operations and to develop a plan of arrangement. The Monitor submits that the Settlement Agreement provides certainty, and does so with input from employee stakeholders. These stakeholders are represented by Employee Representatives as mandated by the court and these Employee Representatives were given the authority to approve such settlements on behalf of their constituents.

**33** The Monitor submits that Clause H.2 was bargained for, and that the employees did give up rights in order to have that clause in the Settlement Agreement; particularly, it asserts that Clause H.1 is the counterpoint to Clause H.2. In this regard, the Settlement Agreement is fair and reasonable.

**34** The Monitor asserts that the court may either (1) approve the Settlement Agreement, (2) not approve the Settlement Agreement, or (3) not approve the Settlement Agreement but provide practical comments on the applicability of Clause H.2.

**Former and LTD Employees**

**35** The Former Employees' Representatives' constituents number an estimated 19,458 people. The LTD Employees number an estimated 350 people between the LTD Employee's Representative and the CAW-Canada, less the 37 people in the Opposing LTD Employee group.

**36** Representative Counsel to the Former and LTD Employees acknowledges that Nortel is insolvent, and that much uncertainty and risk comes from insolvency. They urge that the Settlement Agreement be considered within the scope of this reality. The alternative to the Settlement Agreement is costly litigation and significant uncertainty.

**37** Representative Counsel submits that the Settlement Agreement is fair and reasonable for all creditors, but especially the represented employees. Counsel notes that employees under Nortel are unique creditors under these proceedings, as they are not sophisticated creditors and their personal welfare depends on receiving distributions from Nortel. The Former and LTD Employees assert that this is the best agreement they could have negotiated.

**38** Representative Counsel submits that bargaining away of the right to litigate against directors and officers of the corporation, as well at the trustee of the HWT, are examples of the concessions that have been made. They also point to the giving up of the right to make priority claims upon distribution of Nortel's estate and the HWT, although the claim itself is not extinguished. In exchange, the Former and LTD Employees will receive guaranteed coverage until the end of 2010. The Former and LTD Employees submit that having money in hand today is better than uncertainty going forward, and that, on balance, this Settlement Agreement is fair and reasonable.

**39** In response to allegations that third party releases unacceptably compromise employees' rights, Representative Counsel accepts that this was a concession, but submits that it was satisfac-

tory because the claims given up are risky, costly and very uncertain. The releases do not go beyond s. 5.1(2) of the CCAA, which disallows releases relating to misrepresentations and wrongful or oppressive conduct by directors. Releases as to deemed trust claims are also very uncertain and were acceptably given up in exchange for other considerations.

**40** The Former and LTD Employees submit that the inclusion of Clause H.2 was essential to their approval of the Settlement Agreement. They characterize Clause H.2 as a no prejudice clause to protect the employees by not releasing any future potential benefit. Removing Clause H.2 from the Settlement Agreement would be not the approval of an agreement, but rather the creation of an entirely new Settlement Agreement. Counsel submits that without Clause H.2, the Former and LTD Employees would not be signatories.

**CAW**

**41** The CAW supports the Settlement Agreement. It characterizes the agreement as Nortel's recognition that it has a moral and legal obligation to its employees, whose rights are limited by the laws in this country. The Settlement Agreement temporarily alleviates the stress and uncertainty its constituents feel over the winding up of their benefits and is satisfied with this result.

**42** The CAW notes that some members feel they were not properly apprised of the facts, but all available information has been disclosed, and the concessions made by the employee groups were not made lightly.

**Board of Directors**

**43** The Board of Directors of Nortel supports the Settlement Agreement on the basis that it is a practical resolution with compromises on both sides.

**Opposing LTD Employees**

**44** Mr. Rochon appeared as counsel for the Opposing LTD Employees, notwithstanding that these individuals did not opt out of having Representative Counsel or were represented by the CAW. The submissions of the Opposing LTD Employees were compelling and the court extends it appreciation to Mr. Rochon and his team in co-ordinating the representatives of this group.

**45** The Opposing LTD Employees put forward the position that the cessation of their benefits will lead to extreme hardship. Counsel submits that the Settlement Agreement conflicts with the spirit and purpose of the CCAA because the LTD Employees are giving up legal rights in relation to a $100 million shortfall of benefits. They urge the court to consider the unique circumstances of the LTD Employees as they are the people hardest hit by the cessation of benefits.

**46** The Opposing LTD Employees assert that the HWT is a true trust, and submit that breaches of that trust create liabilities and that the claim should not be released. Specifically, they point to a $37 million shortfall in the HWT that they should be able to pursue.

**47** Regarding the third party releases, the Opposing LTD Employees assert that Nortel is attempting to avoid the distraction of third party litigation, rather than look out for the best interests of the Former and LTD Employees. The Opposing LTD Employees urge the court not to release the only individuals the Former and LTD Employees can hold accountable for any breaches of trust. Counsel submits that Nortel has a common law duty to fund the HWT, which the Former and LTD Employees should be allowed to pursue.

**48** Counsel asserts that allowing these releases (a) is not necessary and essential to the restructuring of the debtor, (b) does not relate to the insolvency process, (c) is not required for the success of the Settlement Agreement, (d) does not meet the requirement that each party contribute to the plan in a material way and (e) is overly broad and therefore not fair and reasonable.

**49** Finally, the Opposing LTD Employees oppose the *pari passu* treatment they will be subjected to under the Settlement Agreement, as they have a true trust which should grant them priority in the distribution process. Counsel was not able to provide legal authority for such a submission.

**50** A number of Opposing LTD Employees made in person submissions. They do not share the view that Nortel will act in their best interests, nor do they feel that the Employee Representatives or Representative Counsel have acted in their best interests. They shared feelings of uncertainty, helplessness and despair. There is affidavit evidence that certain individuals will be unable to support themselves once their benefits run out, and they will not have time to order their affairs. They expressed frustration and disappointment in the CCAA process.

**UCC**

**51** The UCC was appointed as the representative for creditors in the U.S. Chapter 11 proceedings. It represents creditors who have significant claims against the Applicants. The UCC opposes the motion, based on the inclusion of Clause H.2, but otherwise the UCC supports the Settlement Agreement.

**52** Clause H.2, the UCC submits, removes the essential element of finality that a settlement agreement is supposed to include. The UCC characterizes Clause H.2 as a take back provision; if activated, the Former and LTD Employees have compromised nothing, to the detriment of other unsecured creditors. A reservation of rights removes the finality of the Settlement Agreement.

**53** The UCC claims it, not Nortel, bears the risk of Clause H.2. As the largest unsecured creditor, counsel submits that a future change to the BIA could subsume the UCC's claim to the Former and LTD Employees and the UCC could end up with nothing at all, depending on Nortel's asset sales.

**Noteholders**

**54** The Noteholders are significant creditors of the Applicants. The Noteholders oppose the settlement because of Clause H.2, for substantially the same reasons as the UCC.

**55** Counsel to the Noteholders submits that the inclusion of H.2 is prejudicial to the non-employee unsecured creditors, including the Noteholders. Counsel submits that the effect of the Settlement Agreement is to elevate the Former and LTD Employees, providing them a payout of $57 million over nine months while everyone else continues to wait, and preserves their rights in the event the laws are amended in future. Counsel to the Noteholders submits that the Noteholders forego millions of dollars while remaining exposed to future claims.

**56** The Noteholders assert that a proper settlement agreement must have two elements: a real compromise, and resolution of the matters in contention. In this case, counsel submits that there is no resolution because there is no finality in that Clause H.2 creates ambiguity about the future. The very object of a Settlement Agreement, assert the Noteholders, is to avoid litigation by withdrawing claims, which this agreement does not do.

**Superintendent**

**57** The Superintendent does not oppose the relief sought, but this position is based on the form of the Settlement Agreement that is before the Court.

**Northern Trust**

**58** Northern Trust, the trustee of the pension plans and HWT, takes no position on the Settlement Agreement as it takes instructions from Nortel. Northern Trust indicates that an oversight left its name off the third party release and asks for an amendment to include it as a party released by the Settlement Agreement.

**LAW AND ANALYSIS**

**A. Representation and Notice Were Proper**

**59** It is well settled that the Former Employees' Representatives and the LTD Representative (collectively, the "Settlement Employee Representatives") and Representative Counsel have the authority to represent the Former Employees and the LTD Beneficiaries for purposes of entering into the Settlement Agreement on their behalf: *see Grace 2008, supra* at para. 32.

**60** The court appointed the Settlement Employee Representatives and the Representative Settlement Counsel. These appointment orders have not been varied or appealed. Unionized employees continue to be represented by the CAW. The Orders appointing the Settlement Employee Representatives expressly gave them authority to represent their constituencies "for the purpose of settling or compromising claims" in these Proceedings. Former Employees and LTD Employees were given the right to opt out of their representation by Representative Settlement Counsel. After provision of notice, only one former employee and one active employee exercised the opt-out right.

**B. Effect of the Settlement Approval Order**

**61** In addition to the binding effect of the Settlement Agreement, many additional parties will be bound and affected by the Settlement Approval Order. Counsel to the Applicants submits that the binding nature of the Settlement Approval Order on all affected parties is a crucial element to the Settlement itself. In order to ensure all Affected Parties had notice, the Applicants obtained court approval of their proposed notice program.

**62** Even absent such extensive noticing, virtually all employees of the Applicants are represented in these proceedings. In addition to the representative authority of the Settlement Employee Representatives and Representative Counsel as noted above, Orders were made authorizing a Nortel Canada Continuing Employees' Representative and Nortel Canada Continuing Employees' Representative Counsel to represent the interests of continuing employees on this motion.

**63** I previously indicated that "the overriding objective of appointing representative counsel for employees is to ensure that the employees have representation in the CCAA process": *Re Nortel Networks Corp.*, [2009] O.J. No. 2529 at para. 16. I am satisfied that this objective has been achieved.

**64** The Record establishes that the Monitor has undertaken a comprehensive notice process which has included such notice to not only the Former Employees, the LTD Employees, the unionized employees and the continuing employees but also the provincial pension regulators and has given the opportunity for any affected person to file Notices of Appearance and appear before this court on this motion.

**65** I am satisfied that the notice process was properly implemented by the Monitor.

**66** I am satisfied that Representative Counsel has represented their constituents' interests in accordance with their mandate, specifically, in connection with the negotiation of the Settlement Agreement and the draft Settlement Approval Order and appearance on this Motion. There have been intense discussions, correspondence and negotiations among Representative Counsel, the Monitor, the Applicants, the Superintendent, counsel to the Board of the Applicants, the Noteholder Group and the Committee with a view to developing a comprehensive settlement. NCCE's Representative Counsel have been apprised of the settlement discussions and served with notice of this Motion. Representatives have held Webinar sessions and published press releases to inform their constituents about the Settlement Agreement and this Motion.

**C. Jurisdiction to Approve the Settlement Agreement**

**67** The CCAA is a flexible statute that is skeletal in nature. It has been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *Re Nortel,* [2009] O.J. No. 3169 (S.C.J.) at paras. 28-29, citing *Metcalfe, supra,* at paras. 44 and 61.

**68** Three sources for the court's authority to approve pre-plan agreements have been recognized:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
(b) the power of the court to make an order "on such terms as it may impose" pursuant to s. 11(4) of the CCAA; and
(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects: see *Re Nortel,* [2009] O.J. No. 3169 (S.C.J.) at para. 30, citing *Re Canadian Red Cross Society*, [1998] O.J. No. 3306 (Gen. Div.) [*Canadian Red Cross*] at para. 43; *Metcalfe, supra* at para. 44.

**69** In *Re Stelco Inc.*, (2005), 78 O.R. (3d) 254 (C.A.), the Ontario Court of Appeal considered the court's jurisdiction under the CCAA to approve agreements, determining at para. 14 that it is not limited to preserving the *status quo*. Further, agreements made prior to the finalization of a plan or compromise are valid orders for the court to approve: *Grace 2008, supra* at para. 34.

**70** In these proceedings, this court has confirmed its jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order and prior to the proposal of any plan of compromise or arrangement: see, for example, *Re Nortel*, [2009] O.J. No. 5582 (S.C.J.); *Re Nortel* [2009] O.J. 5582 (S.C.J.) and *Re Nortel*, 2010 ONSC 1096 (S.C.J.).

**71** I am satisfied that this court has jurisdiction to approve transactions, including settlements, in the course of overseeing proceedings during a CCAA stay period and prior to any plan of arrangement being proposed to creditors: see *Re Calpine Canada Energy Ltd.*, [2007] A.J. No. 917 (C.A.) [*Calpine*] at para. 23, affirming [2007] A.J. No. 923 (Q.B.); *Canadian Red Cross, supra*; *Air Canada, supra*; *Grace 2008, supra,* and *Re Grace Canada* [2010] O.J. No. 62 (S.C.J.) [*Grace 2010*], leave to appeal to the C.A. refused February 19, 2010; *Re Nortel*, 2010 ONSC 1096 (S.C.J.).

**D. Should the Settlement Agreement Be Approved?**

**72** Having been satisfied that this court has the jurisdiction to approve the Settlement Agreement, I must consider whether the Settlement Agreement *should* be approved.

**73** A Settlement Agreement can be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all circumstances. What makes a settlement agreement fair and reasonable is its balancing of the interests of all parties; its equitable treatment of the parries, including creditors who are not signatories to a settlement agreement; and its benefit to the Applicant and its stakeholders generally.

### *i) Sprit and Purpose*

**74** The CCAA is a flexible instrument; part of its purpose is to allow debtors to balance the conflicting interests of stakeholders. The Former and LTD Employees are significant creditors and have a unique interest in the settlement of their claims. This Settlement Agreement brings these creditors closer to ultimate settlement while accommodating their special circumstances. It is consistent with the spirit and purpose of the CCAA.

### *ii) Balancing of Parties' Interests*

**75** There is no doubt that the Settlement Agreement is comprehensive and that it has support from a number of constituents when considered in its totality.

**76** There is, however, opposition from certain constituents on two aspects of the proposed Settlement Agreement: (1) the Opposing LTD Employees take exception to the inclusion of the third party releases; (2) the UCC and Noteholder Groups take exception to the inclusion of Clause H.2.

**Third Party Releases**

**77** Representative Counsel, after examining documentation pertaining to the Pension Plans and HWT, advised the Former Employees' Representatives and Disabled Employees' Representative that claims against directors of Nortel for failing to properly fund the Pension Plans were unlikely to succeed. Further, Representative Counsel advised that claims against directors or others named in the Third Party Releases to fund the Pension Plans were risky and could take years to resolve, perhaps unsuccessfully. This assisted the Former Employees' Representatives and the Disabled Employees' Representative in agreeing to the Third Party Releases.

**78** The conclusions reached and the recommendations made by both the Monitor and Representative Counsel are consistent. They have been arrived at after considerable study of the issues and, in my view, it is appropriate to give significant weight to their positions.

**79** In *Grace 2008, supra,* and *Grace 2010, supra,* I indicated that a Settlement Agreement entered into with Representative Counsel that contains third party releases is fair and reasonable where the releases are necessary and connected to a resolution of claims against the debtor, will benefit creditors generally and are not overly broad or offensive to public policy.

**80** In this particular case, I am satisfied that the releases are necessary and connected to a resolution of claims against the Applicants.

**81** The releases benefit creditors generally as they reduces the risk of litigation against the Applicants and their directors, protect the Applicants against potential contribution claims and indemnity claims by certain parties, including directors, officers and the HWT Trustee; and reduce the risk

of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs.

**82** Further, in my view, the releases are not overly broad or offensive to public policy. The claims being released specifically relate to the subject matter of the Settlement Agreement. The parties granting the release receive consideration in the form of both immediate compensation and the maintenance of their rights in respect to the distribution of claims.

**Clause H.2**

**83** The second aspect of the Settlement Agreement that is opposed is the provision known as Clause H.2. Clause H.2 provides that, in the event of a bankruptcy of the Applicants, and notwithstanding any provision of the Settlement Agreement, if there are any amendments to the BIA that change the current, relative priorities of the claims against the Applicants, no party is precluded from arguing the applicability or non-applicability of any such amendment in relation to any such claim.

**84** The Noteholders and UCC assert that Clause H.2 causes the Settlement Agreement to not be a "settlement" in the true and proper sense of that term due to a lack of certainty and finality. They emphasize that Clause H.2 has the effect of undercutting the essential compromises of the Settlement Agreement in imposing an unfair risk on the non-employee creditors of NNL, including NNI, after substantial consideration has been paid to the employees.

**85** This position is, in my view, well founded. The inclusion of the Clause H.2 creates, rather than eliminates, uncertainty. It creates the potential for a fundamental alteration of the Settlement Agreement.

**86** The effect of the Settlement Agreement is to give the Former and LTD Employees preferred treatment for certain claims, notwithstanding that priority is not provided for in the statute nor has it been recognized in case law. In exchange for this enhanced treatment, the Former Employees and LTD Beneficiaries have made certain concessions.

**87** The Former and LTD Employees recognize that substantially all of these concessions could be clawed back through Clause H.2. Specifically, they acknowledge that future Pension and HWT Claims will rank *pari passu* with the claims of other ordinary unsecured creditors, but then go on to say that should the BIA be amended, they may assert once again a priority claim.

**88** Clause H.2 results in an agreement that does not provide certainty and does not provide finality of a fundamental priority issue.

**89** The Settlement Parties, as well as the Noteholders and the UCC, recognize that there are benefits associated with resolving a number of employee-related issues, but the practical effect of Clause H.2 is that the issue is not fully resolved. In my view, Clause H.2 is somewhat inequitable from the standpoint of the other unsecured creditors of the Applicants. If the creditors are to be bound by the Settlement Agreement, they are entitled to know, with certainty and finality, the effect of the Settlement Agreement.

**90** It is not, in my view, reasonable to require creditors to, in effect, make concessions in favour of the Former and LTD Employees today, and be subject to the uncertainty of unknown legislation in the future.

**91** One of the fundamental purposes of the CCAA is to facilitate a process for a compromise of debt. A compromise needs certainty and finality. Clause H.2 does not accomplish this objective. The inclusion of Clause H.2 does not recognize that at some point settlement negotiations cease and parties bound by the settlement have to accept the outcome. A comprehensive settlement of claims in the magnitude and complexity contemplated by the Settlement Agreement should not provide an opportunity to re-trade the deal after the fact.

**92** The Settlement Agreement should be fair and reasonable in all the circumstances. It should balance the interests of the Settlement Parties and other affected constituencies equitably and should be beneficial to the Applicants and their stakeholders generally.

**93** It seems to me that Clause H.2 fails to recognize the interests of the other creditors of the Applicants. These creditors have claims that rank equally with the claims of the Former Employees and LTD Employees. Each have unsecured claims against the Applicants. The Settlement Agreement provides for a transfer of funds to the benefit of the Former Employees and LTD Employees at the expense of the remaining creditors. The establishment of the Payments Charge crystallized this agreed upon preference, but Clause H.2 has the effect of not providing any certainty of outcome to the remaining creditors.

**94** I do not consider Clause H.2 to be fair and reasonable in the circumstances.

**95** In light of this conclusion, the Settlement Agreement cannot be approved in its current form.

**96** Counsel to the Noteholder Group also made submissions that three other provisions of the Settlement Agreement were unreasonable and unfair, namely:

(i) ongoing exposure to potential liability for pension claims if a bankruptcy order is made before October 1, 2010;
(ii) provisions allowing payments made to employees to be credited against employees' claims made, rather than from future distributions or not to be credited at all; and
(iii) lack of clarity as to whether the proposed order is binding on the Superintendent in all of his capacities under the *Pension Benefits Act* and other applicable law, and not merely in his capacity as Administrator on behalf of the Pension Benefits Guarantee Fund.

**97** The third concern was resolved at the hearing with the acknowledgement by counsel to the Superintendent that the proposed order would be binding on the Superintendent in all of his capacities.

**98** With respect to the concern regarding the potential liability for pension claims if a bankruptcy order is made prior to October 1, 2010, counsel for the Applicants undertook that the Applicants would not take any steps to file a voluntary assignment into bankruptcy prior to October 1, 2010. Although such acknowledgment does not bind creditors from commencing involuntary bankruptcy proceedings during this time period, the granting of any bankruptcy order is preceded by a court hearing. The Noteholders would be in a position to make submissions on this point, if so advised. This concern of the Noteholders is not one that would cause me to conclude that the Settlement Agreement was unreasonable and unfair.

**99** Finally, the Noteholder Group raised concerns with respect to the provision which would allow payments made to employees to be credited against employees' claims made, rather than from future distributions, or not to be credited at all. I do not view this provision as being unreasonable and unfair. Rather, it is a term of the Settlement Agreement that has been negotiated by the Settlement Parties. I do note that the proposed treatment with respect to any payments does provide certainty and finality and, in my view, represents a reasonable compromise in the circumstances.

**DISPOSITION**

**100** I recognize that the proposed Settlement Agreement was arrived at after hard-fought and lengthy negotiations. There are many positive aspects of the Settlement Agreement. I have no doubt that the parties to the Settlement Agreement consider that it represents the best agreement achievable under the circumstances. However, it is my conclusion that the inclusion of Clause H.2 results in a flawed agreement that cannot be approved.

**101** I am mindful of the submission of counsel to the Former and LTD Employees that if the Settlement Agreement were approved, with Clause H.2 excluded, this would substantively alter the Settlement Agreement and would, in effect, be a creation of a settlement and not the approval of one.

**102** In addition, counsel to the Superintendent indicated that the approval of the Superintendent was limited to the proposed Settlement Agreement and would not constitute approval of any altered agreement.

**103** In *Grace 2008*, *supra*, I commented that a line-by-line analysis was inappropriate and that approval of a settlement agreement was to be undertaken in its entirety or not at all, at para. 74. A similar position was taken by the New Brunswick Court of Queen's Bench in *Wandlyn Inns Limited (Re)* (1992), 15 C.B.R. (3d) 316. I see no reason or basis to deviate from this position.

**104** Accordingly, the motion is dismissed.

**105** In view of the timing of the timing of the release of this decision and the functional funding deadline of March 31, 2010, the court will make every effort to accommodate the parties if further directions are required.

**106** Finally, I would like to express my appreciation to all counsel and in person parties for the quality of written and oral submissions.

G.B. MORAWETZ J.

cp/e/qlrxg/qlpxm/qlaxw/qlced/qljyw

1 On March 25, 2010, the Supreme Court of Canada released the following: *Donald Sproule et al. v. Nortel Networks Corporation et al.* (Ont.) (Civil) (By Leave) (33491) (The motions for directions and to expedite the application for leave to appeal are dismissed. The application for leave to appeal is dismissed with no order as to costs./La requête en vue d'obtenir des directives et la requête visant à accélérer la procédure de demande d'autorisation d'appel sont rejetées. La demande d'autorisation d'appel est rejetée; aucune ordonnance n'est rendue con-

cernant les dépens.): <http://scc.lexum.umontreal.ca/en/news_release/2010/10-03-25.3a/10-03-25.3a.html>

# Tab 2

*Case Name:*

# Robertson v. ProQuest Information and Learning Co.

**RE: IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended**
**AND IN THE MATTER OF a Plan of Compromise or Arrangement of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc.**
**AND RE: Heather Robertson, Plaintiff, and ProQuest Information and Learning Company, Cedrom-SNI Inc., Toronto Star Newspapers Ltd., Rogers Publishing Limited and Canwest Publishing Inc., Defendants**

**[2011] O.J. No. 1160**

**2011 ONSC 1647**

Court File Nos. 03-CV-252945CP, CV-10-8533-00CL

Ontario Superior Court of Justice
Commercial List

**S.E. Pepall J.**

March 15, 2011.

(34 paras.)

*Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Sanction by court -- Application by the representative plaintiff and by one of the defendants, who was governed by an order under the Companies' Creditors Arrangement Act, for approval of a settlement that would resolve plaintiff's class proceeding and claim under the Act allowed -- Settlement would result in fair and reasonable outcome -- Settlement was recommended by all of the involved parties and it was not opposed by the defendants in the class proceeding who were not included in it.*

*Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Settlements -- Application by the representative plaintiff and by one of the defendants, who was governed by an order under the Companies' Creditors Arrangement Act, for approval of a settlement that would resolve plaintiff's class proceeding and claim under the Act allowed -- Settlement would result in fair and*

*reasonable outcome -- Settlement was recommended by all of the involved parties and it was not opposed by the defendants in the class proceeding who were not included in it.*

*Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Settlements -- Approval -- Application by the representative plaintiff and by one of the defendants, who was governed by an order under the Companies' Creditors Arrangement Act, for approval of a settlement that would resolve plaintiff's class proceeding and claim under the Act allowed -- Settlement would result in fair and reasonable outcome -- Settlement was recommended by all of the involved parties and it was not opposed by the defendants in the class proceeding who were not included in it.*

Application by Robertson and by the defendant Canwest Publishing Inc. for approval of a settlement. Robertson, who was a plaintiff in her own capacity and was also the representative plaintiff in a class proceeding, commenced this action in July 2003. The action was certified as a class proceeding in October 2008. Robertson claimed compensatory damages of $500 million and punitive and exemplary damages of $250 million against the defendants for copyright infringement. In January 2010 Canwest was granted an initial order pursuant to the Companies' Creditors Arrangement Act. In April 2010 Robertson filed a claim under the Arrangement Act for $500 million. The Monitor's opinion was that this claim was worth $0. The proposed settlement would resolve the class proceeding and the proceeding under the Arrangement Act. Court approval was not required for the claim under the Arrangement Act but it was required for the class proceeding. Under the settlement the claim under the Arrangement Act would be allowed in the amount of $7.5 million for voting and distribution purposes. Robertson undertook to vote in favour of the proposed Plan under the Arrangement Act. The action would be dismissed against Canwest, which did not admit liability. The action would not be dismissed against the other defendants. The Monitor was involved in the negotiation of the settlement and recommended approval for it concluded that the settlement agreement was a fair and reasonable resolution for Canwest.

HELD: Application allowed. The settlement agreement met the tests for approval under the Arrangement Act and under the Class Act. No one, including the non-settling defendants who received notice, opposed the settlement. Robertson was a very experienced and sophisticated litigant who previously resolved a similar class proceeding against other media companies. The settlement agreement was recommended by experienced counsel and it was entered into after serious negotiations between sophisticated parties. It would result in a fair and reasonable outcome, partly because Canwest was in an insolvency proceeding with all of its attendant risks and uncertainties.

**Statutes, Regulations and Rules Cited:**

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 29, s. 34

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

**Counsel:**

*Kirk Baert*, for the Plaintiff.

*Peter J. Osborne* and *Kate McGrann*, for Canwest Publishing Inc.

*Alex Cobb*, for the CCAA Applicants.

*Ashley Taylor* and *Maria Konyukhova*, for the Monitor.

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## REASONS FOR DECISION

S.E. PEPALL J.:--

Overview

**1** On January 8, 2010, I granted an initial order pursuant to the provisions of the *Companies' Creditors Arrangement Act* ("*CCAA*") in favour of Canwest Publishing Inc. ("CPI") and related entities (the "LP Entities"). As a result of this order and subsequent orders, actions against the LP Entities were stayed. This included a class proceeding against CPI brought by Heather Robertson in her personal capacity and as a representative plaintiff (the "Representative Plaintiff"). Subsequently, CPI brought a motion for an order approving a proposed notice of settlement of the action which was granted. CPI and the Representative Plaintiff then jointly brought a motion for approval of the settlement of both the class proceeding as against CPI and the *CCAA* claim. The Monitor supported the request and no one was opposed. I granted the judgment requested and approved the settlement with endorsement to follow. Given the significance of the interplay of class proceedings with *CCAA* proceedings, I have written more detailed reasons for decision rather than simply an endorsement.

Facts

**2** The Representative Plaintiff commenced this class proceeding by statement of claim dated July 25, 2003 and the action was case managed by Justice Cullity. He certified the action as a class proceeding on October 21, 2008 which order was subsequently amended on September 15, 2009.

**3** The Representative Plaintiff claimed compensatory damages of $500 million plus punitive and exemplary damages of $250 million against the named defendants, ProQuest Information and Learning LLC, Cedrom-SNI Inc., Toronto Star Newspapers Ltd., Rogers Publishing Limited and CPI for the alleged infringement of copyright and moral rights in certain works owned by class members. She alleged that class members had granted the defendants the limited right to reproduce the class members' works in the print editions of certain newspapers and magazines but that the defendant publishers had proceeded to reproduce, distribute and communicate the works to the public in electronic media operated by them or by third parties.

**4** As set out in the certification order, the class consists of:

> A. All persons who were the authors or creators of original literary works ("Works") which were published in Canada in any newspaper, magazine, periodical, newsletter, or journal (collectively "Print Media") which Print Media have been reproduced, distributed or communicated to the public by telecommunication by, or pursuant to the purported authorization or permission of, one or more of the defendants, through any electronic database, excluding electronic databases in which only a precise electronic reproduction of the Work or substantial portion thereof is made available (such as PDF and analogous copies) (collectively "Electronic Media"), excluding:

(a) persons who by written document assigned or exclusively licensed all of the copyright in their Works to a defendant, a licensor to a defendant, or any third party; or

(b) persons who by written document granted to a defendant or a licensor to a defendant a license to publish or use their Works in Electronic Media; or

(c) persons who provided Works to a not for profit or non-commercial publisher of Print Media which was licensor to a defendant (including a third party defendant), and where such persons either did not expect or request, or did not receive, financial gain for providing such Works; or

(d) persons who were employees of a defendant or a licensor to a defendant, with respect to any Works created in the course of their employment.

Where the Print Media publication was a Canadian edition of a foreign publication, only Works comprising of the content exclusive to the Canada edition shall qualify for inclusion under this definition.

(Persons included in clause A are thereinafter referred to as "Creators". A "licensor to a defendant" is any party that has purportedly authorized or provided permission to one or more defendants to make Works available in Electronic Media. References to defendants or licensors to defendants include their predecessors and successors in interest)

B. All persons (except a defendant or a licensor to a defendant) to whom a Creator, or an Assignee, assigned, exclusively licensed, granted or transmitted a right to publish or use their Works in Electronic Media.

(Persons included in clause B are hereinafter referred to as "Assignees")

C. Where a Creator or Assignee is deceased, the personal representatives of the estate of such person unless the date of death of the Creator was on or before December 31, 1950.

**5** As part of the *CCAA* proceedings, I granted a claims procedure order detailing the procedure to be adopted for claims to be made against the LP Entities in the *CCAA* proceedings. On April 12, 2010, the Representative Plaintiff filed a claim for $500 million in respect of the claims advanced against CPI in the action pursuant to the provisions of the claims procedure order. The Monitor was of the view that the claim in the *CCAA* proceedings should be valued at $0 on a preliminary basis.

**6** The Representative Plaintiff's claim was scheduled to be heard by a claims officer appointed pursuant to the terms of the claims procedure order. The claims officer would determine liability and would value the claim for voting purposes in the *CCAA* proceedings.

**7** Prior to the hearing before the claims officer, the Representative Plaintiff and CPI negotiated for approximately two weeks and ultimately agreed to settle the *CCAA* claim pursuant to the terms of a settlement agreement.

**8** When dealing with the consensual resolution of a *CCAA* claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceeding

settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

**9** Pursuant to section 34 of the *Class Proceedings Act*, the same judge shall hear all motions before the trial of the common issues although another judge may be assigned by the Regional Senior Judge (the "RSJ") in certain circumstances. The action had been stayed as a result of the CCAA proceedings. While I was the supervising CCAA judge, I was also assigned by the RSJ to hear the class proceeding notice and settlement motions.

**10** Class counsel said in his affidavit that given the time constraints in the *CCAA* proceedings, he was of the view that the parties had made reasonable attempts to provide adequate notice of the settlement to the class. It would have been preferable to have provided more notice, however, given the exigencies of insolvency proceedings and the proposed meeting to vote on the *CCAA* Plan, I was prepared to accept the notice period requested by class counsel and CPI.

**11** In this case, given the hybrid nature of the proceedings, the motion for an order approving notice of the settlement in both the class action proceeding and the *CCAA* proceeding was brought before me as the supervising *CCAA* judge. The notice procedure order required:

1) the Monitor and class counsel to post a copy of the settlement agreement and the notice order on their websites;
2) the Monitor to publish an English version of the approved form of notice letter in the National Post and the Globe and Mail on three consecutive days and a French translation of the approved form of notice letter in La Presse for three consecutive days;
3) distribution of a press release in an approved form by Canadian Newswire Group for dissemination to various media outlets; and
4) the Monitor and class counsel were to maintain toll-free phone numbers and to respond to enquiries and information requests from class members.

**12** The notice order allowed class members to file a notice of appearance on or before a date set forth in the order and if a notice of appearance was delivered, the party could appear in person at the settlement approval motion and any other proceeding in respect of the class proceeding settlement. Any notices of appearance were to be provided to the service list prior to the approval hearing. In fact, no notices of appearance were served.

**13** In brief, the terms of the settlement were that:

a) the *CCAA* claim in the amount of $7.5 million would be allowed for voting and distribution purposes;
b) the Representative Plaintiff undertook to vote the claim in favour of the proposed *CCAA* Plan;
c) the action would be dismissed as against CPI;
d) CPI did not admit liability; and
e) the Representative Plaintiff, in her personal capacity and on behalf of the class and/or class members, would provide a licence and release in respect of the freelance subject works as that term was defined in the settlement agreement.

**14** The claims in the action in respect of CPI would be fully settled but the claims which also involved ProQuest would be preserved. The licence was a non-exclusive licence to reproduce one or more copies of the freelance subject works in electronic media and to authorize others to do the same. The licence excluded the right to licence freelance subject works to ProQuest until such time as the action was resolved against ProQuest, thereby protecting the class members' ability to pursue ProQuest in the action. The settlement did not terminate the lawsuit against the other remaining defendants. Under the *CCAA* Plan, all unsecured creditors, including the class, would be entitled to share on a pro rata basis in a distribution of shares in a new company. The Representative Plaintiff would share pro rata to the extent of the settlement amount with other affected creditors of the LP Entities in the distributions to be made by the LP Entities, if any.

**15** After the notice motion, CPI and the Representative Plaintiff brought a motion to approve the settlement. Evidence was filed showing, among other things, compliance with the claims procedure order. Arguments were made on the process and on the fairness and reasonableness of the settlement.

**16** In her affidavit, Ms. Robertson described why the settlement was fair, reasonable and in the best interests of the class members:

> In light of Canwest's insolvency, I am advised by counsel, and verily believe, that, absent an agreement or successful award in the Canwest Claims Process, the prospect of recovery for the Class against Canwest is minimal, at best. However, under the Settlement Agreement, which preserves the claims of the Class as against the remaining defendants in the class proceeding in respect of each of their independent alleged breaches of the class members' rights, as well as its claims as against ProQuest for alleged violations attributable to Canwest content, there is a prospect that members of the Class will receive some form of compensation in respect of their direct claims against Canwest.
>
> Because the Settlement Agreement provides a possible avenue of recovery for the Class, and because it largely preserves the remaining claims of the Class as against the remaining defendants in the class proceeding, I am of the view that the Settlement Agreement represents a reasonable compromise of the Class claim as against Canwest, and is both fair and reasonable in the circumstances of Canwest's insolvency.

**17** In the affidavit filed by class counsel, Anthony Guindon of the law firm Koskie Minsky LLP noted that he was not in a position to ascertain the approximate dollar value of the potential benefit flowing to the class from the potential share in a pro rata distribution of shares in the new corporation. This reflected the unfortunate reality of the *CCAA* process. While a share price of $11.45 was used, he noted that no assurance could be given as to the actual market price that would prevail. In addition, recovery was contingent on the total quantum of proven claims in the claims process. He also described the litigation risks associated with attempting to obtain a lifting of the *CCAA* stay of proceedings. The likelihood of success was stated to be minimal. He also observed the problems associated with collection of any judgment in favour of the Representative Plaintiff. He went on to state:

> ... The Representative Plaintiff, on behalf of the Class, could have elected to challenge Canwest's initial valuation of the Class claim of $0 before a Claims Officer, rather than entering into a negotiated settlement. However, a number of factors militated against the advisability of such a course of action. Most importantly, the claims of the Class in the class proceeding have not been proven, and the Class does not enjoy the benefit of a final judgment as against Canwest. Thus, a hearing before the Claims Officer would necessarily necessitate a finding of liability as against Canwest, in addition to a quantification of the claims of the Class against Canwest.
>
> ... a negative outcome in a hearing before a Claims Officer could have the effect of jeopardizing the Class claims as against the remaining defendants in the class proceeding. Such a finding would not be binding on a judge seized of a common issues trial in the class proceeding; however, it could have persuasive effect.
>
> Given the likely limited recovery available from Canwest in the Claims Process, it is the view of Class Counsel that a negotiated resolution of the quantification of Class claim as against Canwest is preferable to risking a negative finding of liability in the context of a contested Claims hearing before a Claims Officer.

**18** The Monitor was also involved in the negotiation of the settlement and was also of the view that the settlement agreement was a fair and reasonable resolution for CPI and the LP Entities' stakeholders. The Monitor indicated in its report that the settlement agreement eliminated a large degree of uncertainty from the *CCAA* proceeding and facilitated the approval of the Plan by the requisite majorities of stakeholders. This of course was vital to the successful restructuring of the LP Entities. The Monitor recommended approval of the settlement agreement.

**19** The settlement of the class proceeding action was made prior to the creditors' meeting to vote on the Plan for the LP Entities. The issues of the fees and disbursements of class counsel and the ultimate distribution to class members were left to be dealt with by the class proceedings judge if and when there was a resolution of the action with the remaining defendants.

Discussion

**20** Both motions in respect of the settlement were heard by me but were styled in both the *CCAA* proceedings and the class proceeding.

**21** As noted by Jay A. Swartz and Natasha J. MacParland in their article "*Canwest Publishing - A Tale of Two Plans*":

> "There have been a number of *CCAA* proceedings in which settlements in respect of class proceedings have been implemented including *McCarthy v. Canadian Red Cross Society, (Re:) Grace Canada Inc., Muscletech Research and Development Inc.*, and *(Re:) Hollinger Inc.* ... The structure and process for notice and approval of the settlement used in the LP Entities restructuring appears to be the most efficient and effective and likely a model for future approvals. Both motions in respect of the Settlement, discussed below, were heard by the *CCAA* judge but were styled in both proceedings." [citations omitted]

(a) Approval

(i) *CCAA* Settlements in General

**22** Certainly the court has jurisdiction to approve a *CCAA* settlement agreement. As stated by Farley J. in *Re Lehndorff General Partner Ltd.*,[2] the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Very broad powers are provided to the *CCAA* judge and these powers are exercised to achieve the objectives of the statute. It is well settled that courts may approve settlements by debtor companies during the *CCAA* stay period: *Re Calpine Canada Energy Ltd.*[3]; *Re Air Canada*[4]; and *Re Playdium Entertainment Corp.*[5] To obtain approval of a settlement under the *CCAA*, the moving party must establish that: the transaction is fair and reasonable; the transaction will be beneficial to the debtor and its stakeholders generally; and the settlement is consistent with the purpose and spirit of the *CCAA*. See in this regard *Re Air Canada*[6] and *Re Calpine.*[7]

(ii) Class Proceedings Settlement

**23** The power to approve the settlement of a class proceeding is found in section 29 of the *Class Proceedings Act*, 1992[8]. That section states:

> 29(1) A proceeding commenced under this *Act* and a proceeding certified as a class proceeding under this *Act* may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> (2) A settlement of a class proceeding is not binding unless approved by the court.
>
> (3) A settlement of a class proceeding that is approved by the court binds all class members.
>
> (4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,
>
> (a) an account of the conduct of the proceedings;
> (b) a statement of the result of the proceeding; and
> (c) a description of any plan for distributing settlement funds.

**24** The test for approval of the settlement of a class proceeding was described in *Dabbs v. Sun Life Assurance Co. of Canada*[9]. The court must find that in all of the circumstances the settlement is fair, reasonable and in the best interests of those affected by it. In making this determination, the court should consider, amongst other things:

a) the likelihood of recovery or success at trial;
b) the recommendation and experience of class counsel; and
c) the terms of the settlement.

As such, it is clear that although the *CCAA* and class proceeding tests for approval are not identical, a certain symmetry exists between the two.

**25** A perfect settlement is not required. As stated by Sharpe J. (as he then was) in *Dabbs v. Sun Life Assurance Co. of Canada*[10]:

> Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

**26** Where there is more than one defendant in a class proceeding, the action may be settled against one of the defendants provided that the settlement is fair, reasonable and in the best interests of the class members: *Ontario New Home Warranty Program et al. v. Chevron Chemical et al.*[11]

(iii) The Robertson Settlement

**27** I concluded that the settlement agreement met the tests for approval under the *CCAA* and the *Class Proceedings Act.*

**28** As a general proposition, settlement of litigation is to be promoted. Settlement saves time and expense for the parties and the court and enables individuals to extract themselves from a justice system that, while of a high caliber, is often alien and personally demanding. Even though settlements are to be encouraged, fairness and reasonableness are not to be sacrificed in the process.

**29** The presence or absence of opposition to a settlement may sometimes serve as a proxy for reasonableness. This is not invariably so, particularly in a class proceeding settlement. In a class proceeding, the court approval process is designed to provide some protection to absent class members.

**30** In this case, the proposed settlement is supported by the LP Entities, the Representative Plaintiff, and the Monitor. No one, including the non-settling defendants all of whom received notice, opposed the settlement. No class member appeared to oppose the settlement either.

**31** The Representative Plaintiff is a very experienced and sophisticated litigant and has been so recognized by the court. She is a freelance writer having published more than 15 books and having been a regular contributor to Canadian magazines for over 40 years. She has already successfully resolved a similar class proceeding against Thomson Canada Limited, Thomson Affiliates, Information Access Company and Bell Global Media Publishing Inc. which was settled for $11 million after 13 years of litigation. That proceeding involved allegations quite similar to those advanced in the action before me. In approving the settlement in that case, Justice Cullity described the involvement of the Representative Plaintiff in the class proceeding:

> The Representative Plaintiff, Ms. Robertson, has been actively involved throughout the extended period of the litigation. She has an honours degree in English from the University of Manitoba, and an M.A. from Columbia University in New York. She is the author of works of fiction and non-fiction, she has been a regular contributor to Canadian magazines and newspapers for over 40 years, and she was a founder member of each of the Professional Writers' Association of Canada and the Writers' Union of Canada. Ms. Robertson has been in

> communication with class members about the litigation since its inception and has obtained funds from them to defray disbursements. She has clearly been a driving force behind the litigation: *Robertson v. Thomson Canada*[12].

**32** The settlement agreement was recommended by experienced counsel and entered into after serious and considered negotiations between sophisticated parties. The quantum of the class members' claim for voting and distribution purposes, though not identical, was comparable to the settlement in *Robertson v. Thomson Canada*. In approving that settlement, Justice Cullity stated:

> Ms. Robertson's best estimate is that there may be 5,000 to 10,000 members in the class and, on that basis, the gross settlement amount of $11 million does not appear to be unreasonable. It compares very favourably to an amount negotiated among the parties for a much wider class in the U.S. litigation and, given the risks and likely expense attached to a continuation of the proceeding, does not appear to be out of line. On this question I would, in any event, be very reluctant to second guess the recommendations of experienced class counsel, and their well informed client, who have been involved in all stages of the lengthy litigation.[13]

**33** In my view, Ms. Robertson's and Mr. Guindon's description of the litigation risks in this class proceeding were realistic and reasonable. As noted by class counsel in oral argument, issues relating to the existence of any implied license arising from conduct, assessment of damages, and recovery risks all had to be considered. Fundamentally, CPI was in an insolvency proceeding with all its attendant risks and uncertainties. The settlement provided a possible avenue for recovery for class members but at the same time preserved the claims of the class against the other defendants as well as the claims against ProQuest for alleged violations attributable to CPI content. The settlement brought finality to the claims in the action against CPI and removed any uncertainty and the possibility of an adverse determination. Furthermore, it was integral to the success of the consolidated plan of compromise that was being proposed in the *CCAA* proceedings and which afforded some possibility of recovery for the class. Given the nature of the CCAA Plan, it was not possible to assess the final value of any distribution to the class. As stated in the joint factum filed by counsel for CPI and the Representative Plaintiff, when measured against the litigation risks, the settlement agreement represented a reasonable, pragmatic and realistic compromise of the class claims.

**34** The Representative Plaintiff, Class Counsel and the Monitor were all of the view that the settlement resulted in a fair and reasonable outcome. I agreed with that assessment. The settlement was in the best interests of the class and was also beneficial to the LP Entities and their stakeholders. I therefore granted my approval.

S.E. PEPALL J.

cp/e/qllxr/qlvxw/qlbdp

1 Annual Review of Insolvency Law, 2010, J.P. Sarra Ed, Carswell, Toronto at page 79.

2 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) at 31.

3 2007 ABQB 504 at para. 71; leave to appeal dismissed 2007 ABCA 266 (Alta. C.A.).

4 (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.).

5 (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J.) at para. 23.

6 *Supra.* at para. 9.

7 *Supra.* at para. 59.

8 S.O. 1992, c. 6.

9 [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 9.

10 (1998), 40 O.R. (3d) 429 at para 30.

11 [1999] O.J. No. 2245 (Ont. S.C.J.) at para. 97.

12 [2009] O.J. No. 2650 at para. 15.

13 *Robertson v. Thomson Canada*, [2009] O.J. No. 2650 para. 20.

# Tab 3

*Indexed as:*

# Borowski v. Canada (Attorney General)

**Joseph Borowski, appellant;**
**v.**
**The Attorney General of Canada, respondent;**
**and**
**Interfaith Coalition on the Rights and Wellbeing of Women and Children, R.E.A.L. Women of Canada, and Women's Legal Education and Action Fund (LEAF), interveners.**

[1989] 1 S.C.R. 342

[1989] S.C.J. No. 14

File No.: 20411.

Supreme Court of Canada

1988: October 3, 4 / 1989: March 9.

**Present: Dickson C.J. and McIntyre, Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

*Appeal -- Mootness -- Abortion provisions of Criminal Code -- Provisions under challenge already found invalid -- Ancillary questions relating to Charter rights of the foetus -- Whether or not issue moot -- Whether or not Court should exercise discretion to hear case -- Criminal Code, R.S.C. 1970, c. C-34, s. 251 -- Canadian Charter of Rights and Freedoms, ss. 7, 15.*

*Criminal law -- Abortion -- Provisions under challenge already found invalid -- Ancillary questions relating to Charter rights of the foetus -- Whether or not issue moot -- Whether or not Court should exercise discretion to hear case.*

*Constitutional law -- Charter of Rights -- Right to life, liberty and security of the person -- Right to equality before and under the law -- Whether or not Charter rights extending to foetus -- Charter issues ancillary to question of validity of abortion provisions of Criminal Code -- Provisions under challenge already found invalid -- Whether or not issue moot -- Whether or not Court should exercise discretion to hear case.*

*Civil procedure -- Standing -- Standing originally found because action seeking declaration as to legislation's validity -- Provisions under challenge already found invalid -- Whether or not standing as originally [page343] determined -- Whether or not s. 24(1) of the Charter and s. 52(1) of the Constitution Act, 1982 able to support claim for standing.*

Appellant attacked the validity of s. 251(4), (5) and (6) of the Criminal Code relating to abortion on the ground that they contravened the life and security and the equality rights of the foetus, as a person, protected by ss. 7 and 15 of the Canadian Charter of Rights and Freedoms. Appellant's standing had been found on the basis that he was seeking a declaration that legislation is invalid, that there was a serious issue as to its invalidity, that he had a genuine interest as a citizen in the validity of the legislation and that there was no other reasonable and effective manner in which the issue could be brought before the Court.

The Court of Queen's Bench found s. 251(4), (5) and (6) did not violate the Charter as a foetus was not protected by either s. 7 or s. 15 of the Charter and also held that the s. 1 of Canadian Bill of Rights did not give the courts the right to assess the substantive content or wisdom of legislation. The Court of Appeal concluded that neither s. 7 nor s. 15 of the Charter applied to a foetus. The constitutional questions stated in this Court queried: (1) if a foetus had the right to life as guaranteed by s. 7 of the Charter; (2) if so, whether s. 251(4), (5) and (6) of the Criminal Code violated the principles of fundamental justice contrary to s. 7 of the Charter; (3) whether a foetus had the right to equal protection and equal benefit of the law without discrimination because of age or mental or physical disability as guaranteed by s. 15 of the Charter; (4) if so, whether s. 251(4), (5) and (6) of the Criminal Code violated s. 15; and (5) if questions (2) and (4) were answered affirmatively, whether s. 251(4), (5) and (6) of the Criminal Code were justified by s. 1 of the Charter. All of s. 251, however, was struck down subsequent to the Court of Appeal's decision but before the appeal reached this Court as a result of this Court's decision in R. v. Morgentaler (No. 2).

A serious issue existed at the commencement of the appeal as to whether the appeal was moot. Questions also existed as to whether the appellant had lost his standing and, indeed, whether the matter was justiciable. These issues were addressed as a preliminary matter and decision on them was reserved. The Court then heard argument on the merits of the appeal so that the whole appeal could be decided without recalling the parties for argument should it decide that the appeal should proceed notwithstanding the preliminary issues.

[page344]

Held: The appeal should be dismissed.

The appeal is moot and the Court should not exercise its discretion to hear it. Moreover, appellant no longer has standing to pursue the appeal as the circumstances upon which his standing was originally premised have disappeared.

The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it.

The approach with respect to mootness involves a two-step analysis. It is first necessary to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case. (In the interest of clarity, a case is moot if it does not present a concrete controversy even though a court may elect to address the moot issue.)

This appeal is moot as there is no longer a concrete legal dispute. The live controversy underlying this appeal -- the challenge to the constitutionality of s. 251(4), (5) and (6) of the Criminal Code -- disappeared when s. 251 was struck down in R. v. Morgentaler (No. 2). None of the relief sought in the statement of claim was relevant. Three of the five constitutional questions that were set explicitly concerned s. 251 and were no longer applicable. The remaining two questions addressed the scope of ss. 7 and 15 of the Charter and were not severable from the context of the original challenge to s. 251.

A constitutional question cannot bind this Court and may not be used to transform an appeal into a reference. Constitutional questions are stated to define with precision the constitutional points at issue, not to introduce new issues, and accordingly, cannot be used as an independent basis for supporting an otherwise moot appeal.

The second stage in the analysis requires that a court consider whether it should exercise its discretion to decide the merits of the case, despite the absence of a live controversy. Courts may be guided in the exercise of [page345] their discretion by considering the underlying rationale of the mootness doctrine.

The first rationale for the policy with respect to mootness in that a court's competence to resolve legal disputes is rooted in the adversary system. A full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system. The second is based on the concern for judicial economy which requires that a court examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. The third underlying rationale of the mootness doctrine is the need for courts to be sensitive to the effectiveness or efficacy of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework. The Court, in exercising its discretion in an appeal which is moot, should consider the extent to which each of these three basic factors is present. The process is not mechanical. The principles may not all support the same conclusion and the presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

The Court should decline to exercise its discretion to decide this appeal on its merits because of concerns for judicial economy and for the Court's role in the law-making process. The absence of an adversarial relationship was of little concern: the appeal was argued as fully as if it were not moot.

With respect to judicial economy, none of the factors justifying the application of judicial resources applied. The decision would not have practical side effects on the rights of the parties. The case was not one that was capable of repetition, yet evasive of review: it will almost certainly be brought be-

fore the Court within a specific legislative context or possibly in review of specific governmental action. An abstract pronouncement on foetal rights here would not necessarily obviate future repetitious litigation. It was not in the public interest, notwithstanding the great public importance of the question involved, to address the merits in order to settle the state of the law. A decision as to whether ss. 7 and 15 of the Charter protect the rights of the foetus is not in the public interest due to the potential uncertainty that could result from such a decision absent a legislative context.

A proper awareness of the Court's law-making function dictated against the Court's exercising its discretion to decide this appeal. The question posed here was not [page346] the question raised in the original action. Indeed, what was sought -- a Charter interpretation in the absence of legislation or other governmental action bringing it into play -- would turn this appeal into a private reference. The Court, if it were to exercise its discretion, would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the Court's traditional role.

The appellant also lacked standing to pursue this appeal given the fact that the original basis for his standing no longer existed. Two significant changes in the nature of this action occurred since standing was granted by this Court in 1981. Firstly, the claim is now premised primarily upon an alleged right of a foetus to life and equality pursuant to ss. 7 and 15 of the Charter. Secondly, the legislative context of original claim disappeared when s. 251 of the Criminal Code was struck down. Standing could not be based on s. 24(1) of the Charter for an infringement or denial of a person's own Charter-based right was required. Here, the rights allegedly violated were those of a foetus. Standing could not be based on s. 52(1) of the Constitution Act, 1982 as this is restricted to litigants challenging a law or governmental action pursuant to power granted by law.

**Cases Cited**

Referred to: R. v. Morgentaler (No. 2), [1988] 1 S.C.R. 30; Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575; Morgentaler v. The Queen (No. 1), [1976] 1 S.C.R. 616; Dehler v. Ottawa Civic Hospital (1980), 29 O.R. (2d) 677 (C.A.), leave to appeal refused [1981] 1 S.C.R. viii; The King ex rel. Tolfree v. Clark, [1944] S.C.R. 69; Moir v. The Corporation of the Village of Huntingdon (1891), 19 S.C.R. 363; Attorney-General for Alberta v. Attorney-General for Canada, [1939] A.C. 117; Coca-Cola Company of Canada Ltd. v. Mathews, [1944] S.C.R. 385; Sun Life Assurance Company of Canada v. Jervis, [1944] A.C. 111; Vic Restaurant Inc. v. City of Montreal, [1959] S.C.R. 58; International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange, [1967] S.C.R. 628; Re Cadeddu and The Queen (1983), 41 O.R. (2d) 481; R. v. Mercure, [1988] 1 S.C.R. 234; Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357; Re Maltby and Attorney-General [page347] of Saskatchewan (1984), 10 D.L.R. (4th) 745; Hall v. Beals, 396 U.S. 45 (1969); United States v. W. T. Grant Co., 345 U.S. 629 (1953); Sibron v. New York, 392 U.S. 40 (1968); Vadebonc(oe)ur v. Landry, [1977] 2 S.C.R. 179; Bisaillon v. Keable, [1983] 2 S.C.R. 60; Southern Pacific Co. v. Interstate Commerce Commission, 219 U.S. 433 (1911); Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec, [1970] S.C.R. 713; Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America, [1973] S.C.R. 756; Minister of Manpower and Immigration v. Hardayal, [1978] 1 S.C.R. 470; Re Opposition by Quebec to a Resolution to amend the Constitution, [1982] 2 S.C.R. 793; Forget v. Quebec (Attorney General), [1988] 2 S.C.R. 90; Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138; Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265.

**Statutes and Regulations Cited**

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 1.
Canadian Charter of Rights and Freedoms, ss. 1, 7, 15, 24(1).
Constitution Act, 1982, s. 52(1).
Constitution of the United States of America, Art. III, s. 2(1).
Criminal Code, R.S.C. 1970, c. C-34, s. 251(4), (5), (6).
Rules of the Supreme Court of Canada, SOR/83-74, s. 32.

**Authors Cited**

Kates, Don B., Jr. and William T. Barker. "Mootness in Judicial Proceedings: Toward a Coherent Theory" (1974), 62 Calif. L.R. 1385.
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Sharpe, Robert J. "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide." In Robert J. Sharpe, ed., Charter Litigation. Toronto: Butterworths, 1987.
"The Mootness Doctrine in the Supreme Court" (1974), 88 Harvard L.R. 373.
Tribe, Laurence H. American Constitutional Law, 2nd ed. Mineola, N.Y.: Foundation Press, 1988.

APPEAL from a judgment of the Saskatchewan Court of Appeal (1987), 56 Sask. R. 129, 39 D.L.R. (4th) 731, [1987] 4 W.W.R. 385, 33 C.C.C. (3d) 402, 59 C.R. (3d) 223, dismissing an appeal from a judgment of Matheson J. (1983), 29 Sask. R. 16, 4 D.L.R. (4th) 112, [1984] 1 W.W.R. [page348] 15, 8 C.C.C. (3d) 392, 36 C.R. (3d) 259. Appeal dismissed.

Morris C. Shumiatcher, Q.C., and R. Bradley Hunter, for the appellant.
Claude R. Thomson, Q.C., and Robert W. Staley, for the intervener Interfaith Coalition on the Rights and Wellbeing of Women and Children.
Angela M. Costigan and Karla Gower, for the intervener R.E.A.L. Women of Canada.
Edward Sojonky, Q.C., for the respondent.
Mary Eberts and Helena Orton, for the intervener Women's Legal Education and Action Fund (LEAF).

Solicitors for the appellant: Shumiatcher - Fox, Regina.
Solicitors for the intervener Interfaith Coalition on the Rights and Wellbeing of Women and Children: Campbell, Godfrey & Lewtas, Toronto.
Solicitor for the intervener R.E.A.L. Women of Canada: Angela M. Costigan, Toronto.
Solicitor for the respondent: Frank Iacobucci, Ottawa.
Solicitors for the intervener Women's Legal Education and Action Fund (LEAF): Tory, Tory, DesLauriers & Binnington, Toronto.

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The judgment of the Court was delivered by

1 **SOPINKA J.**:-- This appeal by leave of this Court is from the Saskatchewan Court of Appeal, [1987] 4 W.W.R. 385, which affirmed the judgment at trial of Matheson J. of the Saskatchewan Court of Queen's Bench, [1984] 1 W.W.R. 15, dismissing the action of the plaintiff (appellant in this Court). In the courts below, the plaintiff attacked the validity of subss. (4), (5) and (6) of s. 251 of the Criminal Code, R.S.C. 1970, c. C-34, relating to abortion on the ground that they contravened protected rights of the foetus. Subsequent to the decision of the Saskatchewan Court of Appeal but by the time the appeal reached this Court, s. 251, including the subsections under attack in this action, had been struck down in R. v. Morgentaler, [1988] 1 S.C.R. 30 (hereinafter R. v. Morgentaler (No. 2)).

2 From this state of the proceedings it was apparent at the commencement of this appeal that a serious issue existed as to whether the appeal was moot. As well, it appeared questionable whether the appellant had lost his standing and, indeed, whether the matter was justiciable. The Court therefore called upon counsel to address these issues as a preliminary matter. Upon completion of these submissions, we reserved decision on these issues and heard the argument of the merits of the [page349] appeal so that we could dispose of the whole appeal without recalling the parties for argument should we decide that, notwithstanding the preliminary issues, the appeal should proceed.

3 In view of the conclusion that I have reached, it is necessary to deal with the issues of mootness and standing only. Since it is a change in the nature of these proceedings which gives rise to these issues, a review of the history of the action is necessary.

History of the Action

4 Mr. Borowski commenced an action in the Court of Queen's Bench of Saskatchewan by filing a statement of claim on September 5, 1978, which asked for the following relief:

> (a) An Order of this Honourable Court declaring section 251, subsections (4), (5) and (6) of the Criminal Code invalid and inoperative;
> (b) An Order of this Honourable Court declaring that the provisions of all Acts of the Parliament of Canada, and all legal instruments purporting to authorize the expenditure of public moneys for any of the purposes described in section 251, subsections (4), (5) and (6) are invalid and inoperative, and the outlay of such moneys is ultra vires and unlawful;
> (c) A permanent injunction enjoining the Minister of Finance, his servants and agents, from allocating, disbursing or in any way providing public moneys out of the Consolidated Revenue Fund for the establishment or maintenance of therapeutic abortion committees, for the performance of abortions or in support of any act or object relating to the abortion and destruction of individual human foetuses;
> (d) The costs of this action; and
> (e) Such further and other relief as to this Honourable Court seems just and expedient.

5 Prior to trial, a motion was brought by the respondents questioning the jurisdiction of the Court of Queen's Bench. That motion culminated in an appeal to this Court in which a central issue was Mr. Borowski's standing to bring the action. The resulting decision of the majority of this Court, reported in Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575, was that Mr.

Borowski had standing to attack the provisions of the Code referred to in his statement of claim. [page350] Martland J., speaking for the majority, stated, at p. 598:

> I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court. In my opinion, the respondent has met this test and should be permitted to proceed with his action.

**6** Laskin C.J., with whom Lamer J. concurred, would have denied standing on the basis that Mr. Borowski was not a person affected by the legislation and that there were others, such as doctors and hospitals, who might be so affected. The Chief Justice concluded, therefore, that Mr. Borowski did not have any judicially cognizable interest in the matter and that the Court ought to exercise its discretion to deny standing.

**7** An amended statement of claim was filed on April 18, 1983, in which the original claims based on an alleged violation of the Canadian Bill of Rights, R.S.C. 1970, App. III, were repeated. Allegations based upon the Canadian Charter of Rights and Freedoms, which had been proclaimed on April 17, 1982, were added. The prayer for relief claimed:

> (a) An Order of this Honourable Court declaring Subsections (4), (5) and (6) of Section 251 of the Criminal Code to be ultra vires, unconstitutional, invalid, inoperative and of no force or effect;
> (b) An Order of this Honourable Court declaring that the provisions of all Acts of the Parliament of Canada, and all legal instruments purporting to authorize the expenditure of public moneys for any of the purposes described in Subsections (4), (5) and (6) of Section 251 of the Criminal Code are ultra vires, inoperative, unconstitutional, invalid and of no force or effect and the outlay of such moneys is unlawful:
> (c) The costs of this action; and
> (d) Such further and other relief as to this Honourable Court seems just.

**8** The Saskatchewan Court of Queen's Bench dismissed Mr. Borowski's claim relating to an alleged violation of s. 1 of the Canadian Bill of Rights. [page351] Matheson J. held that both Morgentaler v. The Queen, [1976] 1 S.C.R. 616 (hereinafter Morgentaler v. The Queen (No. 1)) and Dehler v. Ottawa Civic Hospital (1980), 29 O.R. (2d) 677 (C.A.) (leave to appeal to S.C.C. refused [1981] 1 S.C.R. viii) concluded that the Canadian Bill of Rights did not give the courts the right to assess the substantive content or wisdom of legislation.

**9** Matheson J. noted that Mr. Borowski's principal argument under the Charter was that the foetus is a person and therefore should be afforded the protection of s. 7 of the Charter. It was held, however, that s. 251(4), (5), and (6) did not violate the Charter as a foetus is not included in "everyone" so as to trigger the application of any s. 7 rights.

**10** On appeal Mr. Borowski did not pursue his claim that government funding of abortions was unlawful. The Saskatchewan Court of Appeal dismissed Mr. Borowski's appeal by concluding that

neither s. 7 nor s. 15 (which had come into effect on April 17, 1985, prior to the hearing before the Court of Appeal) applied to a foetus. Speaking for the Court, Gerwing J.A. examined the historical treatment of the foetus as well as the language and legislative history of s. 7 and concluded that the guarantees of s. 7 were not intended to extend to the unborn. As well, the foetus was held not to be included in "every individual" for the purpose of s. 15.

**11** Leave to appeal to this Court was granted on September 3, 1987. The grounds for appeal alleged by the appellant in his notice of motion for leave to appeal refer primarily to ss. 7 and 15 of the Charter. On October 7, 1987, McIntyre J., pursuant to Rule 32 of the Rules of the Supreme Court of Canada, SOR/83-74, stated the following constitutional questions:

1. Does a child en ventre sa mère have the right to life as guaranteed by Section 7 of the Canadian Charter of Rights and Freedoms?
2. If the answer to question 1 is "yes", do subsections (4), (5) and (6) of Section 251 of the Criminal Code violate or deny the principles of fundamental justice, contrary to Section 7 of the Canadian Charter of Rights and Freedoms? [page352] 3. Does a child en ventre sa mère have the right to the equal protection and equal benefit of the law without discrimination because of age or mental or physical disability that are guaranteed by Section 15 of the Canadian Charter of Rights and Freedoms?
4. If the answer to question 3 is "yes", do subsections (4), (5) and (6) of Section 251 of the Criminal Code violate or deny the rights guaranteed by Section 15?
5. If the answer to question 2 is "yes" or if the answer to question 4 is "yes", are the provisions of subsections (4), (5) and (6) of Section 251 of the Criminal Code justified by Section 1 of the Canadian Charter of Rights and Freedoms, and therefore not inconsistent with the Constitution Act, 1982?

**12** On January 28, 1988, after leave to appeal was granted, this Court decided R. v. Morgentaler (No. 2), supra, in which all of s. 251 was found to violate s. 7 of the Charter. Accordingly, s. 251 in its entirety was struck down.

**13** In July of 1988 in light of this Court's judgment in R. v. Morgentaler (No. 2), supra, counsel on behalf of the Attorney General of Canada applied to adjourn the hearing of the appeal. The respondent argued that the issue was now moot as s. 251 of the Criminal Code had been nullified and that the two remaining constitutional questions (numbers 1 and 3) which simply ask whether a child en ventre sa mère is entitled to the protection of ss. 7 and 15 of the Charter respectively are not severable from the other, now moot constitutional questions. Although the respondent claimed the matter was moot, no application to quash the appeal was made. The application to adjourn the hearing of the appeal was denied by Chief Justice Dickson on July 19, 1988, leaving it to the Court to address the mootness issue.

**14** I am of the opinion that the appeal should be dismissed on the grounds that: (1) Mr. Borowski's case has been rendered moot and (2) he has lost his standing. When section 251 was struck down, the basis of the action disappeared. The initial prayer for relief was no longer applicable. The foundation for standing upon which the previous decision of this Court was based also disappeared.

[page353]

Mootness

**15** The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

**16** The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[page354]

When is an Appeal Moot? -- The Authorities

**17** The first stage in the analysis requires a consideration of whether there remains a live controversy. The controversy may disappear rendering an issue moot due to a variety of reasons, some of which are discussed below.

**18** In The King ex rel. Tolfree v. Clark, [1944] S.C.R. 69, this Court refused to grant leave to appeal to applicants seeking a judgment excluding the respondents from sitting and exercising their functions as Members of the Ontario Legislative Assembly. However, the Legislative Assembly had been dissolved prior to the hearing before this Court. As a result, Duff C.J., on behalf of the Court, held at p. 72:

> It is one of those cases where, the state of facts to which the proceedings in the lower Courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation has disappeared. In accordance with well-settled principle, therefore, the appeal could not properly be entertained. [Emphasis added.]

**19** A challenged municipal by-law was repealed prior to a hearing in Moir v. The Corporation of the Village of Huntingdon (1891), 19 S.C.R. 363, leading to a conclusion that the appealing party had no actual interest and that a decision could have no effect on the parties except as to costs. Similarly, in a fact situation analogous to this appeal, the Privy Council refused to address the constitutionality of challenged legislation where two statutes in question were repealed prior to the hearing: Attorney-General for Alberta v. Attorney- General for Canada, [1939] A.C. 117 (P.C.)

**20** Appeals have not been entertained in situations in which the appellant had agreed to an undertaking to pay the respondent the damages awarded in the court below plus costs regardless of the disposition of the appeal: Coca-Cola Company of Canada Ltd. v. Mathews, [1944] S.C.R. 385, and Sun Life Assurance Company of Canada v. Jervis, [1944] A.C. 111. In Coca-Cola v. Mathews, Rinfret C.J. held the result of the undertaking was to eliminate any further lis between the parties such [page355] that the Court would have been forced to decide an abstract proposition of law.

**21** As well, the sale of a restaurant for which a renewal of a licence was sought as required by the impugned municipal by-law rendered an issue technically moot: Vic Restaurant Inc. v. City of Montreal, [1959] S.C.R. 58. Issues in contention may be of a short duration resulting in an absence of a live controversy by the time of appellate review. Such a situation arose in International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange, [1967] S.C.R. 628, in which the cessation of a strike between the parties ended the actual dispute over the validity of an injunction prohibiting certain strike action by one party.

**22** The particular circumstances of the parties to an action may also eliminate the tangible nature of a dispute. The death of parties challenging the validity of a parole revocation hearing (Re Cadeddu and The Queen (1983), 41 O.R. (2d) 481 (C.A.)) and a speeding ticket (R. v. Mercure, [1988] 1 S.C.R. 234) ended any concrete controversy between the parties.

**23** As well, the inapplicability of a statute to the party challenging the legislation renders a dispute moot: Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357. This is similar to those situations in which an appeal from a criminal conviction is seen as moot where the accused has fulfilled his sentence prior to an appeal: Re Maltby v. Attorney-General of Saskatchewan (1984), 10 D.L.R. (4th) 745 (Sask. C.A.).

**24** The issue of mootness has arisen more frequently in American jurisprudence, and there, the doctrine is more fully developed. This may be due in part to the constitutional requirement, contained in s. 2(1) of Article III of the American Constitution, that there exist a "case or controversy":

> Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, [page356] or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

However, despite the constitutional enshrinement of the principle, the mootness doctrine has its roots in common law principles similar to those in Canada: see "The Mootness Doctrine in the Su-

preme Court" (1974), 88 Harvard L.R. 373, at p. 374. Situations resulting in a finding of mootness are similar to those in Canada. For example, in Hall v. Beals, 396 U.S. 45 (1969), a challenge to a Colorado voter residency requirement of six months was held moot due to a legislative change in the law removing the plaintiff from the application of the statute. Mootness was also raised in United States v. W. T. Grant Co., 345 U.S. 629 (1953), where a defendant voluntarily ceased allegedly unlawful conduct. Similarly, in Sibron v. New York, 392 U.S. 40 (1968), mootness was an issue where an accused completed his sentence prior to an appeal of his conviction.

**25** The American jurisprudence indicates a similar willingness to consider the merits of an action in some circumstances even when the controversy is no longer concrete and tangible. The rule that abstract, hypothetical or contingent questions will not be heard is not absolute (see: Tribe, American Constitutional Law (2nd ed. 1988), at p. 84; Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory" (1974), 62 Calif. L.R. 1385). A two-stage process is involved in which a court may consider the merits of an appeal even where the issue is moot.

[page357]

Is this Appeal Moot?

**26** In my opinion, there is no longer a live controversy or concrete dispute as the substratum of Mr. Borowski's appeal has disappeared. The basis for the action was a challenge relating to the constitutionality of subss. (4), (5) and (6) of s. 251. That section of the Criminal Code having been struck down in R. v. Morgentaler (No. 2), supra, the raison d'être of the action has disappeared. None of the relief claimed in the statement of claim is relevant. Three of the five constitutional questions that were set explicitly concern s. 251 and are no longer applicable. The remaining two questions addressing the scope of ss. 7 and 15 Charter rights are not severable from the context of the original challenge to s. 251. These questions were only ancillary to the central issue of the alleged unconstitutionality of the abortion provisions of the Criminal Code. They were a mere step in the process of measuring the impugned provision against the Charter.

**27** In any event, this Court is not bound by the wording of any constitutional question which is stated. Nor may the question be used to transform an appeal into a reference: Vadebonc(oe)ur v. Landry, [1977] 2 S.C.R. 179, at pp. 187-88, and Bisaillon v. Keable, [1983] 2 S.C.R. 60, at p. 71. The procedural requirements of Rule 32 of the Rules of the Supreme Court of Canada are not designed to introduce new issues but to define with precision the constitutional points in issue which emerge from the record. Rule 32 provides:

> 32. (1) When a party to an appeal
>
> (a) intends to raise a question as to the constitutional validity or the constitutional applicability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder,
> (b) intends to urge the inoperability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder.

> such party shall, upon notice to the other parties, apply to the Chief Justice or a Judge for the purpose of stating the question, within thirty days from the granting of leave to appeal or within thirty days from the filing of the notice of appeal in an appeal with leave of the court [page358] of final resort in a province, the Federal Court of Appeal, or in an appeal as of right.

The questions cannot, therefore, be employed as an independent basis for supporting an appeal that is otherwise moot.

**28** By reason of the foregoing, I conclude that this appeal is moot. It is necessary, therefore, to move to the second stage of the analysis by examining the basis upon which this Court should exercise its discretion either to hear or to decline to hear this appeal.

The Exercise of Discretion: Relevant Criteria

**29** Since the discretion which is exercised relates to the enforcement of a policy or practice of the Court, it is not surprising that a neat set of criteria does not emerge from an examination of the cases. This same problem in the United States led commentators there to remark that "the law is a morass of inconsistent or unrelated theories, and cogent judicial generalization is sorely needed." (Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", supra, at p. 1387). I would add that more than a cogent generalization is probably undesirable because an exhaustive list would unduly fetter the court's discretion in future cases. It is, however, a discretion to be judicially exercised with due regard for established principles.

**30** In formulating guidelines for the exercise of discretion in departing from a usual practice, it is instructive to examine its underlying rationalia. To the extent that a particular foundation for the practice is either absent or its presence tenuous, the reason for its enforcement disappears or diminishes.

**31** The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully [page359] argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. For example, although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context. This was one of the factors which played a role in the exercise of this Court's discretion in Vic Restaurant Inc. v. City of Montreal, supra. The restaurant, for which a renewal of permits to sell liquor and operate a restaurant was sought, had been sold and therefore no mandamus for a licence could be given. Nevertheless, there were prosecutions outstanding against the appellant for violation of the municipal by-law which was the subject of the legal challenge. Determination of the validity of this by-law was a collateral consequence which provided the appellant with a necessary interest which otherwise would have been lacking.

**32** In the United States, the role of collateral consequences in the exercise of discretion to hear a case is well recognized. In Southern Pacific Co. v. Interstate Commerce Commission, 219 U.S. 433 (1911), the United States Supreme Court was asked to examine an order of the Interstate Commerce Commission which fixed maximum rates for certain transportation charges. Despite the expiry of this order, it was held, in part, that the remaining potential liability of the railway company to shippers comprised a collateral consequence justifying a decision on the merits. The principle

that collateral consequences of an already completed cause of action warrant appellate review was most clearly stated in Sibron v. New York, supra. The appellant in that case appealed his conviction although his sentence had already been completed. At page 55, Warren C.J. stated:

> ... most criminal convictions do in fact entail adverse collateral legal consequences. The mere "possibility" that this will be the case is enough to preserve a criminal case from ending "ignominiously in the limbo of mootness."

[page360]

**33** In Canada, the cases of Law Society of Upper Canada v. Skapinker, supra, and R. v. Mercure, supra, illustrate the workings of this principle. In those cases, the presence of interveners who had a stake in the outcome supplied the necessary adversarial context to enable the Court to hear the cases.

**34** The second broad rationale on which the mootness doctrine is based is the concern for judicial economy. (See: Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide", Charter Litigation.) It is an unfortunate reality that there is a need to ration scarce judicial resources among competing claimants. The fact that in this Court the number of live controversies in respect of which leave is granted is a small percentage of those that are refused is sufficient to highlight this observation. The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.

**35** The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action. The influence of this factor along with that of the first factor referred to above is evident in Vic Restaurant Inc. v. City of Montreal, supra.

**36** Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. This was the situation in International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange, supra. The issue was the validity of an interlocutory injunction prohibiting certain strike action. By the time the case reached this Court the strike had been settled. This is the usual result of the operation of a temporary injunction in labour cases. If the point was ever to be tested, it almost had to be in a case [page361] that was moot. Accordingly, this Court exercised its discretion to hear the case. To the same effect are Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec, [1970] S.C.R. 713, and Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America, [1973] S.C.R. 756. The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

**37** There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law. See Minister of Manpower and Immigration v. Hardayal, [1978] 1 S.C.R. 470, and Kates and Barker, supra, at pp. 1429-1431. Locke J. alluded to this in Vic Restaurant Inc. v. City of Montreal, supra, at p. 91: "The question, as I have said, is one of general public interest to municipal institutions throughout Canada."

**38** This was the basis for the exercise of this Court's discretion in the Re Opposition by Quebec to a Resolution to amend the Constitution, [1982] 2 S.C.R. 793. The question of the constitutionality of the patriation of the Constitution had, in effect, been rendered moot by the occurrence of the event. The Court stated at p. 806:

> While this Court retains its discretion to entertain or not to entertain an appeal as of right where the issue has become moot, it may, in the exercise of its discretion, take into consideration the importance of the constitutional issue determined by a court of appeal judgment which would remain unreviewed by this Court. [page362] In the circumstances of this case, it appears desirable that the constitutional question be answered in order to dispel any doubt over it and it accordingly will be answered.

**39** Patently, the mere presence of an issue of national importance in an appeal which is otherwise moot is insufficient. National importance is a requirement for all cases before this Court except with respect to appeals as of right; the latter, Parliament has apparently deemed to be in a category of sufficient importance to be heard here. There must, therefore, be the additional ingredient of social cost in leaving the matter undecided. This factor appears to have weighed heavily in the decision of the majority of this Court in Forget v. Quebec (Attorney General), [1988] 2 S.C.R. 90.

**40** The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch. This need to maintain some flexibility in this regard has been more clearly identified in the United States where mootness is one aspect of a larger concept of justiciability. (See: Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", supra, and Tribe, American Constitutional Law (2nd ed. 1988), at p. 67.)

**41** In my opinion, it is also one of the three basic purposes of the mootness doctrine in Canada and a most important factor in this case. I generally agree with the following statement in P. Macklem and E. Gertner: "Re Skapinker and Mootness Doctrine" (1984), 6 Sup. Ct. L. Rev. 369, at p. 373:

> The latter function of the mootness doctrine -- political flexibility -- can be understood as the added degree of flexibility, in an allegedly moot dispute, in the law-making function of the Court. The mootness doctrine permits the Court not to hear a case on the ground that there no longer exists a dispute between the parties, notwithstanding the fact that it is of the opinion that it [page363] is a matter

> of public importance. Though related to the factor of judicial economy, insofar as it implies a determination of whether deciding the case will lead to unnecessary precedent, political flexibility enables the Court to be sensitive to its role within the Canadian constitutional framework, and at the same time reflects the degree to which the Court can control the development of the law.

I prefer, however, not to use the term "political flexibility" in order to avoid confusion with the political questions doctrine. In considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role.

**42** 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.

Exercise of Discretion: Application of Criteria

**43** Applying these criteria to this appeal, I have little or no concern about the absence of an adversarial relationship. The appeal was fully argued with as much zeal and dedication on both sides as if the matter were not moot.

**44** The second factor to be considered is the need to promote judicial economy. Counsel for the appellant argued that an extensive record had been developed in the courts below which would be wasted if the case were not decided on the merits. Although there is some merit in this position, the same can be said for most cases that come to this Court. To give effect to this argument would emasculate the mootness doctrine which by definition applies if at any stage the foundation for the action disappears. Neither can the fact that this Court reserved on the preliminary points and heard the appeal be weighed in favour of the appellant. In the absence of a motion to quash in advance of the appeal, it was the only practical [page364] course that could be taken to prevent the possible bifurcation of the appeal. It would be anomalous if, by reserving on the mootness question and hearing the argument on the merits, the Court fettered its discretion to decide it.

**45** None of the other factors that I have canvassed which justify the application of judicial resources is applicable. This is not a case where a decision will have practical side effects on the rights of the parties. Nor is it a case that is capable of repetition, yet evasive of review. It will almost certainly be possible to bring the case before the Court within a specific legislative context or possibly in review of specific governmental action. In addition, an abstract pronouncement on foetal rights in this case would not necessarily promote judicial economy as it is very conceivable that the courts will be asked to examine specific legislation or governmental action in any event. Therefore, while I express no opinion as to foetal rights, it is far from clear that a decision on the merits will obviate the necessity for future repetitious litigation.

**46** Moreover, while it raises a question of great public importance, this is not a case in which it is in the public interest to address the merits in order to settle the state of the law. The appellant is asking for an interpretation of ss. 7 and 15 of the Canadian Charter of Rights and Freedoms at large. In a legislative context any rights of the foetus could be considered or at least balanced against the rights of women guaranteed by s. 7. See R. v. Morgentaler (No. 2), supra, per Dickson C.J., at p. 75; per Beetz J. at pp. 122-23; per Wilson J. at pp. 181-82. A pronouncement in favour of the [page365] appellant's position that a foetus is protected by s. 7 from the date of conception would decide the

issue out of its proper context. Doctors and hospitals would be left to speculate as to how to apply such a ruling consistently with a woman's rights under s. 7. During argument the question was posed to counsel for R.E.A.L. Women as to what a hospital would do with a pregnant woman who required an abortion to save her life in the face of a ruling in favour of the appellant's position. The answer was that doctors and legislators would have to stay up at night to decide how to deal with the situation. This state of uncertainty would clearly not be in the public interest. Instead of rendering the law certain, a decision favourable to the appellant would have the opposite effect.

**47** Even if I were disposed in favour of the appellant in respect to the first two factors which I have canvassed, I would decline to exercise a discretion in favour of deciding this appeal on the basis of the third. One element of this third factor is the need to demonstrate some sensitivity to the effectiveness or efficacy of judicial intervention. The need for courts to exercise some flexibility in the application of the mootness doctrine requires more than a consideration of the importance of the subject matter. The appellant is requesting a legal opinion on the interpretation of the Canadian Charter of Rights and Freedoms in the absence of legislation or other governmental action which would otherwise bring the Charter into play. This is something only the government may do. What the appellant seeks is to turn this appeal into a private reference. Indeed, he is not seeking to have decided the same question that was the subject of his action. That question related to the validity of s. 251 of the Criminal Code. He now wishes to ask a question that relates to the Canadian Charter of Rights and Freedoms alone. This is not a request to decide a moot question but to decide a different, abstract question. To accede to this request would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the traditional role of the Court.

**48** Having decided that this appeal is moot, I would decline to exercise the Court's discretion to decide it on the merits.

Standing

**49** Mr. Borowski's original action alleged that subss. (4), (5) and (6) of the Criminal Code [page366] violated the s. 1 right to life of the Canadian Bill of Rights: Minister of Justice of Canada v. Borowski, supra. This Court held Borowski had standing as he was able to demonstrate a "genuine interest" in the validity of the legislation.

**50** Standing was granted premised upon Mr. Borowski's desire to challenge specific legislation. Martland J. considered the earlier standing decisions of the Supreme Court in Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138, and Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265, and concluded that the appellant had standing by reason of his "genuine interest as a citizen in the validity of the legislation" under attack (at p. 598):

**51** The Court relied heavily upon the decision in Thorson, supra, where Laskin J. (as he then was), speaking for the majority, stated at p. 161:

> In my opinion, standing of a federal taxpayer seeking to challenge the constitutionality of federal legislation is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process. Central to that discretion is the justiciability of the issue sought to be raised .... [Emphasis added.]

I believe these decisions were clear in allowing an expanded basis for standing where specific legislation is challenged on constitutional grounds.

**52** There have been two significant changes in the nature of this action since this Court granted Mr. Borowski standing in 1981. The claim is now premised primarily upon an alleged right of a foetus to life and equality pursuant to ss. 7 and 15 of the Canadian Charter of Rights and Freedoms. Secondly, by holding s. 251 to be of no force and effect in R. v. Morgentaler (No. 2), supra, the legislative context of this claim has disappeared.

**53** By virtue of s. 24(1) of the Charter and 52(1) of the Constitution Act, 1982, there are two possible [page367] means of gaining standing under the Charter. Section 24(1) provides:

> 24. (1) Anyone whose rights or freedoms as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

**54** In my opinion s. 24(1) cannot be relied upon here as a basis for standing. Section 24(1) clearly requires an infringement or denial of a Charter-based right. The appellant's claim does not meet this requirement as he alleges that the rights of a foetus, not his own rights, have been violated.

**55** Nor can s. 52(1) of the Constitution Act, 1982 be invoked to extend standing to Mr. Borowski. Section 52(1) reads:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This section offers an alternative means of securing standing based on the Thorson, McNeil, Borowski trilogy expansion of the doctrine.

**56** Nevertheless, in the same manner that the "standing trilogy" referred to above was based on a challenge to specific legislation, so too a challenge based on s. 52(1) of the Constitution Act, 1982 is restricted to litigants who challenge a law or governmental action pursuant to power granted by law. The appellant in this appeal challenges neither "a law" nor any governmental action so as to engage the provisions of the Charter. What the appellant now seeks is a naked interpretation of two provisions of the Charter. This would require the Court to answer a purely abstract question which would in effect sanction a private reference. In my opinion, the original basis for the appellant's standing is gone and the appellant lacks standing to pursue this appeal.

**57** Accordingly, the appeal is dismissed on both the grounds that it is moot and that the appellant lacks standing to continue the appeal. In my opinion, in [page368] lieu of applying to adjourn the appeal, the respondent should have moved to quash. Certainly, such a motion should have been brought after the adjournment was denied. Failure to do so has resulted in the needless expense to the appellant of preparing and arguing the appeal before this Court. In the circumstance, it is appropriate that the respondent pay to the appellant the costs of the appeal incurred subsequent to the disposition of the motion to adjourn which was made on July 19, 1988.

qp/i/qlcvd

# Tab 4

# Tamil Co-operative Homes Inc. v. Arulappah
# [Indexed as: Tamil Co-operative Homes Inc. v. Arulappah]

49 O.R. (3d) 566

[2000] O.J. No. 3372

Docket No. C32908

Court of Appeal for Ontario

**Labrosse, Doherty and Austin JJ.A.**

May 10, 2000*
*Note: This judgment recently came to the attention of the editors.

*Appeal -- Mootness -- Board of Directors of non-profit housing co-operative voting to terminate membership and occupancy rights of member and applying to court for judgment to that effect -- Applications judge holding that s. 171.13(12) of Co-operative Corporations Act contemplated reasonableness standard of review of decision of Board to terminate membership and occupancy rights -- Applications judge refusing to exercise discretion under s. 171.21(1)(a) of Act to refuse to grant application for possession where it would be unfair to do so -- Parties reaching settlement before member's appeal heard by Divisional Court -- Divisional Court hearing appeal on merits despite its mootness because appeal raised important issues and represented unique opportunity to address issue of standard of review -- Member's appeal allowed -- Court of Appeal setting aside order of Divisional Court and dismissing appeal as moot -- Issue of applicable standard of review could be raised in case in which the re was live dispute between parties -- Neither standard of review nor scope of discretion granted to court under s. 171.21(1)(a) raising broad question of significant social importance -- Co-operative Corporations Act, R.S.O. 1990, c. C.35, ss. 171.13(12), 171.21(1)(a).*

The Board of Directors of the appellant non-profit housing co-operative voted to terminate the membership and occupancy rights of the respondent member and applied to the court for a judgment to that effect. The applications judge ruled in favour of the appellant. In so doing, she found that s. 171.13(12) of the Co-operative Corporations Act contemplated a reasonableness standard of review of the Board of Director's decision to terminate membership and occupancy rights, and she refused to exercise her discretion under s. 171.21(1)(a) of the Act to refuse to grant an application for possession where it would be unfair to do so. The respondent appealed to the Divisional Court.

By the time the appeal was heard, the parties had settled their dispute. The Divisional Court decided to hear the appeal on the merits despite its mootness since the standard of review called for by s. 171.13(12) of the Act and the ambit of the discretion described in s. 171.21(1)(a) were important and uniq ue issues. The court allowed the respondent's appeal. The appellant appealed.

Held, the order of the Divisional Court should be set aside and the appeal should be dismissed as moot.

The appeal was moot, and this was not a case in which the court should exercise its discretion to hear the merits of the appeal despite the mootness.

The issue of the appropriate standard of review would undoubtedly present itself for determination on appeal in a case in which there was still a live dispute between the parties. Neither the standard of review issue nor the scope of the discretion granted under s. 171.21(1)(a) of the Act raised a question of general public importance.

Judicial economy would not be promoted by hearing this appeal on the merits. The Divisional Court's resolution of the standard of review issue was of limited value in resolving future cases. Section 171.13(12) does not articulate a standard of review. The determination of the operative standard of review is as much an exercise in judicial self-discipline as it is an exercise in statutory interpretation. The standard of review will vary depending upon the issues raised. It is impossible to hold that s. 171.13(12) creates a single standard of review applicable to each and every challenge made to a Board of Director's decision to terminate membership and occupancy rights. Far from avoiding further litigation, the decision of the Divisional Court would inspire further litigation in which the broad language of that decision would be parsed and crafted to fit the specific circumstances of subsequent cases.

The factors relied on by the Divisional Court in its determination to hear the appeal despite its mootness did not provide a proper basis upon which it would exercise its discretion in favour of hearing a moot appeal. The factors relevant to the exercise of that discretion did not warrant the departure from the usual practice whereby courts will not hear moot appeals. The Divisional Court should have dismissed the appeal as moot.

Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342, 75 Sask. R. 82, 57 D.L.R. (4th) 231, 92 N.R. 110, [1989] 3 W.W.R. 97, 38 C.R.R. 232, 47 C.C.C. (3d) 1, 33 C.P.C. (2d) 105, consd

Other cases referred to

M. v. H., [1999] 2 S.C.R. 3, 43 O.R. (3d) 254n, 171 D.L.R. (4th) 577, 238 N.R. 179, 62 C.R.R. (2d) 1, 46 R.F.L. (4th) 32; New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46, 216 N.B.R. (2d) 25, 177 D.L.R. (4th) 124, 244 N.R. 276, 552 A.P.R. 25, 66 C.R.R. (2d) 267, 50 R.F.L. (4th) 63, 26 C.R. (5th) 203; Ryegate (Tecumseh) Co-operative Homes Inc. v. Stallard, Ont. Div. Ct., April 4, 2000 (unreported); Sault Dock Co. v. Sault Ste. Marie (City), [1973] 2 O.R. 479, 34 D.L.R. (3d) 327 (C.A.); St. Louis v. Feleki (1993), 107 D.L.R. (4th) 767 (Ont. Div. Ct.) Statutes referred to

Co-operative Corporations Act, R.S.O. 1990, c. C.35 (am. 1992, c. 19), ss. 171.13(12), 171.21(1)(a) Courts of Justice Act, R.S.O. 1990, c. C.43, s. 134(1)(a)

APPEAL from a judgment of the Divisional Court ( (1999), 44 O.R. (3d) 120, 25 R.P.R. (3d) 85) allowing an appeal from a judgment declaring membership and occupancy rights in a non-profit housing co-operative be terminated.

Bruce D. Woodrow, for appellant.
Allan Rouben, for respondent.

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The judgment of the court was delivered by

**DOHERTY J.A.**: --

I.

[1] This appeal is brought pursuant to leave granted by this court on September 27, 1999. The substantive issues raised in the appeal have sparked divergent views in the courts below. The parties have, however, settled their dispute. The appeal is moot. This is not a case in which the court should exercise its discretion to hear the merits of the appeal despite the fact that it is moot.

II.

[2] The appellant, Tamil Co-operative Homes Inc. (the "Co-operative") is a non-profit housing co-operative founded in 1985 primarily to assist Tamil refugees in obtaining affordable housing. The Co-operative owns an apartment building and persons residing in the building are members of the Co-operative. The relationship between the Co-operative and its members is governed by the provisions of the Co-operative Corporations Act, R.S.O. 1990, c. C.35, as amended by S.O. 1992, c. 19 (the "Act") and the by-laws of the Co-operative. The respondent, Ms. Arulappah, was a member of the Co-operative and occupied a unit in the building owned by the Co-operative from 1988 until the spring of 1994.

[3] In April 1994, the Board of Directors voted to terminate the membership and occupancy rights of Ms. Arulappah effective May 20, 1994. In June 1994, the Co-operative obtained a default judgment declaring that Ms. Arulappah's membership and occupancy rights were terminated and directing that a writ of possession issue. On March 16, 1995, an order was made by Pitt J. setting aside the default judgment and directing that the application be heard on its merits. The application was heard over four days by Molloy J. in June and July of 1995. In a judgment dated March 6, 1996, she ruled in favour of the Co-operative and declared Ms. Arulappah's membership and occupancy rights terminated. She also held that the Co-operative was entitled to possession of the unit formerly occupied by Ms. Arulappah.

[4] In so holding, Molloy J. found that s. 171.13(12) of the Act contemplated a reasonableness standard of review of the Board of Directors' decision to terminate membership and occupancy rights. In addition, Molloy J. refused to exercise her discretion under s. 171.21(1)(a) of the Act which provides that the court may refuse to grant an application for possession where it would "be unfair to grant it".

[5] Ms. Arulappah appealed to the Divisional Court. For some unexplained reason, her appeal was not perfected until August 1998. By the time the appeal came on for oral argument in the Divi-

sional Court in February 1999, the Co-operative and Ms. Arulappah had settled their dispute. In executed minutes of settlement, Ms. Arulappah abandoned any claim to membership in the Co-operative and any claim to occupy the unit in the building. In the minutes of settlement, both parties agreed that the appeal should proceed "in the discretion of the court" and that there would be no order as to costs.

[6] The parties made full disclosure of the settlement to the Divisional Court. They submitted, however, that the court should hear the merits of the appeal. Counsel advised the court that the standard of review called for by s. 171.13(12) of the Act and the ambit of the discretion described in s. 171.21(1) (a) of the Act were significant issues that had not been addressed at the appellate level since the Act was amended in 1992.

[7] Both the majority (per Rosenberg J.) and the dissent (Cumming J.) in the Divisional Court acknowledged that the dispute between the parties was moot [reported (1999), 44 O.R. (3d) 120]. Both proceeded to address the merits of the appeal describing the issues as "important" and "unique".

[8] The appeal in the Divisional Court proceeded on the basis that the Co-operative had reasonable grounds for reaching the decision it did, but that the facts on which the Board relied were incorrect. This was the conclusion reached by Molloy J. While both parties indicated a willingness to have the appeal heard in the Divisional Court on the basis of the two factual assumptions outlined above, it is clear from the facta filed in this court that neither party accepts either assumption as accurate.

[9] Ms. Arulappah's position prevailed with the majority in the Divisional Court. Rosenberg J. held that s. 178.13(12) of the Act required that the court determine whether the grounds for eviction were established. In his view, it was inappropriate to speak in terms of deference to the decision of the Board of Directors. Rosenberg J. further held that Molloy J. should have exercised her discretion under s. 171.21(1)(a) of the Act and refused to grant an order of possession. In coming to that conclusion, Rosenberg J. relied on facts which were in dispute.

[10] Cumming J., in dissent, agreed with the standard of review applied by Molloy J. He did not address the scope of the discretion provided for in s. 171.21(1)(a) of the Act.

[11] The Co-operative sought leave to appeal. In the leave material, it was made clear that the dispute between the parties had been settled. Ms. Arulappah opposed leave, but did not rely on the mootness of the appeal as a basis for that opposition.

[12] Neither party addressed the mootness issue in their facta filed in this court. At the outset of oral argument, the court confirmed with counsel that there was no ongoing dispute between the parties and advised counsel that it wished to hear submissions on the propriety of addressing the merits of a moot appeal. Counsel were granted a two-day adjournment to prepare their submissions. Both argued that the court should hear the appeal. At the conclusion of oral argument, the court advised counsel that it would not hear the merits of the appeal and that reasons would follow.

III.

[13] Courts exist to resolve real disputes between parties and not to provide opinions in response to hypothetical or academic problems. Courts will, however, on occasion address the merits of an appeal even where the dispute giving rise to the appeal has dissolved. Where a question of mootness is raised, the court must first decide whether the appeal is moot. If the appeal is moot, the court

must then decide whether it should nonetheless hear the merits of the appeal. The discretion to hear a moot appeal is intended to address those exceptional cases where the circumstances are such that the general rule against hearing appeals where there is no live controversy between the parties should not be followed: Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342 at p. 353, 47 C.C.C. (3d) 1 at p. 9; New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46, 177 D.L.R. (4th) 124; M. v. H., [1999] 2 S.C.R. 3 at pp. 44-45, 171 D.L.R. (4th) 577.

[14] In Borowski, supra, at p. 353 S.C.R., p. 9 C.C.C., Sopinka J. defined mootness in these terms:

> Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.

[15] Counsel for the Co-operative argued that the dispute was not entirely moot from his Co-operative's point of view in that a pronouncement by the court would be relevant in any potential future litigation in which the Co-operative sought an order under the Act terminating membership and occupancy rights. The mere fact that a party may at some future time resort to the same process which is the subject of the proceedings before the court does not give that party a direct or indirect interest in the litigation so as to give continued life to the controversy which precipitated the litigation.' at end of document]

[16] I do not think there could be a clearer example of mootness than this case. The dispute between the parties has been settled by minutes of settlement. Neither party now has anything to gain or lose directly or indirectly from this litigation. Counsel for Ms. Arulappah frankly acknowledged that she had no greater or lesser interest in the outcome of this appeal than would anyone else who happened to have a interest in the operation of the Act. The parties remain adversarial only in the sense that they take different positions on the legal issues raised before the courts below. They are aptly described as opposing debaters taking affirmative and negative positions on legal propositions and not as litigants opposed in interest in an ongoing legal controversy. The appeal is moot.

IV.

[17] Having concluded, as did the Divisional Court, that the appeal is moot, I turn to the second stage of the analysis -- should the court nonetheless hear the appeal? At this stage of the analysis, the onus rests on the party or parties seeking a determination on the merits to demonstrate why the court should depart from its usual practice of refusing to hear moot appeals. In Borowski, supra, Sopinka J. dealt at length with several of the factors to be considered in determining whether to hear a moot appeal. He was, however, careful to observe that the court's exercise of its discretion to hear moot appeals could not be fettered by the rigid application of pre-established criteria. He noted that the discretion had to be exercised with a view to the circumstances of each case and with careful regard to the "usual" practice of declining to decide the merits of moot appeals. He said, at p. 358 S.C.R., p. 13 C.C.C.:

> In formulating guidelines for the exercise of discretion in departing from a usual practice, it is instructive to examine its underlying rationalia. To the extent that a particular foundation for the practice is either absent or its presence tenuous, the reason for its enforcement disappears or diminishes.

[18] The Divisional Court decided to hear the appeal for two reasons. First, it viewed the appeal as presenting a "unique opportunity" to address the standard of review issue. Second, it agreed with the parties that the issues raised were important and warranted appellate consideration.

[19] The uniqueness referred to by the Divisional Court flowed from the finding of Molloy J. that the Co-operative's decision was reasonable but wrong on the facts as she found them to be. That finding made the determination of the applicable standard of review crucial to the outcome of the proceedings before Molloy J. It did not, however, give the question of the applicable standard of review any uniqueness. The determination of the standard of review to be applied on an application under s. 171.13(12) of the Act must be made in every application brought under that section. I see no reason to think that the standard of review issue would not present itself for determination on appeal in a case in which there was still a real dispute between the parties.

[20] The standard of review is not an issue which is "evasive of review" in the sense that it is not amenable to judicial scrutiny through the normal litigation process: New Brunswick (Minister of Health and Community Services) v. G. (J.), supra, at pp. 71-72. Where a legal issue raised in a moot appeal is one which will recur in the normal flow of litigation involving live disputes between parties, it is best to determine that issue in a genuine adversarial context: Borowski, supra, at p. 361 S.C.R., p. 15 C.C.C.; St. Louis v. Feleki (1993), 107 D.L.R. (4th) 767 (Ont. Div. Ct.).

[21] Nor can it be suggested that the scope of the discretion granted to a court under s. 171.21(1)(a) raises a unique question. I do not understand the Divisional Court to have suggested otherwise.

[22] With respect to the contrary view, I see nothing unique in the legal issues raised before the Divisional Court which justified hearing a moot appeal.

[23] The Divisional Court also decided to hear the appeal because it regarded the standard of review issue as an important one. I agree that the issue is important in the sense that it must be addressed on all applications brought under s. 171.13 of the Act. In some situations, it will be determinative of the application.

[24] The importance of a legal issue raised in a proceeding is a relevant consideration in determining whether a court should hear a moot appeal. It is not, however, determinative. There are an almost infinite number of important legal issues lurking in the myriad of rules and regulations governing the citizenry upon which those interested in the issue would appreciate the opinion of an appellate court. If the importance of a legal issue is enough to overcome concerns associated with hearing moot appeals, the doctrine has little value. It means no more than that the court should not waste its time and resources deciding unimportant legal issues in cases where there is no longer a live dispute between the parties. This would seem self-evident.[2] at end of document]

[25] The importance of the legal issue raised when considered in the context of the exercise of the discretion to hear moot appeals must be measured by reference to the public importance of the legal issue. As Sopinka J. said in Borowski, supra, at p. 361 S.C.R., p. 15 C.C.C.:

> There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law.

(Emphasis added)

[26] A review of the cases in which the Supreme Court of Canada has heard moot appeals demonstrates that there was a strong public interest in the resolution of the issues raised in those cases. The issues involved questions of broad social and constitutional importance. Furthermore, the parties to the appeals (including various levels of government and other intervenors) and the record before the court ensured that the court was in a position to make a fully informed decision on the broad issues raised in those appeals: see M. v. H., supra.

[27] This appeal has none of the characteristics associated with public interest litigation. The only parties to the proceedings, the Co-operative and Ms. Arulappah, are private litigants with no claim to represent any interest beyond their own. Nor does the record go beyond the specifics of the dispute between the Co-operative and Ms. Arulappah. Stripped to its essentials, this is a case that began as a routine piece of private litigation and, like many pieces of private litigation, it was settled in the course of the proceedings. Subsequent to that settlement, at the instigation of the parties, it took on the appearance of a reference to the Divisional Court based on hypothetical facts. The reference process is, of course, not available to private litigants.

[28] There is nothing in this record to support the contention that the standard of review issue raised broad questions of significant social importance so as to warrant its resolution despite the mootness of the appeal. Nor can it be said that the scope of the discretion granted under s. 171.21(1)(a) of the Act raised a question of general public importance.

[29] Counsel submitted that this court should take a pragmatic approach when determining whether to hear the merits of the appeal. They argued that considerations of judicial economy now favour a hearing of the appeal on the merits even if those same concerns spoke against hearing the appeal on the merits in the Divisional Court. Counsel observed that considerable time and effort have been expended by the parties and by the judiciary to bring the case to this stage. They contend that those efforts will be wasted, at least to some extent, if this court now declines to hear the merits of the appeal. It is their position that a definitive resolution of the issues raised by this appeal by the province's highest court is worth the modest additional expenditure of judicial resources that would be required.

[30] A similar argument was made and rejected in Borowski, supra. In that case, the appeal became moot after leave to appeal had been granted by the Supreme Court of Canada. It was argued that the substantial efforts put into the case before it became moot would be wasted if the Supreme Court of Canada did not hear the merits of the appeal. In rejecting this argument, Sopinka J. said, at p. 363 S.C.R., p. 17 C.C.C.:

> To give effect to this argument would emasculate the mootness doctrine which by definition applies if at any stage the foundation for the action disappears.

[31] Like Sopinka J., I do not think that the need to promote the efficient use of judicial resources can be approached on an ad hoc basis. It is not simply a question of the judicial resources needed to dispose of the particular appeal. The question must be whether the case should have been permitted to continue to absorb judicial resources once it became moot. That question must be answered having regard not only to the specific case, but also to similar cases which would have an equal demand on the resources of the court. As this appeal was moot before the Divisional Court heard the appeal, this court should hear the merits of the appeal only if it is satisfied that the Divisional Court could,

in the proper exercise of its discretion, have heard the appeal. If the Divisional Court should not have heard the appeal, its failure to properly exercise its discretion cannot become an argument in favour of this court hearing the merits of the appeal.

[32] Nor does the fact that this court granted leave to appeal speak in favour of hearing the merits of the appeal. The granting of leave by one panel cannot bind or limit the powers of the panel hearing the actual appeal. This is particularly true here where the issue of mootness was not raised on the leave to appeal application.

[33] The parties also argue that judicial economy would be promoted by hearing the appeal on the merits in that it would foreclose litigation on these legal issues in subsequent cases. I cannot agree. The question of the scope of the discretion provided for in s. 171.21(1)(a) of the Act could not be addressed effectively in a factual vacuum. This is perhaps why Cumming J. did not address the issue in dissent and why Ms. Arulappah in this court takes the position that the majority should not have considered that issue. Judicial discretion must respond to specific circumstances. Any attempts to describe discretion in a factual vacuum will provide little or no guidance to those required to apply that discretion in subsequent cases.

[34] The Divisional Court's resolution of the standard of review issue is similarly of limited value in resolving future cases. Section 171.13(12) does not articulate a standard of review. The determination of the operative standard of review is as much an exercise in judicial self-discipline as it is an exercise in statutory interpretation. As Campbell J. observed in Ryegate (Tecumseh) Co-operative Homes Inc. v. Stallard, supra, at para. 36, the standard of review will vary depending upon the issues raised. It is impossible, in my view, to hold that s. 171.13(12) of the Act creates a single standard of review applicable to each and every challenge made to a Board of Directors' decision to terminate membership and occupancy rights. Far from avoiding further litigation, it seems to me that the decision of the Divisional Court will inspire further litigation in which the broad language of that decision will be parsed and crafted to fit the specific circumstances of subsequent cases. R yegate (Tecumseh) Co-operative Homes Inc. v. Stallard, supra, indicates that the case-by-case interpretative process is already underway.

V.

[35] The factors relied on by the Divisional Court in its determination to hear the appeal despite its mootness do not provide a proper basis upon which it could exercise its discretion in favour of hearing a moot appeal. The factors relevant to the exercise of that discretion do not warrant the departure from the usual practice whereby courts will not hear moot appeals. The Divisional Court should have dismissed the appeal as moot. Section 134(1)(a) of the Courts of Justice Act, R.S.O. 1990, c. C.43 provides that this court may make any order or decision that ought to or could have been made by the court or tribunal appealed from.

[36] Under that authority, I would set aside the order of the Divisional Court and make an order dismissing the appeal as moot. I would make no order as to costs.

Order of Divisional Court set aside and appeal dismissed as moot.

Notes

Note 1: Ryegate (Tecumseh) Co-operative Homes Inc. v. Stallard, released April 4, 2000 (Ont. Div. Ct.), provides an example of a case where it could be said that the appeal was not moot even though the specific issues of possession and membership in the Co-operative were no longer an issue. In that case, the trial judge had held that certain by-laws of the Co-operative were unreasonable. The Co-operative had an interest in challenging and reversing that ruling apart entirely from the specific dispute between the Co-operative and Mr. Stallard.

Note 2: There is a second reason, applicable to cases like this where leave to appeal is needed, why the importance of a legal issue cannot, standing alone, justify the hearing of a moot appeal. This court will grant leave to appeal from decisions made by the Divisional Court in the exercise of its appellate jurisdiction only in cases where the issues raised have importance beyond a particular case: Sault Dock Co. v. Sault Ste. Marie (City), [1973] 1 O.R. 479, 34 D.L.R. (3d) 327 (C.A.). If the importance of an issue alone is enough to justify the hearing of a moot appeal, then moot appeals which require leave are in no different position than other appeals requiring leave: Borowski, supra, at p. 362 S.C.R., p. 16 C.C.C.

# Tab 5

*Case Name:*

# Sino-Forest Corp. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended**
**AND IN THE MATTER OF a Plan of Compromise or Arrangement of Sino-Forest Corporation**

**[2012] O.J. No. 5500**

**2012 ONCA 816**

**299 O.A.C. 107**

**98 C.B.R. (5th) 20**

**114 O.R. (3d) 304**

**2012 CarswellOnt 14701**

Dockets: C56115, C56118 and C56125

Ontario Court of Appeal
Toronto, Ontario

**S.T. Goudge, A. Hoy and S.E. Pepall JJ.A.**

Heard: November 13, 2012.
Judgment: November 23, 2012.

(62 paras.)

*Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Priority -- Appeal by auditors and underwriters for Sino-Forest from order made under Companies' Creditors Arrangement Act dismissed -- Shareholders of Sino-Forest commenced several class action proceedings alleging misrepresentation of company's financial situation -- Appellants were named as defendants and claimed indemnity and contribution from Sino-Forest -- Order under appeal directed that appellants' contribution and indemnity claims were equity claims for purpose of s. 2(1) of CCAA -- Supervising judge made no er-*

*ror in interpreting provision or in determining that it was not premature to characterize appellants' claims -- Companies' Creditors Arrangement Act, ss. 2(1), 6(8).*

Appeal by the auditors and underwriters for Sino-Forest from an order directing that certain claims were equity claims for the purpose of s. 2(1) of the Companies' Creditors Arrangement Act (CCAA). In 2009, the CCAA was amended to provide that general creditors were to be paid in full before an equity claim. The appellants provided underwriting and auditor services relevant to several Sino-Forest equity and note offerings. In 2011 and 2012, several proposed class actions were commenced by shareholders against Sino-Forest and certain officers, directors, employees and the appellants. The actions sought damages on the basis Sino-Forest had caused losses to shareholders by misrepresenting its assets and financial situation, and that the appellants had failed to detect and disclose those misrepresentations. The appellants claimed against Sino-Forest for contribution and indemnity arising from the proposed class actions. Sino-Forest subsequently sought protection pursuant to the CCAA. In the judgment under appeal, the judge concluded that the shareholder and related indemnity claims were equity claims within the meaning of the CCAA. The appellants submitted that the judge erred in interpreting the meaning of an "equity claim" and erred in determining the issue prior to completion of the claims procedure in Sino-Forest's CCAA proceeding.

HELD: Appeal dismissed. The judge below properly found that the appellants' claims for contribution and indemnity were equity claims for the purpose of s. 2(1) of the CCAA, based on the expansive language used by Parliament, the absence of certain language, the avoidance of surplusage, the logic of the provision as a whole, and the purpose of the 2009 amendments. The shareholder claims were for a monetary loss resulting from ownership of an equity interest. There was an obvious link between the appellants' indemnity claims and the shareholders' claims. The provision as a whole supported a claim for contribution or indemnity by parties other than shareholders. The judge did not err in determining that the appellants' claims were equity claims prior to the completion of the claims procedure in Sino-Forest's CCAA proceeding. The need to immediately address the characterization of the appellants' claims was clear and did not result in prejudice to the appellants.

**Statutes, Regulations and Rules Cited:**

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 2, s. 121

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2(1), s. 2(1), s. 2(1), s. 2(1)(d), s. 2(1)(e), s. 6(8)

Negligence Act, R.S.O. 1990, c. N.1, s. 2

**Appeal From:**

On appeal from the order of Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated July 27, 2012, with reasons reported at 2012 ONSC 4377, 92 C.B.R. (5th) 99.

**Counsel:**

Peter H. Griffin, Peter J. Osborne and Shara Roy, for the appellant Ernst & Young LLP.

Sheila Block and David Bish, for the appellants Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation (now known as DWM Securities Inc.), RBC Dominion

Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd. (now known as Canaccord Genuity Corp.), Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated, successor by merger to Banc of America Securities LLC.

Kenneth Dekker, for the appellant BDO Limited.

Robert W. Staley, Derek J. Bell and Jonathan Bell, for the respondent Sino-Forest Corporation.

Benjamin Zarnett, Robert Chadwick and Julie Rosenthal, for the respondent the Ad Hoc Committee of Noteholders.

Clifton Prophet, for the Monitor FTI Consulting Canada Inc.

Kirk M. Baert, A. Dimitri Lascaris and Massimo Starnino, for the respondent the Ad Hoc Committee of Purchasers.

Emily Cole, for the respondent Allen Chan.

Erin Pleet, for the respondent David Horsley.

David Gadsden, for the respondent Pöyry (Beijing).

Larry Lowenstein and Edward A. Sellers, for the respondent the Board of Directors.

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The following judgment was delivered by

THE COURT:--

## I OVERVIEW

1 In 2009, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("CCAA"), was amended to expressly provide that general creditors are to be paid in full before an equity claim is paid.

2 This appeal considers the definition of "equity claim" in s. 2(1) of the CCAA. More particularly, the central issue is whether claims by auditors and underwriters against the respondent debtor, Sino-Forest Corporation ("Sino-Forest"), for contribution and indemnity fall within that definition. The claims arise out of proposed shareholder class actions for misrepresentation.

3 The appellants argue that the supervising judge erred in concluding that the claims at issue are equity claims within the meaning of the CCAA and in determining the issue before the claims procedure established in Sino-Forest's CCAA proceeding had been completed.

4 For the reasons that follow, we conclude that the supervising judge did not err and accordingly dismiss this appeal.

## II THE BACKGROUND

### (a) The Parties

5 Sino-Forest is a Canadian public holding company that holds the shares of numerous subsidiaries, which in turn own, directly or indirectly, forestry assets located principally in the People's

Republic of China. Its common shares are listed on the Toronto Stock Exchange. Sino-Forest also issued approximately $1.8 billion of unsecured notes, in four series. Trading in Sino-Forest shares ceased on August 26, 2011, as a result of a cease-trade order made by the Ontario Securities Commission.

**6** The appellant underwriters[1] provided underwriting services in connection with three separate Sino-Forest equity offerings in June 2007, June 2009 and December 2009, and four separate Sino-Forest note offerings in July 2008, June 2009, December 2009 and October 2010. Certain underwriters entered into agreements with Sino-Forest in which Sino-Forest agreed to indemnify the underwriters in connection with an array of matters that could arise from their participation in these offerings.

**7** The appellant BDO Limited ("BDO") is a Hong Kong-based accounting firm that served as Sino-Forest's auditor between 2005 and August 2007 and audited its annual financial statements for the years ended December 31, 2005 and December 31, 2006.

**8** The engagement agreements governing BDO's audits of Sino-Forest provided that the company's management bore the primary responsibility for preparing its financial statements in accordance with Generally Accepted Accounting Principles ("GAAP") and implementing internal controls to prevent and detect fraud and error in relation to its financial reporting.

**9** BDO's Audit Report for 2006 was incorporated by reference into a June 2007 prospectus issued by Sino-Forest regarding the offering of its shares to the public. This use by Sino-Forest was governed by an engagement agreement dated May 23, 2007, in which Sino-Forest agreed to indemnify BDO in respect of any claims by the underwriters or any third party that arose as a result of the further steps taken by BDO in relation to the issuance of the June 2007 prospectus.

**10** The appellant Ernst & Young LLP ("E&Y") served as Sino-Forest's auditor for the years 2007 to 2012 and delivered Auditors' Reports with respect to the consolidated financial statements of Sino-Forest for fiscal years ended December 31, 2007 to 2010, inclusive. In each year for which it prepared a report, E&Y entered into an audit engagement letter with Sino-Forest in which Sino-Forest undertook to prepare its financial statements in accordance with GAAP, design and implement internal controls to prevent and detect fraud and error, and provide E&Y with its complete financial records and related information. Some of these letters contained an indemnity in favour of E&Y.

**11** The respondent Ad Hoc Committee of Noteholders consists of noteholders owning approximately one-half of Sino-Forest's total noteholder debt.[2] They are creditors who have debt claims against Sino-Forest; they are not equity claimants.

**12** Sino-Forest has insufficient assets to satisfy all the claims against it. To the extent that the appellants' claims are accepted and are treated as debt claims rather than equity claims, the noteholders' recovery will be diminished.

### (b) The Class Actions

**13** In 2011 and January of 2012, proposed class actions were commenced in Ontario, Quebec, Saskatchewan and New York State against, amongst others, Sino-Forest, certain of its officers, directors and employees, BDO, E&Y and the underwriters. Sino-Forest is sued in all actions.[3]

**14** The proposed representative plaintiffs in the class actions are shareholders of Sino-Forest. They allege that: Sino-Forest repeatedly misrepresented its assets and financial situation and its compliance with GAAP in its public disclosure; the appellant auditors and underwriters failed to detect these misrepresentations; and the appellant auditors misrepresented that their audit reports were prepared in accordance with generally accepted auditing standards ("GAAS"). The representative plaintiffs claim that these misrepresentations artificially inflated the price of Sino-Forest's shares and that proposed class members suffered damages when the shares fell after the truth was revealed in 2011.

**15** The representative plaintiffs in the Ontario class action seek approximately $9.2 billion in damages. The Quebec, Saskatchewan and New York class actions do not specify the quantum of damages sought.

**16** To date, none of the proposed class actions has been certified.

### (c) CCAA Protection and Proofs of Claim

**17** On March 30, 2012, Sino-Forest sought protection pursuant to the provisions of the CCAA. Morawetz J. granted the initial order which, among other things, appointed FTI Consulting Canada Inc. as the Monitor and stayed the class actions as against Sino-Forest. Since that time, Morawetz J. has been the supervising judge of the CCAA proceedings. The initial stay of the class actions was extended and broadened by order dated May 8, 2012.

**18** On May 14, 2012, the supervising judge granted an unopposed claims procedure order which established a procedure to file and determine claims against Sino-Forest.

**19** Thereafter, all of the appellants filed individual proofs of claim against Sino-Forest seeking contribution and indemnity for, among other things, any amounts that they are ordered to pay as damages to the plaintiffs in the class actions. Their proofs of claim advance several different legal bases for Sino-Forest's alleged obligation of contribution and indemnity, including breach of contract, contractual terms of indemnity, negligent and fraudulent misrepresentation in tort, and the provisions of the *Negligence Act*, R.S.O. 1990, c. N.1.

### (d) Order under Appeal

**20** Sino-Forest then applied for an order that the following claims are equity claims under the CCAA: claims against Sino-Forest arising from the ownership, purchase or sale of an equity interest in the company, including shareholder claims ("Shareholder Claims"); and any indemnification claims against Sino-Forest related to or arising from the Shareholder Claims, including the appellants' claims for contribution or indemnity ("Related Indemnity Claims").

**21** The motion was supported by the Ad Hoc Committee of Noteholders.

**22** On July 27, 2012, the supervising judge granted the order sought by Sino-Forest and released a comprehensive endorsement.

**23** He concluded that it was not premature to determine the equity claims issue. It had been clear from the outset of Sino-Forest's CCAA proceedings that this issue would have to be decided and that the expected proceeds arising from any sales process would be insufficient to satisfy the claims of creditors. Furthermore, the issue could be determined independently of the claims procedure and without prejudice being suffered by any party.

**24** He also concluded that both the Shareholder Claims and the Related Indemnity Claims should be characterized as equity claims. In summary, he reasoned that:

* The characterization of claims for indemnity turns on the characterization of the underlying primary claims. The Shareholder Claims are clearly equity claims and they led to and underlie the Related Indemnity Claims;
* The plain language of the CCAA, which focuses on the nature of the claim rather than the identity of the claimant, dictates that both Shareholder Claims and Related Indemnity Claims constitute equity claims;
* The definition of "equity claim" added to the CCAA in 2009 broadened the scope of equity claims established by pre-amendment jurisprudence;
* This holding is consistent with the analysis in *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 5018, 83 C.B.R. (5th) 123, which dealt with contractual indemnification claims of officers and directors. Leave to appeal was denied by this court, 2012 ONCA 10, 90 C.B.R. (5th) 141; and
* "It would be totally inconsistent to arrive at a conclusion that would enable either the auditors or the underwriters, through a claim for indemnification, to be treated as creditors when the underlying actions of shareholders cannot achieve the same status" (para. 82). To hold otherwise would run counter to the scheme established by the CCAA and would permit an indirect remedy to the shareholders when a direct remedy is unavailable.

**25** The supervising judge did not characterize the full amount of the claims of the auditors and underwriters as equity claims. He excluded the claims for defence costs on the basis that while it was arguable that they constituted claims for indemnity, they were not necessarily in respect of an equity claim. That determination is not appealed.

## III INTERPRETATION OF "EQUITY CLAIM"

### (a) Relevant Statutory Provisions

**26** As part of a broad reform of Canadian insolvency legislation, various amendments to the CCAA were proclaimed in force as of September 18, 2009.

**27** They included the addition of s. 6(8):

> No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Section 22.1, which provides that creditors with equity claims may not vote at any meeting unless the court orders otherwise, was also added.

**28** Related definitions of "claim", "equity claim", and "equity interest" were added to s. 2(1) of the CCAA:

> In this Act,
>
> ...

"claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*;

...

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,
(b) a return of capital,
(c) a redemption or retraction obligation,
(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); [Emphasis added.]

"equity interest" means

(a) in the case of a company other than an income trust, a share in the company -- or a warrant or option or another right to acquire a share in the company -- other than one that is derived from a convertible debt, and
(b) in the case of an income trust, a unit in the income trust -- or a warrant or option or another right to acquire a unit in the income trust -- other than one that is derived from a convertible debt;

**29** Section 2 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") defines a "claim provable in bankruptcy". Section 121 of the BIA in turn specifies that claims provable in bankruptcy are those to which the bankrupt is subject.

2. "claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;
121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act. [Emphasis added.]

### (b) The Legal Framework Before the 2009 Amendments

**30** Even before the 2009 amendments to the CCAA codified the treatment of equity claims, the courts subordinated shareholder equity claims to general creditors' claims in an insolvency. As the supervising judge described:

> [23] Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise.
>
> [24] The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited upside potential when purchasing shares. Creditors have no corresponding upside potential.
>
> [25] As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement. [Citations omitted.][4]

### (c) The Appellants' Submissions

**31** The appellants essentially advance three arguments.

**32** First, they argue that on a plain reading of s. 2(1), their claims are excluded. They focus on the opening words of the definition of "equity claim" and argue that their claims against Sino-Forest are not claims that are "in respect of an equity interest" because they do not have an equity interest in Sino-Forest. Their relationships with Sino-Forest were purely contractual and they were arm's-length creditors, not shareholders with the risks and rewards attendant to that position. The policy rationale behind ranking shareholders below creditors is not furthered by characterizing the appellants' claims as equity claims. They were service providers with a contractual right to an indemnity from Sino-Forest.

**33** Second, the appellants focus on the term "claim" in paragraph (e) of the definition of "equity claim", and argue that the claims in respect of which they seek contribution and indemnity are the shareholders' claims against them in court proceedings for damages, which are not "claims" against Sino-Forest provable within the meaning of the BIA, and, therefore, not "claims" within s. 2(1). They submit that the supervising judge erred in focusing on the characterization of the underlying primary claims.

**34** Third, the appellants submit that the definition of "equity claim" is not sufficiently clear to have changed the existing law. It is assumed that the legislature does not intend to change the common law without "expressing its intentions to do so with irresistible clearness": *District of Parry Sound Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 39, citing *Goodyear Tire & Rubber Co. of Canada Ltd. v. T. Eaton Co. Ltd.*, [1956] S.C.R. 610, at p. 614. The appellants argue that the supervising judge's interpretation of "equity claim" dramatically alters the common law as reflected in *National Bank of Canada v. Merit Energy Ltd.*, 2001 ABQB 583, 294 A.R. 15, aff'd 2002 ABCA 5, 299 A.R. 200. There the court determined that in an insolvency, claims of auditors and underwriters for indemnification are not to be treated in the same manner as claims by shareholders. Furthermore, the Senate debates that preceded the enactment of the amendments did not specifically comment on the effect of the amendments on claims by auditors and underwriters. The amendments should be interpreted as codifying the pre-existing common law as reflected in *National Bank of Canada v. Merit Energy Ltd.*

**35** The appellants argue that the decision of *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.* is distinguishable because it dealt with the characterization of claims for damages by an

equity investor against officers and directors, and it predated the 2009 amendments. In any event, this court confirmed that its decision denying leave to appeal should not be read as a judicial precedent for the interpretation of the meaning of "equity claim" in s. 2(1) of the CCAA.

**(d) Analysis**

*(i) Introduction*

**36** The exercise before this court is one of statutory interpretation. We are therefore guided by the following oft-cited principle from Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), at p. 87:

> [T]he 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.

**37** We agree with the supervising judge that the definition of equity claim focuses on the nature of the claim, and not the identity of the claimant. In our view, the appellants' claims for contribution and indemnity are clearly equity claims.

**38** The appellants' arguments do not give effect to the expansive language adopted by Parliament in defining "equity claim" and read in language not incorporated by Parliament. Their interpretation would render paragraph (e) of the definition meaningless and defies the logic of the section.

*(ii) The expansive language used*

**39** The definition incorporates two expansive terms.

**40** First, Parliament employed the phrase "*in respect of*" twice in defining equity claim: in the opening portion of the definition, it refers to an equity claim as a "claim that is *in respect of* an equity interest", and in paragraph (e) it refers to "contribution or indemnity *in respect of* a claim referred to in any of paragraphs (a) to (d)" (emphasis added).

**41** The Supreme Court of Canada has repeatedly held that the words "in respect of" are "of the widest possible scope", conveying some link or connection between two related subjects. In *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 16, citing *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39, the Supreme Court held as follows:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. [Emphasis added in *CanadianOxy*.]

That court also stated as follows in *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94, at para. 26:

> The words "in respect of" have been held by this Court to be words of the broadest scope that convey some link between two subject matters. [Citations omitted.]

**42** It is conceded that the Shareholder Claims against Sino-Forest are claims for "a monetary loss resulting from the ownership, purchase or sale of an equity interest", within the meaning of paragraph (d) of the definition of "equity claim". There is an obvious link between the appellants' claims against Sino-Forest for contribution and indemnity and the shareholders' claims against Sino-Forest. The legal proceedings brought by the shareholders asserted their claims against Sino-Forest together with their claims against the appellants, which gave rise to these claims for contribution and indemnity. The causes of action asserted depend largely on common facts and seek recovery of the same loss.

**43** The appellants' claims for contribution or indemnity against Sino-Forest are therefore clearly connected to or "in respect of" a claim referred to in paragraph (d), namely the shareholders' claims against Sino-Forest. They are claims in respect of equity claims by shareholders and are provable in bankruptcy against Sino-Forest.

**44** Second, Parliament also defined equity claim as "including a claim for, among others", the claims described in paragraphs (a) to (e). The Supreme Court has held that this phrase "including" indicates that the preceding words - "a claim that is in respect of an equity interest" - should be given an expansive interpretation, and include matters which might not otherwise be within the meaning of the term, as stated in *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, at p. 1041:

> [T]hese words are terms of extension, designed to enlarge the meaning of preceding words, and not to limit them.
>
> ... [T]he natural inference is that the drafter will provide a specific illustration of a subset of a given category of things in order to make it clear that that category extends to things that might otherwise be expected to fall outside it.

**45** Accordingly, the appellants' claims, which clearly fall within paragraph (e), are included within the meaning of the phrase a "claim that is in respect of an equity interest".

*(iii) What Parliament did not say*

**46** "Equity claim" is not confined by its definition, or by the definition of "claim", to a claim advanced by the holder of an equity interest. Parliament could have, but did not, include language in paragraph (e) restricting claims for contribution or indemnity to those made by shareholders.

*(iv) An interpretation that avoids surplusage*

**47** A claim for contribution arises when the claimant for contribution has been sued. Section 2 of the *Negligence Act* provides that a tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort. The securities legislation of the various provinces provides that an issuer, its underwriters, and, if they consented to the disclosure of information in the prospectus, its auditors, among others, are jointly and severally liable for a misrepresentation in the prospectus, and provides for rights of contribution.[5]

**48** Counsel for the appellants were unable to provide a satisfactory example of when a holder of an equity interest in a debtor company would seek contribution under paragraph (e) against the

debtor in respect of a claim referred to in any of paragraphs (a) to (d). In our view, this indicates that paragraph (e) was drafted with claims for contribution or indemnity by non-shareholders rather than shareholders in mind.

**49** If the appellants' interpretation prevailed, and only a person with an equity interest could assert such a claim, paragraph (e) would be rendered meaningless, and as Lamer C.J. wrote in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28:

> It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage.

*(v) The scheme and logic of the section*

**50** Moreover, looking at s. 2(1) as a whole, it would appear that the remedies available to shareholders are all addressed by ss. 2(1)(a) to (d). The logic of ss. 2(1)(a) to (e) therefore also supports the notion that paragraph (e) refers to claims for contribution or indemnity not by shareholders, but by others.

*(vi) The legislative history of the 2009 amendments*

**51** The appellants and the respondents each argue that the legislative history of the amendments supports their respective interpretation of the term "equity claim". We have carefully considered the legislative history. The limited commentary is brief and imprecise. The clause by clause analysis of Bill C-12 comments that "[a]n equity claim is defined to include any claim that is related to an equity interest".[6] While, as the appellants submit, there was no specific reference to the position of auditors and underwriters, the desirability of greater conformity with United States insolvency law to avoid forum shopping by debtors was highlighted in 2003, some four years before the definition of "equity claim" was included in Bill C-12.

**52** In this instance the legislative history ultimately provided very little insight into the intended meaning of the amendments. We have been guided by the plain words used by Parliament in reaching our conclusion.

*(vii) Intent to change the common law*

**53** In our view the definition of "equity claim" is sufficiently clear to alter the pre-existing common law. *National Bank of Canada v. Merit Energy Ltd.*, an Alberta decision, was the single case referred to by the appellants that addressed the treatment of auditors' and underwriters' claims for contribution and indemnity in an insolvency before the definition was enacted. As the supervising judge noted, in a more recent decision, *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*, the courts of this province adopted a more expansive approach, holding that contractual indemnification claims of directors and officers were equity claims.

**54** We are not persuaded that the practical effect of the change to the law implemented by the enactment of the definition of "equity claim" is as dramatic as the appellants suggest. The operations of many auditors and underwriters extend to the United States, where contingent claims for reimbursement or contribution by entities "liable with the debtor" are disallowed pursuant to s. 502(e)(1)(B) of the U.S. Bankruptcy Code, 11 U.S.C.S.[7]

*(viii) The purpose of the legislation*

**55** The supervising judge indicated that if the claims of auditors and underwriters for contribution and indemnity were not included within the meaning of "equity claim", the CCAA would permit an indirect remedy to the shareholders when a direct remedy is not available. We would express this concept differently.

**56** In our view, in enacting s. 6(8) of the CCAA, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest *not* diminish the assets of the debtor available to general creditors in a restructuring. If a shareholder sues auditors and underwriters in respect of his or her loss, in addition to the debtor, and the auditors or underwriters assert claims of contribution or indemnity against the debtor, the assets of the debtor available to general creditors would be diminished by the amount of the claims for contribution and indemnity.

## IV PREMATURITY

**57** We are not persuaded that the supervising judge erred by determining that the appellants' claims were equity claims before the claims procedure established in Sino-Forest's CCAA proceeding had been completed.

**58** The supervising judge noted at para. 7 of his endorsement that from the outset, Sino-Forest, supported by the Monitor, had taken the position that it was important that these proceedings be completed as soon as possible. The need to address the characterization of the appellants' claims had also been clear from the outset. The appellants have not identified any prejudice that arises from the determination of the issue at this stage. There was no additional information that the appellants have identified that was not before the supervising judge. The Monitor, a court-appointed officer, supported the motion procedure. The supervising judge was well positioned to determine whether the procedure proposed was premature and, in our view, there is no basis on which to interfere with the exercise of his discretion.

## V SUMMARY

**59** In conclusion, we agree with the supervising judge that the appellants' claims for contribution or indemnity are equity claims within s. 2(1)(e) of the CCAA.

**60** We reach this conclusion because of what we have said about the expansive language used by Parliament, the language Parliament did not use, the avoidance of surplusage, the logic of the section, and what, from the foregoing, we conclude is the purpose of the 2009 amendments as they relate to these proceedings.

**61** We see no basis to interfere with the supervising judge's decision to consider whether the appellants' claims were equity claims before the completion of the claims procedure.

## VI DISPOSITION

**62** This appeal is accordingly dismissed. As agreed, there will be no costs.

S.T. GOUDGE J.A.
A. HOY J.A.
S.E. PEPALL J.A.

cp/ln/e/qlmdl/qlpmg/qlced/qlcas/qlhcs

1 Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation (now known as DWM Securities Inc.), RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd. (now known as Canaccord Genuity Corp.), Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated, successor by merger to Banc of America Securities LLC.

2 Noteholders holding in excess of $1.296 billion, or 72%, of Sino-Forest's approximately $1.8 billion in noteholders' debt have executed written support agreements in favour of the Sino-Forest CCAA plan as of March 30, 2012. These include noteholders represented by the Ad Hoc Committee of Noteholders.

3 None of the appellants are sued in Saskatchewan and all are sued in Ontario. E&Y is also sued in Quebec and New York and the appellant underwriters are also sued in New York.

4 The supervising judge cited the following cases as authority for these propositions: *Blue Range Resource Corp., Re*, 2000 ABQB 4, 259 A.R. 30; *Stelco Inc., Re* (2006), 17 C.B.R. (5th) 78 (Ont. S.C.); *Central Capital Corp. (Re)* (1996), 27 O.R. (3d) 494 (C.A.); *Nelson Financial Group Ltd., Re*, 2010 ONSC 6229, 71 C.B.R. (5th) 153; *EarthFirst Canada Inc., Re*, 2009 ABQB 316, 56 C.B.R. (5th) 102.

5 *Securities Act*, R.S.O. 1990, c. S.5, s. 130(1), (8); *Securities Act*, R.S.A. 2000, c. S-4, s. 203(1), (10); *Securities Act*, R.S.B.C. 1996, c. 418, s. 131(1), (11); *The Securities Act*, C.C.S.M. c. S50, s. 141(1), (11); *Securities Act*, S.N.B. 2004, c. S-5.5, s. 149(1), (9); *Securities Act*, R.S.N.L. 1990, c. S-13, s. 130(1), (8); *Securities Act*, R.S.N.S. 1989, c. 418, s. 137(1), (8); *Securities Act*, S.Nu. 2009, c. 12, s. 111(1), (12); *Securities Act*, S.N.W.T. 2008, c. 10, s. 111(1), (12); *Securities Act*, R.S.P.E.I. 1988, c. S-3.1, s. 111(1), (12); *Securities Act*, R.S.Q. c. V-1.1, ss. 218, 219, 221; *The Securities Act, 1988*, S.S. 1988-89, c. S-42.2, s. 137(1), (9); *Securities Act*, S.Y. 2007, c. 16, s. 111(1), (13).

6 We understand that this analysis was before the Standing Senate Committee on Banking, Trade and Commerce in 2007.

7 The United States Bankruptcy Court for the District of Delaware in *In Re: Mid-American Waste Systems, Inc.*, 228 B.R. 816 (1999), indicated that this provision applies to underwriters' claims, and reflects the policy rationale that such stakeholders are in a better position to evaluate the risks associated with the issuance of stock than are general creditors.

# Tab 6

*Case Name:*

# Canwest Global Communications (Re)

**IN THE MATTER OF Section 11 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a Plan of Compromise or Arrangement of Canwest Global Communications and the Other Applicants**

**[2010] O.J. No. 2984**

2010 ONSC 3537

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

Ontario Superior Court of Justice
Commercial List

**S.E. Pepall J.**

Oral judgment: June 23, 2010.

(30 paras.)

*Bankruptcy and involvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Applications -- Sanction by court -- Application by debtor companies for order accepting filing of plan, authorizing establishment of two creditor classes and approving certain documentation allowed -- After initial order of protection granted, parties mediated outstanding issues -- Mediation resulted in new arrangement which required changes to plan -- New transaction amended documentation in respect of transaction that court had already approved to reflect successful resolution of certain outstanding matters -- Amended transaction was fair and reasonable and negotiated resolution of parties' differences was in best interests of debtor companies and stakeholders.*

Application by the debtor companies for an order accepting the filing of a plan, authorizing the establishment of two creditor classes and the calling of a meeting to vote on the plan, and approving certain documentation. An initial order granting protection to the debtor companies under the CCAA was granted in 2009. It was granted on the basis of a filing based on an agreement which contemplated that the debt of the debtor companies would be converted into equity of a restructured company. As part of that transaction noteholders agreed to reduce their recovery of the equity of the restructured company and allow it to be distributed to shareholders. After an equity solicitation

process one bid was considered to be best over all and it was approved by the court. However, certain issues regarding a shareholders agreement remained unresolved and a mediation was conducted. The mediation resulted in a new arrangement under which shareholders would not receive any cash or equity interest, contrary to what they expected to receive on the basis of the filing. The new arrangement also involved changes to the equity compensation plans. At least one shareholder took the position that the new arrangement was a breach of a fundamental term of the CCAA filing upon which he and others had relied. Consequently, some of the shareholders objected to the requested relief.

HELD: Application allowed. The new transaction amended the documentation in respect of the transaction that the court had already approved to reflect the successful resolution of certain outstanding matters. The amended transaction was fair and reasonable and the negotiated resolution of the parties' differences was in the best interests of the debtor companies and their stakeholders.

**Statutes, Regulations and Rules Cited:**

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2(1), s. 3(8), s. 11

**Counsel:**

*Lyndon Barnes, Jeremy Dacks and Shawn Irving,* for the CMI Entities.

*David Byers and Marie Konyukhova,* for the Monitor.

*M.P. Gottlieb and Vince Mercier,* for Shaw Communications Inc.

*Robert Staley, Derek Bell and Jonathan Bell,* for the Shareholder Group.

*Mario Forte,* for the Special Committee of the Board of Directors.

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

*Hugh O'Reilly,* for Canwest Retirees.

*Peter Osborne,* for Management Directors.

*Steven Weisz,* for CIBC Asset-Based Lending Inc.

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## REASONS FOR DECISION

**1 S.E. PEPALL J.** (orally):-- The Initial Order granting CCAA protection to the CMI Entities was granted by me on October 6, 2009. Unlike the sister restructuring of the LP Entities, this CCAA proceeding has experienced certain significant problems and hurdles. As will be discussed, many if not all of these have been overcome. The CMI Entities now seek an order amongst other things: (i) accepting the filing of a Plan based on the Amended Shaw Transaction; (ii) authorizing the CMI Entities to establish two classes of creditors and to call meetings of those creditors to vote on the Plan; and (iii) approving certain documentation relating to the Amended Shaw Transaction.

**2** A shareholder group consisting of members of the Asper family, the Asper Foundation, Blott Asset Management LLC, two U.S. equity funds and four unnamed Canadian individuals objected to

the relief requested. They call themselves the Ad Hoc Group of Canwest Shareholders (the "Shareholder Group").

**3** They complained about a variety of things including the canvassing of the market, the value received and the absence of a "fiduciary out" provision. They also stated that the process was unfair to shareholders and disregarded the promise of 2.3% equity value for the shareholders.

**4** As mentioned, on October 6, 2009, I granted an Initial Order under the CCAA. In the materials filed in support of the motion, the Applicants stated that they were insolvent and I so found. This is a prerequisite to an Initial Order under the CCAA[1].

**5** I do not propose to review the entire history of these proceedings which has been discussed before in various reasons for decision rendered by me, however, I will mention a few significant facts.

**6** The CCAA filing on October 6, 2009, was described as a prepackaged filing and was based on a Support Agreement entered into with members of the Ad Hoc Committee of 8% Senior Subordinated Noteholders (the "Ad Hoc Committee"). The filing and the original recapitalization transaction ("ORT") described therein contemplated that the current debt of the CMI Entities would be converted into equity of a restructured Canwest Global. As part of that transaction, the Ad Hoc Committee agreed to reduce its allocated recovery by 2.3% of the equity of a restructured Canwest Global and to allow it to be distributed to the existing shareholders.

**7** The ORT proposed that one or more Canadians would invest at least $65 million for a minimum 20% of the equity of a restructured Canwest Global. It was also a condition that the CW Investments Co. Shareholders Agreement between CMI, 4414616 Canada Inc., Goldman Sachs Capital Partners and certain of its affiliates (the "GS Parties") and CW Investments Co. be amended or restated or otherwise dealt with in a manner acceptable to CMI and the Ad Hoc Committee.

**8** Others who were not CCAA applicants included CW Investments Co. In August, 2007, Canwest Global and the GS Parties jointly acquired through CW Investments Co. and its subsidiaries a portfolio of 17 specialty television channels from Alliance Atlantis Communications Inc. The relationship of the Canwest Global and GS Parties was governed by the aforementioned Shareholders Agreement. The purchase from Alliance Atlantis Communications Inc. and the terms of the Shareholders Agreement were agreed upon at the peak of the financial markets and economic cycle in 2007.

**9** As described in the June 7, 2010, affidavit of Mr. Strike of the CMI Entities, the GS Parties adopted an adversarial position in the CCAA proceedings. They challenged various transactions and sought a declaration that would prevent the CMI Entities from disclaiming their obligations under the Shareholders Agreement. On December 8, 2009, I stayed the GS Parties' request for relief.

**10** For reasons discussed before, both the Monitor and the CMI Entities took the position that the Ad Hoc Committee had a veto over a CCAA restructuring plan[2]. Similarly, the Shareholders Agreement continued to be a thorny problem without an obvious solution absent a consensual resolution.

**11** On November 2, 2009, RBC Capital Markets commenced an equity solicitation process. This process has already been described by me in my reasons approving the original Shaw Transaction.

**12** Ultimately the Shaw Communications Inc. ("Shaw") bid was considered to be the best overall offer received. It contemplated that the company would be private and not public. The principal elements of the Shaw transaction were:

- the investment of $95 million in a restructured Canwest Global representing a 20% equity interest and an 80% voting interest;
- a portion of the net cash proceeds would be distributed to the 8% Senior Subordinated Noteholders pursuant to a Plan in connection with the partial payment of the secured intercompany note and the balance would be used for working capital purposes;
- Shaw would subscribe for an additional amount of equity shares of a restructured Canwest Global to fund certain cash payments that would be made to Affected Creditors;
- existing shareholders would receive a cash payment. The Monitor stated that this represented approximately $11 million.

**13** It was a condition of each party's obligation to consummate the Shaw transaction that the Shareholders Agreement be amended or restated or otherwise addressed in a manner to be agreed by Shaw, Canwest Global and the Ad Hoc Committee of Noteholders or disclaimed. As such the issues with the GS Parties continued to be unresolved.

**14** On February 19, 2010, the CMI Entities brought a motion seeking approval of the Shaw transaction. The GS Parties opposed the relief sought and requested an adjournment of the motion which I refused. I granted the order and approved the Shaw transaction agreements. In my reasons, I stated that:

> - during the course of initial discussions between RBC Capital Markets and potential investors, it was recognized that alternative proposals would be considered;
>
> - the list of potential investors included both strategic and financial investors and qualified high net worth individuals in Canada;
>
> - RBC Capital Markets had fully canvassed the market and there was overwhelming evidence of an extensive market canvas;
>
> - there was a level playing field;
>
> - the CMI Entities had made a sufficient effort to obtain the best offer;
>
> - the interests of all parties were considered; and
>
> - a major objective underpinning the initial CCAA filing had now been accomplished.

**15** The GS Parties then sought leave to appeal my decision from the Court of Appeal.

**16** Although the equity solicitation had been successful, the dispute with the GS Parties was without resolution. This in spite of the fact that in my reasons for decision both with respect to the contested stay motion and the contested approval motion, I expressed my view that a commercial and negotiated resolution was in the best interests of all concerned.

**17** If the CMI Entities had been required to seek approval to disclaim the Shareholders Agreement, protracted, expensive and uncertain litigation would have resulted regardless of who was successful. If the GS Parties were successful, the CMI Entities would have been unable to meet the condition provided for in both the Shaw transaction and the Support Agreement they had entered into with the Ad Hoc Committee. If the GS Parties were unsuccessful, the GS Parties would have had a substantial and complicated damages claim that may have given them a blocking position in the restructuring. As such, absent a resolution, this going concern restructuring was at an impasse with unattractive potential consequences.

**18** Discussions had reached a stalemate.

**19** In the face of what appeared to be an insoluble problem, the Monitor and the CMI Entities requested a court supervised mediation. Given the importance of the restructuring in Canada, the need to identify a judge with stature and superlative mediation skills, and the fact that at least one leave to appeal motion was before the Court of Appeal, I inquired as to whether Chief Justice Winkler was prepared to conduct a mediation. Chief Justice Winkler conducted the mediation which resulted in an acceptable conceptual framework. In my view, absent this mediation, this restructuring was in serious difficulty. As noted in Mr. Strike's June 7, 2010 affidavit:

> "The CMI Entities and the CMI CRA had unsuccessfully expended all commercially reasonable efforts to achieve a consensual renegotiation of the Shareholders Agreement with Goldman Sachs. Moreover, the CMI Entities and their stakeholders required certainty with respect to the path forward, particularly as the time to negotiate new programming agreements with the U.S. television studios was approaching, as was the period for upfront selling to advertisers of the 2010-2011 program schedules of the television channels and stations of CTLP and CW Investments.
>
> The CMI Entities, the CMI CRA and the Monitor also recognized that if the parties continued to proceed down a litigation track in respect of any or all of (i) a potential request to disclaim or resiliate the Shareholders Agreement, (ii) the Leave Motion and, if leave was granted, the appeal of the Shaw Approval Order itself, and/or (iii) the 4414616 Transaction, the CMI Entities would be required to incur significant litigation costs, divert many hundreds of hours of senior management time to the litigation effort at one of the most critical times of the restructuring and, based upon even the most optimistic view, would likely not be able to complete a going concern recapitalization transaction for a significant period of time, likely well into 2011, if at all (assuming all lower court decisions were appealed). This would have put the Shaw Transaction in jeopardy as, under the terms of the Amended Support Agreement, the Original Shaw Support Agreement and the Original Shaw Subscription Agreement, creditor approval of the proposed plan of arrangement or compromise was required to be obtained by April 15, 2010, and the plan of arrangement or compromise itself was required to

> be implemented by no later than August 11, 2010 (unless such dates were extended by Shaw and Canwest Global). It would also have put the DIP facility provided by CIBC Asset-Based Lending Inc. (formerly CIT Business Credit Canada Inc.) in jeopardy, which, if terminated, would have had a detrimental effect on the CMI Entities' ongoing liquidity."

**20** The Court and in my view, stakeholders should be grateful to Chief Justice Winkler for the result he was instrumental in achieving.

**21** Ultimately the GS Parties agreed to sell to Shaw certain shares in CW Investments Co. and to provide an option to purchase the remainder for $709 million. Shaw would replace the GS Parties as a party to the Shareholders Agreement. Under the amended Shaw transaction, Shaw would become the sole shareholder of a restructured Canwest Global. Shaw would pay US$440 million to be allocated to the 8% Senior Subordinated Noteholders and $38 million to Affected Creditors not including the Noteholders[3]. Under this arrangement, the shareholders would not receive any cash or equity interest, contrary to what the shareholders may have expected to receive when the prepackaged filing was first announced. In addition, all equity compensation plans would be terminated as would outstanding options, restricted share units and other equity based awards.

**22** In response to this development, amongst other things, Mr. Leonard Asper stated that the fundamental term of the CCAA prepackaged filing which was relied upon by him and others had been breached.

**23** Attempts by the CMI Entities (the Special Committee Chair, Derek Burney) and the CMI CRA to reinstate the shareholders' recovery did not meet with success.

**24** On the return of the Applicants' motion, I encouraged the parties to attempt to resolve their dispute which they did.

**25** I am satisfied that the order requested by the CMI Entities should be approved. In that regard, I make the following observations. The new Shaw transaction amends the definitive documentation in respect of the Shaw transaction I already approved to reflect the successful resolution of the express condition regarding the need to resolve the treatment of the Shareholders Agreement. I agree with the statements found in the factum of counsel for the CMI Entities:

> "... the Amended Shaw Transaction represents a number of significant advances in this process relative to the Approved Shaw Transaction. In particular:
>
> (a) the Amended Shaw Transaction is the only transaction available to the CMI Entities that satisfies both of the principal commercial conditions necessary to ensure that the CMI Entities will be able to emerge from the CCAA proceeding as going-concern entities:
>
> (i) Restructured Canwest Global will be owned by a "Canadian" in a manner compliant with the Direction; and
> (ii) the Shareholders Agreement has been addressed in a manner satisfactory to the CMI Entities, the Ad Hoc Committee and Shaw.

(b) the Amended Shaw Transaction will provide long-term stability for the CMI Entities' employees, pensioners, suppliers of television content, customers and other stakeholders.

(c) the Amended Shaw Transaction will provide enhanced value for the CMI Entities' Affected Creditors.

One of the most important benefits of the Amended Shaw Transaction is the resolution of the treatment of the Shareholders Agreement and the release of all the claims of Goldman Sachs in relation to the matters that were the subject of ongoing litigation. The potential effect of a failure to resolve these issues cannot be overstated ...

Without a consensual resolution of the treatment of Goldman Sachs' rights under the Shareholders Agreement, the CMI Entities were essentially at an impasse in their efforts to emerge from this CCAA proceeding as a going-concern in the foreseeable future."

**26** The CMI Entities did run an auction of the equity interest they were empowered to sell. I approved both the process, the absence of a fiduciary out provision and the result. Shaw was entitled to exercise liquidity rights in relation to the purchase of other equity interests.

**27** Clear contractual commitments were made to the Noteholders by the CMI Entities. As a result of those commitments, no Plan can be approved without the support of the Noteholders; upon default under the Use of Cash Collateral and Consent Agreement, the Ad Hoc Committee can obtain an assignment of the Irish Holdco notes which would frustrate the viability of another plan which does not have Ad Hoc Committee support and would jeopardize the CMI Entities liquidity.

**28** As to the shareholders, they have made certain allegations relating to commitments made. In the interests of certainty, to avoid delay, and given the evidence and some of the proposed provisions of the Plan, I urged the parties to reach a resolution of their differences.

**29** I am fully supportive of the approval of the Shaw Transaction Agreements. They consist of the Amended Subscription Agreement, the Further Amended Support Agreement, the Amended Shaw Support Agreement as supplemented by the Minutes of Settlement entered into by the CMI Entities, the Shareholder Group, Shaw and the Ad Hoc Committee dated June 23, 2010. The Amended Shaw Transaction Agreement is fair and reasonable and I am pleased that the parties considered section 6(8) of the CCAA with respect to the structure supporting the Minutes of Settlement and that the $38 million for the Affected Creditors is not impacted by this resolution.

**30** In conclusion, a negotiated resolution of the parties' differences is in the best interests of the CMI Entities and their stakeholders. No one opposed the requested order and it was supported by the Monitor, the Ad Hoc Committee, Shaw, and the Shareholders Group. I am approving the proposed order accepting the filing of a Plan based on the Amended Shaw Transaction, the proposed meeting provisions and approving the Amended Shaw Transaction Definitive Documents.

S.E. PEPALL J.

cp/e/qllxr/qlmxj/qljxr

1 In addition to the provisions of the definition of debtor company found in s. 2(1) of CCAA.

2 In addition, the 8% Senior Subordinated Noteholders provided the liquidity to the CMI Entities under the Use of Cash Collateral and Consent Agreement to permit the CMI Entities to continue to operate.

3 Subject to a pro rata increase in that amount for any restructuring period claims directly referable to the Amended Shaw Transaction, in certain circumstances.

**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 OR COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION**

Court of Appeal File Number: M42399
Court File No. CV-12-9667-00CL

**COURT OF APPEAL FOR ONTARIO**

**RESPONDING BOOK OF AUTHORITIES OF SINO-FOREST CORPORATION (Motion for Leave to Appeal the Ernst & Young LLP Settlement Order and Representation Dismissal Order)**

**BENNETT JONES LLP**
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

Robert W. Staley (LSUC #27115J)
Derek J. Bell (LSUC #43420J)
Jonathan Bell (LSUC #55457P)

Tel: 416-777-4857
Fax: 416-863-1716

Lawyers for Sino-Forest Corporation