

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

BRIEF OF AUTHORITIES OF THE APPLICANT,
SINO-FOREST CORPORATION
(Scope of Stay Motion returnable May 8, 2012)

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Indexed as:
Sarvanis v. Canada

Ioannis Sarvanis, appellant;
v.
Her Majesty the Queen in Right of Canada, respondent.

[2002] 1 S.C.R. 921

[2002] S.C.J. No. 27

2002 SCC 28

File No.: 27796

Supreme Court of Canada

2001: October 10 / 2002: March 21.

**Present: Gonthier, Iacobucci, Major, Bastarache,
Binnie, Arbour and LeBel JJ.**

ON APPEAL FROM THE FEDERAL COURT OF APPEAL (39 paras.)

Crown -- Crown liability -- Inmate injured while working at federal penitentiary -- Inmate received Canada Pension Plan disability benefits out of Consolidated Revenue Fund -- Inmate sued Crown in tort -- Whether tort action barred by s. 9 of Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 -- Canada Pension Plan, R.S.C. 1985, c. C-8.

While working in a federal penitentiary, an inmate sustained serious personal injuries, many of which appear to be permanent. As a result, he qualified for Canada Pension Plan ("CPP") disability benefits, which are paid out of the Consolidated Revenue Fund. The inmate sued the Crown in tort soon after suffering his injuries. The Crown moved for summary judgment claiming that the action was statute-barred by s. 9 of the Crown Liability and Proceedings Act, which provides that "[n]o proceedings lie against the Crown ... if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund ... in respect of the death, injury, damage or loss in respect of which the claim is made." There is a reasonable possibility that the Crown will be found liable should this case proceed to trial. The trial judge found that s. 9 did not apply to the CPP disability benefits received by the inmate. The Federal Court of Appeal allowed the Crown's appeal.

Held: The appeal should be allowed.

Section 9 of the Crown Liability and Proceedings Act, properly construed, does not immunize the Crown from tort liability where an individual has received benefits under the CPP. Although s. 9 uses the phrase "in respect of", which is of very broad import, that phrase cannot be interpreted without looking to the context in which it is found. Section 9 refers to pensions and compensations made "in respect of ... death, injury, damage or loss". Because "in respect of" is tied to specific events to which liability could attach but for the operation of s. 9, an action will only be barred if it is based on the factual basis specified in s. 9. By contrast, the CPP is a contributory plan wherein disability benefits are contingent on the present disabled condition of an otherwise qualified contributor. Since CPP benefits are contingent on a mere disability, not on the factual basis specified in s. 9, they do not fall within its scope. The disability benefit awarded to the inmate does not constitute a pension or compensation for the purposes of s. 9 of the Crown Liability and Proceedings Act. This conclusion is also consistent with the French version of the section.

This conclusion is bolstered by the language used in Acts awarding pensions that are caught by s. 9, and by the broader legislative purpose of the Crown Liability and Proceedings Act which was to establish Crown liability previously blocked by the common law. It would be surprising if the Canada Pension Plan was meant to nullify that increased exposure. Moreover, there is no explicit provision barring tort liability in the Canada Pension Plan.

Cases Cited

Distinguished: *Langille v. Canada (Minister of Agriculture)*, [1992] 2 F.C. 208; referred to: *Cugliari v. White* (1998), 159 D.L.R. (4th) 254; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654.

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Statutes and Regulations Cited

Act to amend the statute law in relation to veterans' benefits, S.C. 2000, c. 34, s. 42.
 Canada Pension Plan, R.S.C. 1985, c. C-8, ss. 42(2)(a) [rep. & sub. c. 30 (2nd Supp.), s. 12], 44(1)(b) [am. *idem*, s. 13; am. 1992, c. 2, s. 1], 108(1), (3)(a).
 Crown Liability Act, R.S.C. 1970, c. C-38, s. 4(1).
 Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 [rep. & sub. 1990, c. 8, s. 21], s. 9.
 Government Employees Compensation Act, R.S.C. 1985, c. G-5, ss. 4(1)(a), 12.
 Merchant Seamen Compensation Act, R.S.C. 1985, c. M-6, s. 13.
 Pension Act, R.S.C. 1985, c. P-6, ss. 21(1)(a) [rep. & sub. c. 16 (1st Supp.), s. 2; rep. & sub. 1990, c. 43, s. 8], 111(2) [repl. 2000, c. 34, s. 42].
 Statute Revision Act, R.S.C. 1985, c. S-20, s. 6(e), (f).

Authors Cited

Canada. House of Commons Debates, vol. 4, 7th Sess., 21st Parl., March 26, 1953, p. 3333.

APPEAL from a judgment of the Federal Court of Appeal (2000), 184 D.L.R. (4th) 124, 252 N.R. 131,

[2000] F.C.J. No. 12 (QL), setting aside a judgment of the Trial Division (1998), 156 F.T.R. 265, [1998] F.C.J. No. 1304 (QL). Appeal allowed.

David R. Tenszen, for the appellant.

David Sgayias and Christopher Rupar, for the respondent.

Solicitors for the appellant: Thomson, Rogers, Toronto.

Solicitor for the respondent: The Deputy Attorney General of Canada, Ottawa.

The judgment of the Court was delivered by

IACOBUCCI J.:--

I. Introduction

1 In this appeal, we must consider whether s. 9 of the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, operates so as to immunize the Crown from tort liability where an individual has received benefits under the Canada Pension Plan [page924] ("CPP"). I conclude that, on the proper interpretation of the statute, it does not. Accordingly I would allow the appeal and dismiss the Crown's motion for summary judgment.

II. Background

2 The appellant, Ioannis Sarvanis, was an inmate in the Pittsburgh Institution, a federal penitentiary in Joyceville, Ontario. He was working in the hay barn of the prison farm when, on June 16, 1992, he fell through a trap door on the second floor of the barn. The trap door had been concealed by hay. He landed on the first floor of the barn and sustained serious personal injuries, many of which appear from the record to be permanent. These injuries rendered the appellant unable to work. There is a reasonable possibility that liability may be found to lie with the respondent should this case proceed to trial.

3 On September 12, 1996, it was determined by the Government of Canada Income Security Programs that the appellant was disabled and that he qualified for CPP disability benefits. He continues to receive these benefits each month. Retroactive payment was made in November of 1996 to cover the period from October 1994, which was the effective date of the benefit decided on by the Ministry, to the time when the payments began regularly. The appellant has also received Ontario welfare benefits and "family benefits" or benefits under the Ontario Disability Support Program.

4 The appellant initially brought this action in tort on August 21, 1992, about two months after suffering his injuries. The respondent filed a statement of defence on September 18, 1992. On September 15, 1998, a motion by the respondent was granted by MacKay J. of the Federal Court, Trial Division, allowing it to amend its statement of defence. The amended statement of defence claimed that the [page925] action was statute-barred by s. 9 of the Crown Liability and Proceedings Act. On this basis, the respondent moved for summary judgment.

5 MacKay J. dismissed the motion, finding that s. 9 did not apply to the payments received by the appellant. An appeal was heard and allowed by the Federal Court of Appeal. Sarvanis now appeals to this Court.

III. Relevant Statutory Provisions

6 Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50

9. No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

9. Ni l'État ni ses préposés ne sont susceptibles de poursuites pour toute perte -- notamment décès, blessures ou dommages -- ouvrant droit au paiement d'une pension ou indemnité sur le Trésor ou sur des fonds gérés par un organisme mandataire de l'État.

Canada Pension Plan, R.S.C. 1985, c. C-8

42. ...

(2) For the purposes of this Act,

- (a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,
 - (i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and
 - (ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death;

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44. (1) Subject to this Part,

...

- (b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who
 - (i) has made contributions for not less than the minimum qualifying period,
 - (ii) has made contributions for at least two of the last three calendar years included either wholly or partly within his contributory period,
 - (iii) where there are only two calendar years included either wholly or partly within his contributory period, has made contributions for both such years, or
 - (iv) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled had an

application for a disability pension been received prior to the time the contributor's application for a disability pension was actually received;

108. (1) There is hereby established in the accounts of Canada an account to be known as the Canada Pension Plan Account.

...

(3) There shall be paid out of the Consolidated Revenue Fund and charged to the Canada Pension Plan Account

(a) all amounts payable under this Act as or on account of benefits or otherwise;

IV. Judgments Below

A. Federal Court, Trial Division (1998), 156 F.T.R. 265

7 MacKay J. found that CPP benefits were paid out of the Consolidated Revenue Fund. He found that such disability benefits as the appellant received are paid to those who have contributed under the CPP and who are also disabled. He rejected the Crown's argument that the case of *Langille v. Canada (Minister of Agriculture)*, [1992] 2 F.C. 208 (C.A.), applied. That case involved plaintiffs who attempted [page927] to sue the government over the destruction of their diseased farm animals, although compensation had already been paid to them with respect to this matter directly out of the Consolidated Revenue Fund. He also distinguished pensions payable under the Pension Act, R.S.C. 1985, c. P-6, and the Government Employees Compensation Act, R.S.C. 1985, c. G-5, since these pensions explicitly preclude claims for loss or injury incurred in the course of military or civil service, respectively, replacing such claims with pension benefits.

8 The learned motions judge also noted that CPP disability benefits were not deducted from judicial awards of damages in tort. He referred to the view expressed in *Cugliari v. White* (1998), 159 D.L.R. (4th) 254 (Ont. C.A.), that such payments are not compensatory but are "akin to a private policy of insurance, payable to a qualified contributor under the plan in relation to his or her disability" (para. 11). Similarly, CPP disability pensions are paid to persons who are contributors solely in respect of their disability. Such pensions make no reference to any particular cause of the disability, nor to any further damage or loss that might be the subject of a damage award in a tort action. Although it was often possible, in an historical sense, to relate a disability to an injury, the injury or damage at issue was not the basis of or reason for such payments. Accordingly, he dismissed the motion for summary judgment.

B. Federal Court of Appeal (2000), 184 D.L.R. (4th) 124

9 Malone J.A., for the court, focused on the proper interpretation of the words "in respect of" in s. 9 of the Crown Liability and Proceedings Act. He found that these words had been given an extremely broad interpretation by this Court and by other courts. In his view, the pension in this case was both paid out [page928] of the Consolidated Revenue Fund and was "in respect of" the injury for which Sarvanis sought to bring action (para. 8). Sarvanis' own application for a CPP disability pension indicated that the cause of his disability was the injury in question. Section 9's use of the phrase "in respect of" was intended to capture not only compensation, but pensions as well.

10 He therefore allowed the Crown's appeal and granted the motion for summary judgment.

V. Issue

11 The issue is whether, by receiving a disability pension under the Canada Pension Plan, the appellant has been paid a "pension or compensation ... in respect of the death, injury, damage or loss" in respect of which the claim is brought, so as to bar his action pursuant to s. 9 of the Crown Liability and Proceedings Act.

VI. Analysis

A. Overview of the CPP Disability Scheme

12 This case involves a very narrow question of statutory interpretation. The crux of the inquiry is, as Malone J.A. found, whether the breadth of the words "in respect of" is sufficient to include the pension granted the appellant. The appellant received a disability pension under the CPP. Section 9 of the Crown Liability and Proceedings Act bars any claim against the Crown

if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

pour toute perte -- notamment décès, blessures ou dommages -- ouvrant droit au paiement d'une pension ou [page929] indemnité sur le Trésor ou sur des fonds gérés par un organisme mandataire de l'État. [Emphasis added.]

13 The text of the French version of this provision is worded in a different manner. But the effect is the same, which may reflect the different approaches to drafting in the official languages. It is noteworthy, however, that the previous French version of this section closely mirrored the English text ("... si une pension ou une indemnité a été payée ou est payable ... relativement à ce décès, ces blessures, dommages ou autres pertes", R.S.C. 1970, c. C-38, s. 4(1) (emphasis added)), while the current version is the product of a modification in the 1985 revision. The conclusion that the meaning must nevertheless be the same is bolstered by the authority of the Statute Revision Act, R.S.C. 1985, c. S-20, s. 6(e) and (f), providing that revisions of this sort will not change the substance of the enactment. The present French version of s. 9 immunizes the Crown from a cause of action "... pour toute perte -- notamment décès, blessures ou dommages -- ouvrant droit au paiement d'une pension ou indemnité ..." ("for any loss -- in particular, for death, injury or damage -- that gives rise to the payment of a pension or compensation"). The question, therefore, is whether a disability pension under the Canada Pension Plan is a pension paid "in respect of ... death, injury, damage or loss in respect of which the claim is made".

14 The pension in this case was awarded pursuant to the CPP which came into being in 1966. Most salaried Canadians are contributors to the CPP, although eligible persons employed in Quebec subscribe instead to a similar plan, the Quebec Pension Plan. Eligible persons make one half of the mandatory contributions based on their wage, while the person's employer must pay the other half of the contribution. Contributors are then entitled to apply for benefits, provided they meet the criteria set out in the CPP Act. The quantity of the benefit allowed will vary according to the class of benefit received, the length of time a contributor has made [page930] contributions and the total amount of contributions made.

15 Benefits are paid under the CPP in several situations. The most common benefit is the CPP retirement pension. Survivor's benefits are also available to the surviving spouse or children of a contributor. The benefit class with which we are concerned in this appeal is the disability benefit.

16 The CPP pays benefits to disabled persons and their dependent children pursuant to s. 44 of the Canada Pension Plan. In order to receive these benefits, a person must apply for them and must generally meet three conditions. First, generally speaking, he or she must be under 65 years of age.

Second, he or she must have contributed the minimum qualifying amount to the CPP for the minimum qualifying period. These figures vary according to situation and are subject to some exceptions, but the essential fact is that there is a minimum qualifying contribution and contributory period. Third, he or she must be "disabled".

17 Disability is defined at s. 42(2)(a) of the Canada Pension Plan. The section requires that a disability, in order to fulfil this criterion of eligibility for benefits, be both "severe and prolonged". These terms are defined thus in s. 42(2)(a):

- (i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and
- (ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death.

Thus, the third requirement for receiving disability benefits under the CPP is that the contributor be unable to work, and likely to be unable to work for a long, indefinite period, because of his or her disability.

[page931]

18 CPP disability benefits are discontinued upon the contributor ceasing to be disabled, or upon the contributor turning 65, at which time he or she is moved to the CPP retirement pension. Thus, these benefits are awarded only so long as the contributor continues to meet the eligibility criteria.

B. Section 9 of the Crown Liability and Proceedings Act

19 I turn now to a consideration of the text of s. 9 of the Crown Liability and Proceedings Act before moving to the ultimate question, that is, whether the section, properly construed, captures the CPP disability benefit. The crux of the question is whether the section's description of pensions paid "in respect of ... death, injury, damage or loss" encompasses the benefit. Within that context, the words of significance here are the words "in respect of".

20 This phrase, "in respect of", is clearly a broad one. In urging a broad approach to interpreting that phrase in s. 9, the respondent relies, as did the Federal Court of Appeal, on the following observations of Dickson J. (as he then was), interpreting the Income Tax Act, in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39:

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.

Dickson J.'s reading of these words has been more recently approved by this Court in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 16, interpreting s. 487(1) of the Criminal Code.

21 The Federal Court of Appeal has also relied on Dickson J.'s interpretation in another case interpreting s. 9 (then s. 4(1) of the Crown Liability Act, [page932] R.S.C. 1970, c. C-38), *Langille v.*

Canada (Minister of Agriculture), *supra*. In that case, a farmer brought an action against the Crown for damages after the Ministry of Agriculture destroyed his diseased farm animals in order to prevent the spread of disease. Compensation was paid to him directly from the Consolidated Revenue Fund in settlement of his losses. The Federal Court of Appeal found that s. 4(1) barred his action. The words "in respect of" were found to catch the compensation paid. Stone J.A. concluded, at p. 213, that:

[T]he broad reach of subsection 4(1) does include the damage or loss for which the respondents here claim on account of their destroyed animals. The compensation was paid "in respect of" "damage or loss" resulting from the destruction of the animals and the claim in the present action is also "in respect of" that same "damage or loss". The only difference here is that respondents, by way of this action in tort, are seeking to enhance recovery in respect of that destruction beyond the level of the compensation they were paid in 1978 out of the Consolidated Revenue Fund.

22 It is fair to say, at the minimum, that the phrase "in respect of" signals an intent to convey a broad set of connections. The phrase is not, however, of infinite reach. Although I do not depart from Dickson J.'s view that "in respect of" is among the widest possible phrases that can be used to express connection between two legislative facts or circumstances, the inquiry is not concluded merely on the basis that the phrase is very broad.

23 The breadth and ambiguity of the words used to express the connection between the pension or compensation paid and the loss to which the payment relates is equally present in the French version. This is seen most clearly in the verb phrase connecting the loss to the pension, that is, "ouvrant droit au paiement d'une pension ou indemnité" (emphasis added). It is important to keep in mind the distinct manner in which Parliament has chosen to frame the section in the two languages. However, I would note, crucially, that it is the same connection -- the link between the pension paid and the loss sustained - - [page933] that Parliament has rendered somewhat obscure by the use of both "in respect of" and "ouvrant droit". The distinct features of phrasing in each official version do not, in themselves, remedy the central ambiguity with which this appeal is concerned.

24 In both cases, we must not interpret words that are of a broad import taken by themselves without looking to the context in which the words are found. Indeed, the proper approach to statutory interpretation requires that we more carefully examine the wider context of s. 9 before settling on the correct view of its reach. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, in discussing the preferred approach to statutory interpretation, the Court stated, at para. 21:

... Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

In my view, the nature and content of this approach, and the accuracy of Professor Driedger's succinct formulation, have not changed. Accordingly, we cannot rely blindly on the fact that the words "in respect of" are words of broad meaning.

25 With this approach in mind, I take note that s. 9 refers to pensions and compensations that are made in respect of "death, injury, damage or loss". The fact that the broad phrase "in respect of" is tied

to this enumeration of events is of some significance. The ordinary sense of this list of words indicates that they are specific events to which liability could, but for the operation of s. 9, attach. That is, s. 9 envisions pensions and compensation paid because of an event of death, injury, damage or loss. This is consistent with, for instance, the destruction of cattle in Langille, supra. The compensation paid by the government in that case was in settlement of the [page934] loss of cattle suffered by the plaintiffs. The fact that the plaintiffs sought compensation of the same loss in tort was sufficient to show identity between the subject of the attempted claim and the subject of the compensation.

26 This example is consistent with a reading of the words "in respect of" in the context of the clause in which they appear. The fact that a pension must be in respect of some event of "death, injury, damage or loss" gives us a fuller understanding of the import of the words. What this broad, yet in itself imprecise, phrase means, can be understood by asking what kind of a thing the pension must be in respect of. We will have a different view of the precise scope of the phrase in this context from, for example, the context of the clause which follows in s. 9. The latter clause refers to "death, injury, damage or loss in respect of which the claim is made". The breadth of the words "in respect of" when attached to the concept of a "claim" may be different from the breadth of the same words when attached to a series of events.

27 This interpretation is also consistent with the French version of the section. Actions that are barred are actions "pour toute perte", or "for any loss", "notamment décès, blessures ou dommages," that is, "in particular, for death, injury or damage" where such a loss also gives rise to ("ouvrant droit") the payment of a pension or compensation. In both the French and English versions of the statute, the key is to recognize that the loss the recovery of which is barred by the statute must be the same loss that creates an entitlement to the relevant pension or compensation. The enumeration of events as clearly explicates the meaning of "perte" in the French text as it does the meaning of "in respect of" in English.

[page935]

28 In my view, the language in s. 9 of the Crown Liability and Proceedings Act, though broad, nonetheless requires that such a pension or compensation paid or payable as will bar an action against the Crown be made on the same factual basis as the action thereby barred. In other words, s. 9 reflects the sensible desire of Parliament to prevent double recovery for the same claim where the government is liable for misconduct but has already made a payment in respect thereof. That is to say, the section does not require that the pension or payment be in consideration or settlement of the relevant event, only that it be on the specific basis of the occurrence of that event that the payment is made.

29 This breadth is necessary to ensure that there is no Crown liability under ancillary heads of damages for an event already compensated. That is, a suit only claiming for pain and suffering, or for loss of enjoyment of life, could not be entertained in light of a pension falling within the purview of s. 9 merely because the claimed head of damages did not match the apparent head of damages compensated for in that pension. All damages arising out of the incident which entitles the person to a pension will be subsumed under s. 9, so long as that pension or compensation is given "in respect of", or on the same basis as, the identical death, injury, damage or loss.

30 Although such comments are not determinative, I note that this view is consistent with comments made by the Minister of the day in debating the original Crown Liability Act in 1953. The Minister likened the type of pensions the receipt of which was intended to bar other actions to provincial worker's compensation legislation, in which the right to sue was exchanged, as it were, for comprehensive administrative compensation (House of Commons Debates, vol. 4, 7th Sess., 21st Parl., March 26, 1953,

at p. 3333).

[page936]

C. Application to the Canada Pension Plan

31 Keeping in mind that s. 9 refers to pensions and compensations "in respect of" particular kinds of events, I am of the opinion that disability benefits under the CPP do not fall within its scope on the ordinary meaning of the words. I concede that the words "in respect of" may encompass more than direct compensation for loss. However, I do not believe that the CPP makes its payments on the same basis as s. 9 seems to require. That is, s. 9 contemplates payment in some manner contingent on the occurrence of an event of "death, injury, damage or loss". A CPP disability benefit, by contrast, is not contingent on events at all, but on the present disabled condition of a qualified contributor under 65 years of age who makes an application for payment. Whether or not the present serious and long-term disability that entitles an otherwise qualified contributor to receive CPP disability benefits happens to be the result of "death, injury, damage or loss" is not relevant to the determination of eligibility. The only relevant question, assuming a person has met the conditions of eligibility with respect to age and contribution status, is the status of the applicant as disabled at the time the application is made.

32 The respondent argued that the pension is "in respect of" the injury that is the subject of the action in tort, since it is only "because" of the injuries suffered that the appellant was eligible for CPP disability benefits. This follows on the Federal Court of Appeal's observation in this case that "in his own application for the CPP disability pension [Sarvanis] identified the cause of this injury as the accident which he suffered on that date" (para. 8). I disagree that this is a relevant fact to our understanding of the nature of the CPP benefit. Sarvanis' explanation of the cause of his disability was only relevant as evidence for the determination by the government as to whether or not he actually was disabled at the [page937] time of the application, as well as in establishing the date on which he became eligible for benefits. It implies nothing about the contingency of such payments on an event of injury. It simply reveals that, in this case, the requisite disabled status of Sarvanis happened to be caused by an injury, rather than, for example, genetic factors.

33 This conclusion is bolstered by the context both of the CPP and other Acts awarding pensions that are caught by s. 9. To look first at the CPP, the clear purpose of the CPP disability benefits is to supplement the incomes of disabled Canadians who have difficulty meeting day-to-day expenses because of their inability to work, that is, their status as disabled. For this reason, it has already been held by this Court that CPP disability payments are not to be considered indemnity payments, and therefore that they are not to be deducted from tort damages compensating injuries that factually caused or contributed to the relevant disability. See *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654, at p. 670; *Cugliari*, supra. This rule is premised on the contractual or contributory nature of the CPP. Only contributors are eligible, at the outset, to receive benefits, provided that they then meet the requisite further conditions.

34 It is useful to contrast other statutes providing pensions or compensations that are clearly foreclosed by s. 9 of the Crown Liability and Proceedings Act. One example, already noted above, is the Pension Act. The Pension Act provides for pensions payable to members of the Canadian Forces who are injured in the line of duty. The current version of the Pension Act specifically refers to s. 9 at s. 111 (2), referring to "action[s] that [are] not barred by virtue of section 9 of the Crown Liability and Proceedings Act" (S.C. 2000, c. 34, s. 42). The [page938] former version of the Pension Act, also at s. 111, provided simply that:

No action or other proceeding lies against Her Majesty or against any officer, servant or agent of Her Majesty in respect of any injury or disease or aggravation thereof resulting in disability or death in any case where a pension is or may be awarded under this Act or any other Act in respect of the disability or death.

Similarly, the Government Employees Compensation Act provides, at s. 12:

Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependants to compensation under this Act, neither the employee nor any dependant of the employee has any claim against Her Majesty, or any officer, servant or agent of Her Majesty, other than for compensation under this Act.

The Merchant Seamen Compensation Act, R.S.C. 1985, c. M-6, contains a similar provision at s. 13.

35 The key difference among all three of these examples of pensions which, upon receipt or eligibility, do foreclose an action pursuant to s. 9 of the Crown Liability and Proceedings Act is not simply the fact that the bar is repeated in each particular statute. Rather, it is that in each case the crucial condition of eligibility is the occurrence of "death, injury, damage or loss", and that it is because of that occurrence that the pension is received. For example, s. 21(1)(a) of the Pension Act provides that a pension is granted only "where a member of the forces suffers disability resulting from an injury or disease ... that was attributable to or was incurred during ... military service ..." (emphasis added). Similarly, the Government Employees Compensation Act at s. 4(1)(a) provides benefits only where an employee:

[page939]

- (i) is caused personal injury by an accident arising out of and in the course of his employment, or
- (ii) is disabled by reason of an industrial disease due to the nature of the employment;

That is, these pensions are paid on the same basis as a tort claim is, while the CPP is paid on the same basis as an insurance claim.

36 The interpretation adopted here is further bolstered by considering the context of the broader legislative purpose of the Crown Liability and Proceedings Act as a whole. This Act was passed in order to establish Crown liability, which had hitherto been blocked by the common law. Although it was passed prior to the establishment of the CPP, it would be surprising indeed if the Canada Pension Plan, and the quasi-contractual insurance scheme it created, were meant to nullify the increased exposure of the Crown liability legislation. Put another way, why would the Crown Liability and Proceedings Act explicitly give so much by removing the common law obstacle, yet tacitly take almost all of it away by the construction of the Canada Pension Plan advanced by the Crown? Given the mandatory nature of contribution to the CPP, such would be the effect of the reading of s. 9 urged by the respondent.

37 That Parliament most likely did not intend this outcome is also consistent with the absence of any explicit provision suggesting so in the Canada Pension Plan, measured alongside the clear provisions citing to, or replicating in substance, s. 9. Unlike the Canada Pension Plan, the Acts which do reproduce the bar of actions are comprehensive schemes designed to ensure the efficacious compensation of

persons for their injuries and losses incurred in the public service.

38 Simply put, s. 9 of the Crown Liability and Proceedings Act establishes Crown immunity where the very event of death, injury, damage or loss that [page940] forms the basis of the barred claim is the event that formed the basis of a pension or compensation award. The CPP, a contributory plan not contingent on death, injury, damage or loss, but rather on physical condition and on adequate quantum and duration of contribution, is a significantly different animal.

VII. Conclusion

39 For all of these reasons, I find that a disability benefit awarded under the Canada Pension Plan does not constitute a pension or compensation "in respect of ... death, injury, damage or loss" for the purposes of s. 9 of the Crown Liability and Proceedings Act. Accordingly the appeal is allowed, the order of MacKay J. is restored, and the respondent's motion for summary judgment is dismissed. The appellant should have his costs in this Court and in the courts below.

cp/e/qllls

Tab 2

Case Name:
Canadian Airlines Corp. (Re)

**IN THE MATTER OF Canadian Airlines Corporation
and Canadian Airlines International Ltd.**

Between

**The Bank of Nova Scotia Trust Company of New York,
As Trustee for the Holders of Senior Secured Notes
and Montreal Trust Company of Canada, As Collateral
Agent for the Holders of Senior Secured Notes,**

Plaintiffs, and

**Canadian Airlines Corporation, Canadian Airlines
International Ltd., Canadian Regional Airlines Ltd.,
Canadian Regional Airlines (1998) Ltd. and Canadian
Airlines Fuel Corporation Inc., defendants**

[2000] A.J. No. 1692

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

Docket: 0001-05071, 0001-05044

Alberta Court of Queen's Bench
Judicial District of Calgary

Paperny J.

Oral Judgment: May 4, 2000.

(41 paras.)

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

Counsel:

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

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

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

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

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

P. McCarthy, for Monitor - Price Waterhouse Cooper.

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

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

G. Wells, for NavCanada.

D. Hardy, for Royal Bank of Canada.

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

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

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

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

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

5 On March 24, 2000, the Senior Secured Noteholders commenced Action No. 0001-05044 and

brought an application for the appointment of a receiver over their collateral. On the same day, CAC and CAIL were granted CCAA protection and the Senior Secured Noteholders adjourned their application for a receiver. However, the Senior Secured Noteholders made further application that day for orders that Ernst & Young be appointed monitor over their security and for weekly payments from CAC and CAIL of \$500,000 U.S. These applications were dismissed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.
- (3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
- (4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
- (5) The status quo does not mean preservation of the relative pre-stay debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, the preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.
- (6) The court has a broad discretion to apply these principles to the facts of the particular case.

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

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

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

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

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

23 The evidence before me suggests that progress may still be made in the negotiations with the representatives of the Senior Secured Noteholders and that it would be premature to conclude that any

further discussions would be unsuccessful. The parties are continuing to explore revisions and alternative proposals which would satisfy the Senior Secured Noteholders.

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

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

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

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

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

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

The Monitor believes the if the Plan is not approved and implemented, CAIL will not be able to continue as a going concern. In that case, the only foreseeable alternative would be a liquidation of CAIL's assets by a receiver and manager and/or by a trustee. Under the Plan, CAIL's obligations to parties it considers to be essential in order to continue operations, including employees, customers, travel agents, fuel,

maintenance, catering and equipment suppliers, and airport authorities, are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights, statutory priorities or other legal protection, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if CAIL were to cease operation as a going concern and be forced into liquidation would be in excess of \$1.1 billion.

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

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

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

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

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

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

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

35 With respect to the application to sell shares or assets of Canadian Regional, this application raises a distinct issue in that Canadian Regional is not one of the debtor companies. In my view, Paragraph 5 (a) of Chief Justice Moore's March 24, 2000 order encompasses marketing the shares or assets of Canadian Regional. That paragraph stays, inter alia:

...any and all proceedings ... against or in respect of ... any of the Petitioners'

property ... whether held by the Petitioners directly or indirectly, as principal or nominee, beneficially or otherwise...

36 As noted above, Canadian Regional is CAC's subsidiary, and its shares and assets are the "property" of CAC and marketing of these would constitute a "proceeding ... in respect of ... the Petitioners' property" within the meaning of Paragraph 5(a) and Section 11 of the CCAA.

37 If I am incorrect in my interpretation of Paragraph 5(a), I rely on the inherent jurisdiction of the court in these proceedings.

38 As noted above, the CCAA is to be afforded a large and liberal interpretation. Two of the landmark decisions in this regard hail from Alberta: *Meridian Development Mc. v. Toronto Dominion Bank*, supra, and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (NS.) 20 (Alta. Q.B.). At least one court has also recognized an inherent jurisdiction in relation to the CCAA in order to grant stays in relation to proceedings against third parties: *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C.S.C.). Tysoe J. urged that although this power should be used cautiously, a prerequisite to its use should not be an inability to otherwise complete the reorganization. Rather, what must be shown is that the exercise of the inherent jurisdiction is important to the reorganization process. The test described by Tysoe J. is consistent with the critical balancing that must occur in CCAA proceedings. He states:

In deciding whether to exercise its inherent jurisdiction, the court should weigh the interests of the insolvent company against the interests of parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the court that it should not exercise its discretion under Section 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

39 The balancing that I have described above in the context of the receivership application equally applies to this application. While the threshold of prejudice is lower, the Senior Secured Noteholders still fail to meet it. I cannot see that it is important to the CCAA proceedings that the Senior Secured Noteholders get started on marketing Canadian Regional. Instead, it would be disruptive and en-danger the CCAA proceedings which, on the evidence before me, have progressed swiftly and in good faith.

40 The application in Action No. 0001-05044 is dismissed, also with leave to reapply after the vote on May 26, 2000.

41 I appreciate that the Senior Secured Noteholders will be disappointed and likely frustrated with the outcome of these applications. I would emphasize that on the evidence before me their rights are being postponed and not eradicated. Any hardship they experience at this time must yield to the greater hardship that the debtor companies and the other constituents would suffer were the stay to be lifted at this time.

PAPERNY J.

cp/s/qw/qlmmm

Tab 3

Case Name:
Stelco Inc. (Re)

**IN THE MATTER OF the Companies' Creditors
Arrangement Act, R.S.C., c. C-36, as amended
AND IN THE MATTER OF a proposed plan of compromise or
arrangement with respect to Stelco Inc., and other
Applicants listed in Schedule "A"***

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

**APPLICATION UNDER the Companies' Creditors
Arrangement Act, R.S.C. 1985, c. C-36, as amended**

[2005] O.J. No. 1171

75 O.R. (3d) 5

253 D.L.R. (4th) 109

196 O.A.C. 142

2 B.L.R. (4th) 238

9 C.B.R. (5th) 135

138 A.C.W.S. (3d) 222

2005 CarswellOnt 1188

2005 CanLII 8671

Docket: M32289

Ontario Court of Appeal
Toronto, Ontario

S.T. Goudge, K.N. Feldman and R.A. Blair JJ.A.

Heard: March 18, 2005.
Judgment: March 31, 2005.

(79 paras.)

*Creditors & debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act --
Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005]*

O.J. No. 730 allowed.

Civil procedure -- Courts -- Jurisdiction -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Civil procedure -- Courts -- Superior courts -- Inherent jurisdiction -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Corporations and associations law -- Corporations -- Directors -- Appointment or election -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Corporations and associations law -- Corporations -- Directors -- Duties -- Business judgment rule -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Corporations and associations law -- Corporations -- Directors -- Duties -- Fiduciary duties -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Insolvency law -- Proposals -- Court approval -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Administrative law -- Natural justice -- Reasonable apprehension of bias -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Application by two former directors of Stelco for leave to appeal and appeal from the order of their removal from the board of directors. Stelco was engaged in an extensive economic restructuring while under statutory insolvency protection that involved court-appointed capital raising via a competitive bid process. The appellants were involved with two companies that purchased approximately 20 per cent of Stelco's publicly traded shares during the protection period and were subsequently appointed to its board of directors to fill vacancies caused by resignations. As part of the appointment process, the appellants were informed of their fiduciary duties and agreed that their companies would have no further involvement in the competitive bid process. Stelco's employees sought the appellants' removal from the board on the basis that the participation of two major shareholder representatives would tilt the evaluation of the bids in favour of maximizing shareholder value at the expense of bids more favourable to the interests of the employees. The motions judge held that the involvement of the appellants on the board raised an unnecessary risk that their future conduct potentially jeopardized the integrity and neutrality of the capital raising process, and declared the appointments to be of no force and effect. The judge cited the inherent jurisdiction of the court as the basis for the order. The appellants submitted that the judge had no jurisdiction to make a removal order, and in the alternative, he erred in applying a reasonable bias test to the removal of directors. The appellants further submitted that the judge erred by interfering with the board's exercise of business judgment, and that the facts did not justify the removal order.

HELD: Application for leave and appeal allowed. The judge misconstrued his authority, and made an order that he was not empowered to make. The court had no statutory or inherent authority to interfere with the composition of the board of directors. The judge erred in declining to give effect to the business judgment rule, and was not entitled to usurp the role of the directors and management in conducting the company's restructuring efforts. The record did not support a finding that there was sufficient risk of misconduct to warrant a conclusion of oppression, nor was the level of such risk assessed. There was no

statutory principle that envisaged screening the neutrality of the appellants in advance of their appointment to the board of Stelco. Legal remedies were available to the employees of Stelco in the event that the appellants engaged in conduct that breached their legal obligations to the corporation. The applicability of such remedies was dependent on actual misconduct rather than mere speculation. Therefore, an apprehension of bias approach was not appropriate in the corporate law context.

Statutes, Regulations and Rules Cited:

Canada Business Corporations Act ss. 1, 102, 106(3), 109(1), 111, 122(1)(a), 122(1)(b), 145, 145(2)(b), 241, 241(3)(e)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 As Amended, ss. 11, 11(1), 11(3), 11(4), 11(6), 20

Appeal From:

Application for Leave to Appeal, and if leave be granted, an appeal from the order of Farley J. dated February 25, 2005 removing the applicants as directors of Stelco Inc., reported at: [2005] O.J. No. 729.

Counsel:

Jeffrey S. Leon and Richard B. Swan, for the appellants, Michael Woolcombe and Roland Keiper

Kenneth T. Rosenberg and Robert A. Centa, for the respondent United Steelworkers of America

Murray Gold and Andrew J. Hatnay, for the respondent Retired Salaried Beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd. and Welland Pipe Ltd.

Michael C.P. McCreary and Carrie L. Clynick, for USWA Locals 5328 and 8782

John R. Varley, for the Active Salaried Employee Representative

Michael Barrack, for Stelco Inc.

Peter Griffin, for the Board of Directors of Stelco Inc.

K. Mahar, for the Monitor

David R. Byers, for CIT Business Credit, Agent for the DIP Lender

The judgment of the Court was delivered by

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

PART I - INTRODUCTION

1 Stelco Inc. and four of its wholly owned subsidiaries obtained protection from their creditors under the Companies' Creditors Arrangement Act¹ on January 29, 2004. Since that time, the Stelco Group has been engaged in a high profile, and sometimes controversial, process of economic restructuring. Since October 2004, the restructuring has revolved around a court-approved capital raising process which, by

February 2005, had generated a number of competitive bids for the Stelco Group.

2 Farley J., an experienced judge of the Superior Court Commercial List in Toronto, has been supervising the CCAA process from the outset.

3 The appellants, Michael Woollcombe and Roland Keiper, are associated with two companies - Clearwater Capital Management Inc., and Equilibrium Capital Management Inc. - which, respectively, hold approximately 20% of the outstanding publicly traded common shares of Stelco. Most of these shares have been acquired while the CCAA process has been ongoing, and Messrs. Woollcombe and Keiper have made it clear publicly that they believe there is good shareholder value in Stelco in spite of the restructuring. The reason they are able to take this position is that there has been a solid turn around in worldwide steel markets, as a result of which Stelco, although remaining in insolvency protection, is earning annual operating profits.

4 The Stelco board of directors ("the Board") has been depleted as a result of resignations, and in January of this year Messrs. Woollcombe and Keiper expressed an interest in being appointed to the Board. They were supported in this request by other shareholders who, together with Clearwater and Equilibrium, represent about 40% of the Stelco common shareholders. On February 18, 2005, the Board appointed the appellants directors. In announcing the appointments publicly, Stelco said in a press release:

After careful consideration, and given potential recoveries at the end of the company's restructuring process, the Board responded favourably to the requests by making the appointments announced today.

Richard Drouin, Chairman of Stelco's Board of Directors, said: "I'm pleased to welcome Roland Keiper and Michael Woollcombe to the Board. Their experience and their perspective will assist the Board as it strives to serve the best interests of all our stakeholders. We look forward to their positive contribution."

5 On the same day, the Board began its consideration of the various competing bids that had been received through the capital raising process.

6 The appointments of the appellants to the Board incensed the employee stakeholders of Stelco ("the Employees"), represented by the respondent Retired Salaried Beneficiaries of Stelco and the respondent United Steelworkers of America ("USWA"). Outstanding pension liabilities to current and retired employees are said to be Stelco's largest long-term liability - exceeding several billion dollars. The Employees perceive they do not have the same, or very much, economic leverage in what has sometimes been referred to as 'the bare knuckled arena' of the restructuring process. At the same time, they are amongst the most financially vulnerable stakeholders in the piece. They see the appointments of Messrs. Woollcombe and Keiper to the Board as a threat to their well being in the restructuring process, because the appointments provide the appellants, and the shareholders they represent, with direct access to sensitive information relating to the competing bids to which other stakeholders (including themselves) are not privy.

7 The Employees fear that the participation of the two major shareholder representatives will tilt the bid process in favour of maximizing shareholder value at the expense of bids that might be more favourable to the interests of the Employees. They sought and obtained an order from Farley J. removing Messrs. Woollcombe and Keiper from their short-lived position of directors, essentially on the basis of that apprehension.

8 The Employees argue that there is a reasonable apprehension the appellants would not be able to act

in the best interests of the corporation - as opposed to their own best interests as shareholders - in considering the bids. They say this is so because of prior public statements by the appellants about enhancing shareholder value in Stelco, because of the appellants' linkage to such a large shareholder group, because of their earlier failed bid in the restructuring, and because of their opposition to a capital proposal made in the proceeding by Deutsche Bank (known as "the Stalking Horse Bid"). They submit further that the appointments have poisoned the atmosphere of the restructuring process, and that the Board made the appointments under threat of facing a potential shareholders' meeting where the members of the Board would be replaced en masse.

9 On the other hand, Messrs. Woollcombe and Keiper seek to set aside the order of Farley J. on the grounds that (a) he did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test applied by the motion judge has no application to the removal of directors, (c) the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) the facts do not meet any test that would justify the removal of directors by a court in any event.

10 For the reasons that follow, I would grant leave to appeal, allow the appeal, and order the reinstatement of the applicants to the Board.

PART II - ADDITIONAL FACTS

11 Before the initial CCAA order on January 29, 2004, the shareholders of Stelco had last met at their annual general meeting on April 29, 2003. At that meeting they elected eleven directors to the Board. By the date of the initial order, three of those directors had resigned, and on November 30, 2004, a fourth did as well, leaving the company with only seven directors.

12 Stelco's articles provide for the Board to be made up of a minimum of ten and a maximum of twenty directors. Consequently, after the last resignation, the company's corporate governance committee began to take steps to search for new directors. They had not succeeded in finding any prior to the approach by the appellants in January 2005.

13 Messrs. Woollcombe and Keiper had been accumulating shares in Stelco and had been participating in the CCAA proceedings for some time before their request to be appointed to the Board, through their companies, Clearwater and Equilibrium. Clearwater and Equilibrium are privately held, Ontario-based, investment management firms. Mr. Keiper is the president of Equilibrium and associated with Clearwater. Mr. Woollcombe is a consultant to Clearwater. The motion judge found that they "come as a package."

14 In October 2004, Stelco sought court approval of its proposed method of raising capital. On October 19, 2004, Farley J. issued what has been referred to as the Initial Capital Process Order. This order set out a process by which Stelco, under the direction of the Board, would solicit bids, discuss the bids with stakeholders, evaluate the bids, and report on the bids to the court.

15 On November 9, 2004, Clearwater and Equilibrium announced they had formed an investor group and had made a capital proposal to Stelco. The proposal involved the raising of \$125 million through a rights offering. Mr. Keiper stated at the time that he believed "the value of Stelco's equity would have the opportunity to increase substantially if Stelco emerged from CCAA while minimizing dilution of its shareholders." The Clearwater proposal was not accepted.

16 A few days later, on November 14, 2004, Stelco approved the Stalking Horse Bid. Clearwater and Equilibrium opposed the Deutsche Bank proposal. Mr. Keiper criticized it for not providing sufficient value to existing shareholders. However, on November 29, 2004, Farley J. approved the Stalking Horse

Bid and amended the Initial Capital Process Order accordingly. The order set out the various channels of communication between Stelco, the monitor, potential bidders and the stakeholders. It provided that members of the Board were to see the details of the different bids before the Board selected one or more of the offers.

17 Subsequently, over a period of two and a half months, the shareholding position of Clearwater and Equilibrium increased from approximately 5% as at November 19, to 14.9% as at January 25, 2005, and finally to approximately 20% on a fully diluted basis as at January 31, 2005. On January 25, Clearwater and Equilibrium announced that they had reached an understanding jointly to pursue efforts to maximize shareholder value at Stelco. A press release stated:

Such efforts will include seeking to ensure that the interests of Stelco's equity holders are appropriately protected by its board of directors and, ultimately, that Stelco's equity holders have an appropriate say, by vote or otherwise, in determining the future course of Stelco.

18 On February 1, 2005, Messrs. Keiper and Woollcombe and others representatives of Clearwater and Equilibrium, met with Mr. Drouin and other Board members to discuss their views of Stelco and a fair outcome for all stakeholders in the proceedings. Mr. Keiper made a detailed presentation, as Mr. Drouin testified, "encouraging the Board to examine how Stelco might improve its value through enhanced disclosure and other steps." Mr. Keiper expressed confidence that "there was value to the equity of Stelco," and added that he had backed this view up by investing millions of dollars of his own money in Stelco shares. At that meeting, Clearwater and Equilibrium requested that Messrs. Woollcombe and Keiper be added to the Board and to Stelco's restructuring committee. In this respect, they were supported by other shareholders holding about another 20% of the company's common shares.

19 At paragraphs 17 and 18 of his affidavit, Mr. Drouin, summarized his appraisal of the situation:

17. It was my assessment that each of Mr. Keiper and Mr. Woollcombe had personal qualities which would allow them to make a significant contribution to the Board in terms of their backgrounds and their knowledge of the steel industry generally and Stelco in particular. In addition I was aware that their appointment to the Board was supported by approximately 40% of the shareholders. In the event that these shareholders successfully requisitioned a shareholders meeting they were in a position to determine the composition of the entire Board.
18. I considered it essential that there be continuity of the Board through the CCAA process. I formed the view that the combination of existing Board members and these additional members would provide Stelco with the most appropriate board composition in the circumstances. The other members of the Board also shared my views.

20 In order to ensure that the appellants understood their duties as potential Board members and, particularly that "they would no longer be able to consider only the interests of shareholders alone but would have fiduciary responsibilities as a Board member to the corporation as a whole," Mr. Drouin and others held several further meetings with Mr. Woollcombe and Mr. Keiper. These discussions "included areas of independence, standards, fiduciary duties, the role of the Board Restructuring Committee and confidentiality matters." Mr. Woollcombe and Mr. Keiper gave their assurances that they fully understood the nature and extent of their prospective duties, and would abide by them. In addition, they agreed and confirmed that:

- a) Mr. Woollcombe would no longer be an advisor to Clearwater and Equilibrium

- with respect to Stelco;
- b) Clearwater and Equilibrium would no longer be represented by counsel in the CCAA proceedings; and
- c) Clearwater and Equilibrium then had no involvement in, and would have no future involvement, in any bid for Stelco.

21 On the basis of the foregoing - and satisfied "that Messrs. Keiper and Woollcombe would make a positive contribution to the various issues before the Board both in [the] restructuring and the ongoing operation of the business" - the Board made the appointments on February 18, 2005.

22 Seven days later, the motion judge found it "appropriate, just, necessary and reasonable to declare" those appointments "to be of no force and effect" and to remove Messrs. Woollcombe and Keiper from the Board. He did so not on the basis of any actual conduct on the part of the appellants as directors of Stelco but because there was some risk of anticipated conduct in the future. The gist of the motion judge's rationale is found in the following passage from his reasons (at para. 23):

In these particular circumstances and aside from the Board feeling coerced into the appointments for the sake of continuing stability, I am not of the view that it would be appropriate to wait and see if there was any explicit action on behalf of K and W while conducting themselves as Board members which would demonstrate that they had not lived up to their obligations to be "neutral." They may well conduct themselves beyond reproach. But if they did not, the fallout would be very detrimental to Stelco and its ability to successfully emerge. What would happen to the bids in such a dogfight? I fear that it would be trying to put Humpty Dumpty back together again. The same situation would prevail even if K and W conducted themselves beyond reproach but with the Board continuing to be concerned that they not do anything seemingly offensive to the bloc. The risk to the process and to Stelco in its emergence is simply too great to risk the wait and see approach.

PART III - LEAVE TO APPEAL

23 Because of the "real time" dynamic of this restructuring project, Laskin J.A. granted an order on March 4, 2005, expediting the appellants' motion for leave to appeal, directing that it be heard orally and, if leave be granted, directing that the appeal be heard at the same time. The leave motion and the appeal were argued together, by order of the panel, on March 18, 2005.

24 This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": *Country Style Food Services Inc. (Re)*, (2002) 158 O.A.C. 30; [2002] O.J. No. 1377 (C.A.), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,

- a) whether the point on appeal is of significance to the practice;
- b) whether the point is of significance to the action;
- c) whether the appeal is *prima facie* meritorious or frivolous;
- d) whether the appeal will unduly hinder the progress of the action.

25 Counsel agree that (d) above is not relevant to this proceeding, given the expedited nature of the hearing. In my view, the tests set out in (a) - (c) are met in the circumstances, and as such, leave should be granted. The issue of the court's jurisdiction to intervene in corporate governance issues during a CCAA restructuring, and the scope of its discretion in doing so, are questions of considerable

importance to the practice and on which there is little appellate jurisprudence. While Messrs. Woollcombe and Keiper are pursuing their remedies in their own right, and the company and its directors did not take an active role in the proceedings in this court, the Board and the company did stand by their decision to appoint the new directors at the hearing before the motion judge and in this court, and the question of who is to be involved in the Board's decision making process continues to be of importance to the CCAA proceedings. From the reasons that follow it will be evident that in my view the appeal has merit.

26 Leave to appeal is therefore granted.

PART IV - THE APPEAL

The Positions of the Parties

27 The appellants submit that,

- a) in exercising its discretion under the CCAA, the court is not exercising its "inherent jurisdiction" as a superior court;
- b) there is no jurisdiction under the CCAA to remove duly elected or appointed directors, notwithstanding the broad discretion provided by s. 11 of that Act; and that,
- c) even if there is jurisdiction, the motion judge erred:
 - (i) by relying upon the administrative law test for reasonable apprehension of bias in determining that the directors should be removed;
 - (ii) by rejecting the application of the "business judgment" rule to the unanimous decision of the Board to appoint two new directors; and,
 - (iii) by concluding that Clearwater and Equilibrium, the shareholders with whom the appellants are associated, were focussed solely on a short-term investment horizon, without any evidence to that effect, and therefore concluding that there was a tangible risk that the appellants would not be neutral and act in the best interests of Stelco and all stakeholders in carrying out their duties as directors.

28 The respondents' arguments are rooted in fairness and process. They say, first, that the appointment of the appellants as directors has poisoned the atmosphere of the CCAA proceedings and, secondly, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the ability of the court at the end of the day to approve any compromise or arrangement emerging from that process. The respondents contend that Farley J. had jurisdiction to ensure the integrity of the CCAA process, including the capital raising process Stelco had asked him to approve, and that this court should not interfere with his decision that it was necessary to remove Messrs. Woollcombe and Keiper from the Board in order to ensure the integrity of that process. A judge exercising a supervisory function during a CCAA proceeding is owed considerable deference: *Algoma Steel Inc. (2001)*, 25 C.B.R. (4th) 194, at para. 8.

29 The crux of the respondents' concern is well-articulated in the following excerpt from paragraph 72 of the factum of the Retired Salaried Beneficiaries:

The appointments of Keiper and Woollcombe violated every tenet of fairness in the restructuring process that is supposed to lead to a plan of arrangement. One stakeholder group - particular investment funds that have acquired Stelco shares

during the CCAA itself - have been provided with privileged access to the capital raising process, and voting seats on the Corporation's Board of Directors and Restructuring Committee. No other stakeholder has been treated in remotely the same way. To the contrary, the salaried retirees have been completely excluded from the capital raising process and have no say whatsoever in the Corporation's decision-making process.

30 The respondents submit that fairness, and the perception of fairness, underpin the CCAA process, and depend upon effective judicial supervision: see *Olympia & York Development Ltd. v. Royal Trust* (1993), 12 O.R. (3d) 500 (Gen. Div.); *Re Ivaco Inc.*, (2004), 3 C.B.R. (5th) 33, at para. 15-16. The motion judge reasonably decided to remove the appellants as directors in the circumstances, they say, and this court should not interfere.

Jurisdiction

31 The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA." He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

32 The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786 (Sup. Ct.) at para. 11. See also, *Re Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at p. 320; *Re Lehndorff General Partners Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.). Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), *Royal Oak Mines Inc. (Re)* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]); and *Westar Mining Ltd. (Re)* (1992), 70 B.C.L.R. (2d) 6 (B.C.S.C.).

33 It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent Jurisdiction

34 Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law," permitting the court "to maintain its authority and to prevent its process being obstructed and abused." It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner." See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Current Legal Problems* 27-28. In *Halsbury's Laws of England*, 4th ed. (London: Lexis-Nexis UK, 1973 -) vol. 37, at para. 14, the concept is described as follows:

In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or

equitable to do so, in particular to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

35 In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the Legislature has acted. As Farley J. noted in *Royal Oak Mines*, *supra*, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play" (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.*, [1976] 2 S.C.R. 475 (S.C.C.) at 480; *Richtree Inc. (Re)*, [2005] O.J. No. 251 (Sup. Ct.).

36 In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, [2003] B.C.J. No. 1335 (B.C.C.A.), (2003) 43 C.B.R. (4th) 187 at para. 46, that:

... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above,² rather than the integrity of their own process.

37 As Jacob observes, in his article "The Inherent Jurisdiction of the Court," *supra*, at p. 25:

The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

38 I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however - difficult as it may be to draw - between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose."³ Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The Section 11 Discretion

39 This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval

process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, the s. 11 discretion - in spite of its considerable breadth and flexibility - does not permit the exercise of such a power in and of itself. There may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the CBCA, and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA. However, this was not argued in the present case, and the facts before the court would not justify the removal of Messrs. Woollcombe and Keiper on oppression remedy grounds.

40 The pertinent portions of s. 11 of the CCAA provide as follows:

Powers of court	11(1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.
Initial application court orders	<p>(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days.</p> <p>(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);</p> <p>(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and</p> <p>(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.</p>
Other than initial application court orders	<p>(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose.</p> <p>(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);</p> <p>(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and</p> <p>(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.</p>

- Burden of proof on application
- (6) The court shall not make an order under subsection (3) or (4) unless
- (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
 - (b) in the case of an order under subsection (4), the applicant also satisfied the court that the applicant has acted, and is acting, in good faith and with due diligence.

41 The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 33, and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21 is articulated in E.A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) as follows:

Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at page 262.

42 The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the CCAA, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions made by directors and officers in the course of managing the business and affairs of the corporation.

43 Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparagraphs 11(3)(a)-(c) and 11(4)(a)-(c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.

44 What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff*, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors." But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.

45 With these principles in mind, I turn to an analysis of the various factors underlying the

interpretation of the s. 11 discretion.

46 I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: *London Finance Corporation Limited v. Banking Service Corporation Limited* (1923), 23 O.W.N. 138 (Ont. H.C.); *Stephenson v. Vokes* (1896), 27 O.R. 691 (Ont. H.C.). The authority to remove must therefore be found in statute law.

47 In Canada, the CBCA and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting: CBCA, ss. 106(3) and 111.⁴ The specific power to remove directors is vested in the shareholders by s. 109(1) of the CBCA. However, s. 241 empowers the court - where it finds that oppression as therein defined exists - to "make any interim or final order it thinks fit," including (s. 241 (3)(e)) "an order appointing directors in place of or in addition to all or any of the directors then in office." This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief: see, for example, *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2004] O.J. No. 4722.

48 There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment, and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.*, supra, at p. 480; *Royal Oak Mines Inc. (Re)*, supra; and *Richtree Inc. (Re)*, supra.

49 At paragraph 7 of his reasons, the motion judge said:

The board is charged with the standard duty of "manage[ing], [sic] or supervising the management, of the business and affairs of the corporation": s. 102(1) CBCA. *Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem.* The directors should not be required to constantly look over their shoulders for this would be the sure recipe for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual. [emphasis added]

50 Respectfully, I see no authority in s. 11 of the CCAA for the court to interfere with the composition of a board of directors on such a basis.

51 Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power - which the courts are disinclined to exercise in any event - except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

52 The fact that s. 11 does not itself provide the authority for a CCAA judge to order the removal of directors does not mean that the supervising judge is powerless to make such an order, however. Section 20 of the CCAA offers a gateway to the oppression remedy and other provisions of the CBCA and similar provincial statutes. Section 20 states:

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

53 The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them." Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances.

54 I do not accept the respondents' argument that the motion judge had the authority to order the removal of the appellants by virtue of the power contained in s. 145(2)(b) of the CBCA to make an order "declaring the result of the disputed election or appointment" of directors. In my view, s. 145 relates to the procedures underlying disputed elections or appointments, and not to disputes over the composition of the board of directors itself. Here, it is conceded that the appointment of Messrs. Woollcombe and Keiper as directors complied with all relevant statutory requirements. Farley J. quite properly did not seek to base his jurisdiction on any such authority.

The Level of Conduct Required

55 Colin Campbell J. recently invoked the oppression remedy to remove directors, without appointing anyone in their place, in *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, supra. The bar is high. In reviewing the applicable law, C. Campbell J. said (para. 68):

Director removal is *an extraordinary remedy* and certainly should be *imposed most sparingly*. As a starting point, I accept the basic proposition set out in Peterson, "Shareholder Remedies in Canada"⁵:

SS. 18.172 *Removing and appointing directors to the board is an extreme form of judicial intervention*. The board of directors is elected by the shareholders, vested with the power to manage the corporation, and appoints the officers of the company who undertake to conduct the day-to-day affairs of the corporation. [Footnote omitted.] It is clear that the board of directors has control over policymaking and management of the corporation. *By tampering with a board, a court directly affects the management of the corporation*. If a reasonable balance between protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of directors should be *a measure of last resort*. The order could be suitable where the continuing presence of the incumbent directors is harmful to both the company and the interests of corporate stakeholders, and where the appointment of a new director or

directors would remedy the oppressive conduct without a receiver or receiver-manager. [emphasis added]

56 C. Campbell J. found that the continued involvement of the Ravelston directors in the Hollinger situation would "significantly impede" the interests of the public shareholders and that those directors were "motivated by putting their interests first, not those of the company" (paras. 82-83). The evidence in this case is far from reaching any such benchmark, however, and the record would not support a finding of oppression, even if one had been sought.

57 Everyone accepts that there is no evidence the appellants have conducted themselves, as directors - in which capacity they participated over two days in the bid consideration exercise - in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants "may well conduct themselves beyond reproach." However, he simply decided there was a risk - a reasonable apprehension - that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future.

58 The risk or apprehension appears to have been founded essentially on three things: (1) the earlier public statements made by Mr. Keiper about "maximizing shareholder value"; (2) the conduct of Clearwater and Equilibrium in criticizing and opposing the Stalking Horse Bid; and (3) the motion judge's opinion that Clearwater and Equilibrium - the shareholders represented by the appellants on the Board - had a "vision" that "usually does not encompass any significant concern for the long-term competitiveness and viability of an emerging corporation," as a result of which the appellants would approach their directors' duties looking to liquidate their shares on the basis of a "short-term hold" rather than with the best interests of Stelco in mind. The motion judge transposed these concerns into anticipated predisposed conduct on the part of the appellants as directors, despite their apparent understanding of their duties as directors and their assurances that they would act in the best interests of Stelco. He therefore concluded that "the risk to the process and to Stelco in its emergence [was] simply too great to risk the wait and see approach."

59 Directors have obligations under s. 122(1) of the CBCA (a) to act honestly and in good faith with a view to the best interest of the corporation (the "statutory fiduciary duty" obligation), and (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the "duty of care" obligation). They are also subject to control under the oppression remedy provisions of s. 241. The general nature of these duties does not change when the company approaches, or finds itself in, insolvency: Peoples Department Stores Inc (Trustee of). v. Wise, [2004] S.C.J. No. 64 (S.C.C.) at paras. 42-49.

60 In Peoples the Supreme Court noted that "the interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders" (para. 43), but also accepted "as an accurate statement of the law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (para. 42). Importantly as well - in the context of "the shifting interest and incentives of shareholders and creditors" - the court stated (para. 47):

In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.

61 In determining whether directors have fallen foul of those obligations, however, more than some

risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. Although the motion judge concluded that there was a risk of harm to the Stelco process if Messrs Woollcombe and Keiper remained as directors, he did not assess the level of that risk. The record does not support a finding that there was a sufficient risk of sufficient misconduct to warrant a conclusion of oppression. The motion judge was not asked to make such a finding, and he did not do so.

62 The respondents argue that this court should not interfere with the decision of the motion judge on grounds of deference. They point out that the motion judge has been case-managing the restructuring of Stelco under the CCAA for over fourteen months and is intimately familiar with the circumstances of Stelco as it seeks to restructure itself and emerge from court protection.

63 There is no question that the decisions of judges acting in a supervisory role under the CCAA, and particularly those of experienced commercial list judges, are entitled to great deference: see *Algoma Steel Inc. v. Union Gas Limited* (2003), 63 O.R. (3d) 78 (C.A.), at para. 16. The discretion must be exercised judicially and in accordance with the principles governing its operation. Here, respectfully, the motion judge misconstrued his authority, and made an order that he was not empowered to make in the circumstances.

64 The appellants argued that the motion judge made a number of findings without any evidence to support them. Given my decision with respect to jurisdiction, it is not necessary for me to address that issue.

The Business Judgment Rule

65 The appellants argue as well that the motion judge erred in failing to defer to the unanimous decision of the Stelco directors in deciding to appoint them to the Stelco Board. It is well-established that judges supervising restructuring proceedings - and courts in general - will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in *Peoples*, supra, at para. 67:

Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making ...

66 In *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (C.A.) at 320, this court adopted the following statement by the trial judge, Anderson J.:

Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority.⁶

67 McKinlay J.A then went on to say:

There can be no doubt that on an application under s. 234⁷ the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not mean that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no

knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.

68 Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind. See also *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, supra, *Sammi Atlas Inc. (Re)* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.); *Olympia & York Developments Ltd. (Re)*, supra; *Re Alberta Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C.S.C.). The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.

69 Here, the motion judge was alive to the "business judgment" dimension in the situation he faced. He distinguished the application of the rule from the circumstances, however, stating at para. 18 of his reasons:

With respect I do not see the present situation as involving the "management of the business and affairs of the corporation," but rather as a quasi-constitutional aspect of the corporation entrusted albeit to the Board pursuant to s. 111(1) of the CBCA. I agree that where a board is actually engaged in the business of a judgment situation, the board should be given appropriate deference. However, to the contrary in this situation, I do not see it as a situation calling for (as asserted) more deference, but rather considerably less than that. With regard to this decision of the Board having impact upon the capital raising process, as I conclude it would, then similarly deference ought not to be given.

70 I do not see the distinction between the directors' role in "the management of the business and affairs of the corporation" (CBCA, s. 102) - which describes the directors' overall responsibilities - and their role with respect to a "quasi-constitutional aspect of the corporation" (i.e. in filling out the composition of the board of directors in the event of a vacancy). The "affairs" of the corporation are defined in s. 1 of the CBCA as meaning "the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate." Corporate governance decisions relate directly to such relationships and are at the heart of the Board's business decision-making role regarding the corporation's business and affairs. The dynamics of such decisions, and the intricate balancing of competing interests and other corporate-related factors that goes into making them, are no more within the purview of the court's knowledge and expertise than other business decisions, and they deserve the same deferential approach. Respectfully, the motion judge erred in declining to give effect to the business judgment rule in the circumstances of this case.

71 This is not to say that the conduct of the Board in appointing the appellants as directors may never come under review by the supervising judge. The court must ultimately approve and sanction the plan of compromise or arrangement as finally negotiated and accepted by the company and its creditors and stakeholders. The plan must be found to be fair and reasonable before it can be sanctioned. If the Board's decision to appoint the appellants has somehow so tainted the capital raising process that those criteria are not met, any eventual plan that is put forward will fail.

72 The respondents submit that it makes no sense for the court to have jurisdiction to declare the process flawed only after the process has run its course. Such an approach to the restructuring process would be inefficient and a waste of resources. While there is some merit in this argument, the court

cannot grant itself jurisdiction where it does not exist. Moreover, there are a plethora of checks and balances in the negotiating process itself that moderate the risk of the process becoming irretrievably tainted in this fashion - not the least of which is the restraining effect of the prospect of such a consequence. I do not think that this argument can prevail. In addition, the court at all times retains its broad and flexible supervisory jurisdiction - a jurisdiction which feeds the creativity that makes the CCAA work so well - in order to address fairness and process concerns along the way. This case relates only to the court's exceptional power to order the removal of directors.

The Reasonable Apprehension of Bias Analogy

73 In exercising what he saw as his discretion to remove the appellants as directors, the motion judge thought it would be useful to "borrow the concept of reasonable apprehension of bias ... with suitable adjustments for the nature of the decision making involved" (para. 8). He stressed that "there was absolutely no allegation against [Mr. Woolcombe and Mr. Keiper] of any actual 'bias' or its equivalent" (para. 8). He acknowledged that neither was alleged to have done anything wrong since their appointments as directors, and that at the time of their appointments the appellants had confirmed to the Board that they understood and would abide by their duties and responsibilities as directors, including the responsibility to act in the best interests of the corporation and not in their own interests as shareholders. In the end, however, he concluded that because of their prior public statements that they intended to "pursue efforts to maximize shareholder value at Stelco," and because of the nature of their business and the way in which they had been accumulating their shareholding position during the restructuring, and because of their linkage to 40% of the common shareholders, there was a risk that the appellants would not conduct themselves in a neutral fashion in the best interests of the corporation as directors.

74 In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

75 Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants - including the respondents in this case - but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

76 If the respondents are correct, and reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 (S.C.C.) at para. 35, "persons are assumed to act in good faith unless proven otherwise." With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in

appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

PART V - DISPOSITION

77 For the foregoing reasons, then, I am satisfied that the motion judge erred in declaring the appointment of Messrs. Woolcombe and Keiper as directors of Stelco of no force and effect.

78 I would grant leave to appeal, allow the appeal and set aside the order of Farley J. dated February 25, 2005.

79 Counsel have agreed that there shall be no costs of the appeal.

R.A. BLAIR J.A.

S.T. GOUDGE J.A. - I agree.

K.N. FELDMAN J.A. - I agree.

cp/lm/e/qljxh/qlkjg/qlgxc/qlmlt

1 R.S.C. 1985, c. C-36, as amended.

2 The reference is to the decisions in Dyle, Royal Oak Mines, and Westar, cited above.

3 See paragraph 43, *infra*, where I elaborate on this distinction.

4 It is the latter authority that the directors of Stelco exercised when appointing the appellants to the Stelco Board.

5 Dennis H. Peterson, *Shareholder Remedies in Canada* (Markham: LexisNexis ' Butterworths ' Looseleaf Service, 1989) at 18-47.

6 Or, I would add, unpopular with other stakeholders.

7 Now s. 241.

Tab 4

Indexed as:

Chef Ready Foods Ltd. v. Hongkong Bank of Canada

**IN THE MATTER of The Company Act R.S.B.C. 1979, C. 59
AND IN THE MATTER of The Companies' Creditors Arrangement Act,
R.S.C. 1985 c. C-36
AND IN THE MATTER of Chef Ready Foods Ltd. and Istonio Foods
Ltd.**

Between

**Chef Ready Foods Ltd., Respondent, (Petitioner), and
Hongkong Bank of Canada, Appellant, (Respondent)**

[1990] B.C.J. No. 2384

[1991] 2 W.W.R. 136

51 B.C.L.R. (2d) 84

4 C.B.R. (3d) 311

23 A.C.W.S. (3d) 976

1990 CanLII 529

Vancouver Registry: CA12944

British Columbia Court of Appeal

Carrothers, Cumming and Gibbs JJ.A.

Heard: October 12, 1990

Judgment: October 29, 1990

Debtor and creditor -- Arrangement under companies' creditors arrangement act -- Bank Act security -- Priority.

Appeal from a stay order issued under the Companies' Creditors Arrangement Act. Bank supplying credit and services to Chef Ready, and holding security under section 178 of the Bank Act. Bank commencing proceedings upon its security. Chef Ready petitioning for relief under the Companies' Creditors Arrangement Act. Order issued staying realization on any security of Chef Ready. Issue whether Bank Act security should be exempt from the order.

HELD: Appeal dismissed. Nothing in the Companies' Creditors Arrangement Act exempted any creditors from the provisions of the Act, and nothing in the Bank Act excluded the impact of the Companies' Creditors Arrangement Act. Bank's interest not defeated, but its right to seize and sell postponed. Broad protection of creditors in the Companies' Creditors Arrangement Act to prevail over

the Bank Act. Section 178 security included in the term "security" in the Companies' Creditors Relief Act.

STATUTES, REGULATIONS AND RULES CITED:

Bank Act, R.S.C. 1985, c. B-1, s. 178, 179.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 8, 11.

Counsel for the Appellant: D.I. Knowles and H.M. Ferris.

Counsel for the Respondent: R.H. Sahrman and L.D. Goldberg.

GIBBS J.A. (for the Court, dismissing the appeal):-- The sole issue on this appeal is whether a stay order made by a Chambers judge under s. 11 of the Companies' Creditors Arrangement Act, R.S.C. 1985, Chap. C-36 is a bar to realization by the Hongkong Bank of Canada (the "Bank") on security granted to it under s. 178 of the Bank Act, R.S.C. 1985, Chap. B-1.

The facts relevant to resolution of the issue are not in dispute. The respondent Chef Ready Foods Ltd. ("Chef Ready") is in the business of manufacturing and wholesaling fresh and frozen pizza products. The appellant Bank provided credit and other banking services to Chef Ready. As part of the security for its indebtedness Chef Ready executed the appropriate documentation and filed the appropriate notices under s. 178 of the Bank Act. Accordingly the Bank holds what is commonly referred to as "section 178 security".

Chef Ready encountered financial difficulties. On August 22, 1990, following upon some fruitless negotiations, the Bank, through its solicitors, demanded payment from Chef Ready. The debt then stood at \$365,318.69 with interest accruing thereafter at \$150.443 per day. Chef Ready did not pay.

On August 27, 1990 the Bank commenced proceedings upon debenture security which it held and upon guarantees by the principals of Chef Ready. Also on August 27, 1990, the Bank appointed an agent under a general assignment of book debts which it held, with instructions to the agent to realize upon the accounts. In the meantime, on August 23, 1990, so as to qualify under the Companies' Creditors Arrangement Act (the "C.C.A.A."), Chef Ready had granted a trust deed to a trustee and issued an unsecured \$50 bond. On August 28, 1990, the day after the Bank commenced its debenture and guarantee proceedings, Chef Ready filed a petition seeking various forms of relief under the C.C.A.A. On the same day Chef Ready filed an application, ex parte, as they were entitled to do under the C.C.A.A. for an order to be issued that day granting the relief claimed in the petition.

The application was heard in Chambers in the afternoon of August 28, 1990 and the following day. The Bank learned "on the grapevine" of the application and appeared on the hearing and was given standing to make submissions. It also filed affidavit evidence which appears to have been taken into account by the Chambers judge. The affidavit evidence had appended to it, inter alia, the s. 178 security documentation. On August 30, 1990 the Chambers judge granted the order and delivered oral reasons at the end of which he said:

"I therefore conclude that the Companies' Creditors Arrangement Act is an overriding statute which gives the court power to stay all proceedings including the right of the

bank to collect the accounts receivable."

The reasons refer specifically to the accounts receivable because the Bank was then poised ready to take possession of those accounts and collect the amounts owing. Its right to do so arose under the general assignment of book debts and under clause 4 of the s. 178 security instrument:

" 4. If the Customer shall sell the property or any part thereof, the proceeds of any such sale, including cash, bills, notes, evidence of title, and securities, and the indebtedness of any purchaser in connection with such sales shall be the property of the Bank to be forthwith paid or transferred to the Bank, and until so paid or transferred to be held by the Customer on behalf of and in trust for the Bank. Execution by the Customer and acceptance by the Bank of an assignment of book debts shall be deemed to be in furtherance of this declaration and not an acknowledgement by the Bank of any right or title on the part of the Customer to such book debts."

The formal order made by the Chambers judge contains a paragraph which stays realization upon or otherwise dealing with any securing on "the undertaking, property and assets" of Chef Ready:

" THIS COURT FURTHER ORDERS THAT all proceedings taken or that might be taken by any of the Petitioners' creditors or any other person, firm or corporation under the Bankruptcy Act (Canada) or the Winding-Up Act (Canada) shall be stayed until further Order of this Court upon 2 days notice to the Petitioners and that further proceedings in any action, suit or proceeding commenced by any person, firm or corporation against any of the Petitioners be stayed until the further Order of this Court upon 2 days notice to the Petitioners, that no action, suit or other proceeding may be proceeded with or commenced against any of the Petitioners by any person, firm or corporation except with leave of this Court upon 2 days notice to the Petitioners and subject to such terms as this Court may impose and that the right of any person, firm or corporation to realize upon or otherwise deal with any property right or security held by that person firm or corporation on the undertaking, property and assets of the Petitioners be and the same is postponed;"

(Emphasis added.)

The jurisdiction in the court to make such a stay order is found in s. 11 of the C.C.A.A.:

" ii. Notwithstanding anything in the Bankruptcy Act or the Winding-Up Act, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,

- (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the Bankruptcy Act and the Winding-Up Act or either of them;
- (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
- (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes."

The question of whether a step, not involving any court or litigation process, taken to realize upon the accounts receivable is a "suit, action or other proceeding ... against the company" is not before the court on this appeal. The Bank does not put its case forward on that footing. Its contention is more general in nature. It is that s. 178 security is beyond the reach of the C.C.A.A.; put another way, that whatever the scope of the C.C.A.A. it does not go so far as to impede or qualify, or give jurisdiction to make orders which will impede or qualify, the rights of realization of a holder of s. 178 security. Consistent with that position, by way of relief on the appeal the Bank asks only that the stay order be varied to free up the s. 178 security:

"NATURE OF ORDER SOUGHT

An order that the appeal of the Appellant be allowed and an order be made the Order of the Judge in the Court below be set aside insofar as it restrains the Appellant from exercising its rights under its section 178 security..."

The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all encompassing scope of the Act qua creditors is even underscored by s. 8 which negates any contracting out provisions in a security instrument. And Chief Justice Lamer emphasizes the obvious, that if it had been intended that s. 178 security or the holders of s. 178 security be exempt from the C.C.A.A. it would have been a simple matter to say so. But that does not dispose of the issue. There is the Bank Act to consider.

There is nothing in the Loans and Security division of the Bank Act either, where s. 178 is found, which specifically excludes direct or indirect impact by the C.C.A.A. Nonetheless the Bank's position, in essence, is that there is a notional cordon sanitaire around s. 178 and other sections associated with it such that neither the C.C.A.A. or orders made under it can penetrate. In support of its position the Bank relies heavily upon the recent unanimous judgment of the Supreme Court of Canada in *Bank of Montreal v. Hall*, [1990 1 S.C.R. 121, and to a lesser degree upon an earlier unanimous Supreme Court of Canada judgment in *Flintoft v. Royal Bank of Canada* (1964), S.C.R. 631.

The principal issue in *Hall* was whether ss. 19 to 36 of the Saskatchewan Limitation of Civil Rights Act applied to a security taken under ss. 178 and 179 of the Bank Act. The court held that it was beyond the competence of the Saskatchewan Legislature "to superadd conditions governing realization over and above those found within the confines of the Bank Act" (p. 154). In the course of arriving at its decision the court considered the property interest acquired by a bank under s. 178 security, the legislative history leading up to the present ss. 178 and 179, the purposes intended to be achieved by the legislation, and the rights of a bank holding s. 178 security. All of those considerations have application to the issue here, and the judgment merits reading in full to appreciate the relevance of all of its parts. However a few extracts will serve to illustrate the Bank's reliance:

"... a bank taking security under section 178 effectively acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower" (p. 134)

"... the Parliament of Canada has enacted these sections not so much for the benefit of banks as for the benefit of manufacturers" (p. 139)

"... These sections of the Bank Act have become an integral part of bank lending activities and are a means of providing support in many fields of endeavour to an extent which otherwise would not be practical from the standpoint of prudent banking" (p. 139)

"The bank obtains and may assert its right to the goods and their proceeds against the world, except as only Parliament itself may reduce or modify those rights" (p. 143)

"... the rights, duties and obligations of creditor and debtor are to be determined solely by reference to the Bank Act ..." (p. 143)

"The essence of that regime [ss. 178 and 179], it hardly needs repeating, is to assign to the bank, on the taking out of the security, right and title to the goods in question, and to confer, on default of the debtor, and immediate right to seize and sell those goods ..." (p. 152)

"... it was Parliament's manifest legislative purpose that the sole realization scheme applicable to the s. 178 security interest be that contained in the Bank Act itself" (p. 154)

"... Parliament, under its power to regulate banking, has enacted a complete code that at once defines and provides for the realization of a security interest" (p. 155).

It is the insular theme which runs through these propositions that the Bank seizes upon to support its claim for immunity. But, it must be asked, in what respect does the preservation of the status quo qua creditors under the C.C.A.A. for a temporary period infringe upon the rights of the Bank under ss. 178 and 179? It does not detract from the Bank's title; it does not distort the mechanics of realization of the security in the sense of the steps to be taken; it does not prevent immediate crystallization of the right to seize and sell; it does not breach the "complete code". All that it does is postpone the exercise of the right to seize and sell. And here the Bank had already allowed at least five days to expire between the accrual of the right and the taking of a step to exercise. It follows from this analysis that there is no apparent bar in the Bank Act to the application of the C.C.A.A. to s. 178 security and the Bank's rights in respect of it.

Having regard to the broad public policy objectives of the C.C.A.A. there is good reason why s. 178 security should not be excluded from its provisions. The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent liquidation followed because that was the consequence of the only insolvency legislation which then existed - the Bankruptcy Act and the Winding-Up Act. Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business. These excerpts from an article by

Stanley E. Edwards at p. 587 of 1947 Vol. 25 of the Canadian Bar Review, entitled "Reorganizations Under The Companies' Creditors Arrangement Act", explain very well the historic and continuing purposes of the Act:

" It is important in applying the C.C.A.A. to keep in mind its purpose and several fundamental principles which may serve to accomplish that purpose. Its object, as one Ontario judge has stated in a number of cases, is to keep a company going despite insolvency. Hon. C. H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation, through reorganization, to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often a sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders." (p. 592)

" There are a number of conditions and tendencies in this country which underline the importance of this statute. There has been over the last few years a rapid and continuous growth of industry, primarily manufacturing. The tendency here, as in other expanding private enterprise countries, is for the average size of corporations to increase faster than the number of them, and for much of the new wealth to be concentrated in the hands of existing companies or their successors. The results of permitting dissolutions of companies without giving the parties an adequate opportunity to reorganize them would therefore likely be more serious in the future than they have been in the past.

Because of the country's relatively small population, however, Canadian industry is and will probably continue to be very much dependent on world markets and consequently vulnerable to world depressions. If there should be such a depression it will become particularly important that an adequate reorganization procedure should be in existence, so that the Canadian economy will not be permanently injured by discontinuance of its industries, so that whatever going concern value the insolvent companies have will not be lost through dismemberment and sale of their assets, so that their employees will not be thrown out of work, and so that large numbers of investors will not be deprived of their claims and their opportunity to share in the fruits of the future activities of the corporations. While we hope that this dismal prospect will not materialize, it is nevertheless a possibility which must be recognized. But whether it does or not, the growing importance of large companies in Canada will make it important that adequate provision be made for reorganization of insolvent corporations." (p. 590)

It is apparent from these excerpts and from the wording of the statute that, in contrast with ss. 178 and 179 of the Bank Act which are preoccupied with the competing rights and duties of the borrower and the lender, the C.C.A.A. serves the interests of a broad constituency of investors, creditors and employees. If a bank's rights in respect of s. 178 security are accorded an unique status which renders those rights immune from the provisions of the C.C.A.A. the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because

almost inevitably the realization by the bank on its security will destroy the company as a going concern. Here, for example, if the Bank signifies and collects the accounts receivable Chef Ready will be deprived of working capital. Collapse and liquidation must necessarily follow. The lesson will be that where s. 178 security is present a single creditor can frustrate the public policy objectives of the C.C.A.A. There will be two classes of debtor companies: those for whom there are prospects for recovery under the C.C.A.A.; and those for whom the C.C.A.A. may be irrelevant dependant upon the whim of the s. 178 security holder. Given the economic circumstances which prevailed when the C.C.A.A. was enacted it is difficult to imagine that the legislators of the day intended that result to follow.

In the exercise of their functions under the C.C.A.A. Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives. See such cases as *Meridian Developments Inc. v. T.D. Bank* (1984), 52 C.B.R. 109 (Alta. Q.B.); *Northland Properties Limited v. Excelsior Life Insurance Company* (1989), 34 B.C.L.R. (2d) 122 (B.C.C.A.); *Re Feifer and Frame Manufacturing Corporation* (1947), 28 C.B.R. 124 (Que. C.A.); *Wynden Canada Inc. v. Gaz Metropolitaine* (1982), 44 C.B.R. 285 (Que. S.C.); and *Norcen Energy Resources v. Oakwood Petroleums* (1988) 72 C.B.R. 2 (Alta. Q.B.). The trend demonstrated by these cases is entirely consistent with the object and purpose of the C.C.A.A.

The trend which emerges from this sampling will be given effect here by holding that where the word security occurs in the C.A.A.A. it includes s. 178 security and where the word creditor occurs it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes therefore, the broad scope of the C.C.A.A. prevails.

For these reasons the disposition by the Chambers judge of the application made by Chef Ready will be upheld. it follows that the appeal is dismissed.

GIBBS J.A.

CARROTHERS J.A.:-- I agree.

CUMMING J.A.:-- I agree.

TAB 5

Case Name:
Stelco Inc. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement
 Act, R.S.C. 1985, C. c-36, as amended
 AND IN THE MATTER OF a proposed plan of compromise or
 arrangement with respect to Stelco Inc. and the other
 applicants listed in Schedule "A"
 APPLICATION UNDER the Companies' Creditors
 Arrangement Act, R.S.C. 1985, C. c-36, as amended**

[2005] O.J. No. 4733

Docket: M33099 (C44332)

Ontario Court of Appeal
 Toronto, Ontario

J.I. Laskin, M. Rosenberg and H.S. LaForme JJ.A.

Heard: November 2, 2005.
 Judgment: November 4, 2005.

(32 paras.)

Creditors & debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act -- Appeal by debenture holders from orders, reported at [2005] O.J. No. 4309, approving agreements involving steel company in bankruptcy protection, necessary for success of company's plan of arrangement, dismissed -- Motions judge had jurisdiction to make orders where power of debenture holders to vote down proposal preserved and agreements had support of other stakeholders and Monitor -- Companies' Creditors Arrangement Act, s. 11.

Insolvency law -- Proposals -- Court approval -- Appeal by debenture holders from orders approving agreements involving steel company in bankruptcy protection, necessary for success of company's plan of arrangement, dismissed -- Motions judge had jurisdiction to make orders where orders did not amount to approval of plan of arrangement -- Debentures holders' power to vote down proposed plan not usurped -- Companies' Creditors Arrangement Act, s. 11.

Application by a committee of senior debenture holders for leave to appeal from orders authorizing Stelco to enter into agreements with two stakeholders and a finance provider. A group of equity holders supported the application, while other stakeholders and the Monitor supported the orders. Stelco and its four subsidiaries obtained protection from their creditors in 1994 *ES*. Stelco's attempts over twenty months to restructure were unsuccessful, in part because certain stakeholders continually exercised veto powers. Stelco's board of directors negotiated agreements with the stakeholders, the Ontario government and the steelworkers union, and Tricap Management, necessary to the success of Stelco's proposed plan of arrangement. The debenture holders objected to terms of the agreements providing for fees payable to

Tricap and providing Ontario with power to accept or reject members of Stelco's board of directors. The debenture holders did not propose an alternate plan of arrangement, but made it clear they would not support the one on the table. The motions judge stated in his reasons he was not approving Stelco's plan, but did not think the plan was doomed to fail. He scheduled a meeting of creditors to vote on the plan for November 2005.

HELD: Application allowed. Leave to appeal was granted and the appeal was dismissed. Leave to appeal was granted because the debenture holders raised a novel and important point that was significant to the action. The appeal was prima facie meritorious, and would not unduly interfere with Stelco's continuing negotiations. The appeal was dismissed because the judge had jurisdiction to make the orders approving the agreements, as the orders did not usurp the debenture holders' power to ultimately decide on whether or not to approve Stelco's plan. It was open to the motions judge to find the plan was not doomed to fail, despite the position of the debenture holders, because of the support the plan had from other stakeholders and the Monitor.

Statute, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 6, 11, 11(4), 13

Appeal From:

On appeal from the orders of Justice James M. Farley of the Superior Court of Justice made on October 4, 2005.

Counsel:

Robert W. Staley and Alan P. Gardner for the Informal Committee of Senior Debentureholders, Appellants

Michael E. Barrack and Geoff R. Hall for Stelco Inc., Respondent

Robert I. Thornton and Kyla E.M. Mahar for the Monitor, Respondent

John R. Varley for Salaried Active Employees, Respondents

Michael C.P. McCreary and David P. Jacobs for USW Locals 8782 and 5328, Respondents

George Karayannides for EDS Canada Inc., Respondent

Aubrey E. Kauffman for Tricap Management Ltd., Respondents

Ben Zarnett and Gale Rubenstein for the Province of Ontario, Respondents

Murray Gold for Salaried Retirees, Respondents

Kenneth T. Rosenberg for USW International, Respondents

Robert A. Centa for USWA, Respondents

George Glezos for AGF Management Ltd., Respondents

The judgment of the Court was delivered by

1 M. ROSENBERG J.A.:-- This appeal is another chapter in the continuing attempt by Stelco Inc. and four of its wholly-owned subsidiaries to emerge from protection from their creditors under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36. The appellant, an Informal Committee of Senior Debenture Holders who are Stelco's largest creditor, applies for leave to appeal under s. 13 of the CCAA and if leave be granted appeals three orders made by Farley J. on October 4, 2005 in the CCAA proceedings. These orders authorize Stelco to enter into agreements with two of its stakeholders and a finance provider. The appellant submits that the motions judge had no jurisdiction to make these orders and that the effect of these orders is to distort or skew the CCAA process. A group of Stelco's equity holders support the submissions of the appellant. The various other players with a stake in the restructuring and the court-appointed Monitor support the orders made by the motions judge.

2 Given the urgency of the matter it is only possible to give relatively brief reasons for my conclusion that while leave to appeal should be granted, the appeal should be dismissed.

THE FACTS

3 Stelco Inc. and the four wholly-owned subsidiaries obtained protection from their creditors under the CCAA on January 29, 1994. Thus, the CCAA process has been going on for over twenty months, longer than anyone expected. Farley J. has been managing the process throughout. The initial order made under s. 11 of the CCAA gives Stelco sole and exclusive authority to propose and file a plan of arrangement with its creditors. To date, attempts to restructure have been unsuccessful. In particular, a plan put forward by the Senior Debt Holders failed.

4 While there have no doubt been many obstacles to a successful restructuring, the paramount problem appears to be that stakeholders, the Ontario government and Stelco's unions, who do not have a formal veto (i.e. they do not have a right to vote to approve any plan of arrangement and reorganization) have what the parties have referred to as a functional veto. It is unnecessary to set out the reasons for these functional vetoes. Suffice it to say, as did the Monitor in its Thirty-Eighth Report, that each of these stakeholders is "capable of exercising sufficient leverage against Stelco and other stakeholders such that no restructuring could be completed without that stakeholder's support".

5 In an attempt to successfully emerge from CCAA protection with a plan of arrangement, the Stelco board of directors has negotiated with two of these stakeholders and with a finance provider and has reached three agreements: an agreement with the provincial government (the Ontario Agreement), an agreement with The United Steelworkers International and Local 8782 (the USW Agreement), and an agreement with Tricap Management Limited (the Tricap Agreement). Those agreements are intrinsic to the success of the Plan of Arrangement that Stelco proposes. However, the debt holders including this appellant have the ultimate veto. They alone will vote on whether to approve Stelco's Plan. The vote of the affected debt holders is scheduled for November 15, 2005.

6 The three agreements have terms to which the appellant objects. For example, the Tricap Agreement contemplates a break fee of up to \$10.75 million depending on the circumstances. Tricap will be entitled to a break fee if the Plan fails to obtain the requisite approvals or if Tricap terminates its obligations to provide financing as a result of the Plan being amended without Tricap's approval. Half of the break fee becomes payable if the Plan is voted down by the creditors. Another example is found in the Ontario Agreement, which provides that the order sanctioning the Final Plan shall name the members of Stelco's board of directors and such members must be acceptable to the province. Consistent with the Order of March 30, 2005 and as required by the terms of the agreements themselves, Stelco sought court authorization to enter into the three agreements. We were told that, in any event, it is common practice

to seek court approval of agreements of this importance. The appellant submits that the motions judge had no jurisdiction to make these orders.

7 There are a number of other facts that form part of the context for understanding the issues raised by this appeal. First, on July 18, 2005, the motions judge extended the stay of proceedings until September 9, 2005 and warned the stakeholders that this was a "real and functional deadline". While that date has been extended because Stelco was making progress in its talks with the stakeholders, the urgency of the situation cannot be underestimated. Something will have to happen to either break the impasse or terminate the CCAA process.

8 Second, on October 4, 2005, the motions judge made several orders, not just the orders to authorize Stelco to enter into the three agreements to which the appellant objects. In particular, the motions judge extended the stay to December and made an order convening the creditors meeting on November 15th to approve the Stelco Plan. The appellant does not object to the orders extending the stay or convening the meeting to vote on the Plan.

9 Third, the appellant has not sought permission to prepare and file its own plan of arrangement. At present, the Stelco Board's Plan is the only plan on the table and as the motions judge observed, "one must realistically appreciate that a rival financing arrangement at this stage, starting from essentially a standing start, would take considerable time for due diligence and there is no assurance that the conditions will be any less onerous than those extracted by Tricap".

10 Fourth, in his orders authorizing Stelco to enter into these agreements, the motions judge made it clear that these authorizations, "are not a sanction of the terms of the plan ... and do not prohibit Stelco from continuing discussions in respect of the Plan with the Affected Creditors".

11 Fifth, the independent Monitor has reviewed the Agreements and the Plan and supports Stelco's position.

12 Finally, and importantly, the Senior Debenture Holders that make up the appellant have said unequivocally that they will not approve the Plan. The motions judge recognized this in his reasons:

The Bondholder group has indicated that it is firmly opposed to the plan as presently constituted. That group also notes that more than half of the creditors by \$ value have advised the Monitor that they are opposed to the plan as presently constituted. ... The present plan may be adjusted (with the blessing of others concerned) to the extent that it, in a revised form, is palatable to the creditors (assuming that they do not have a massive change of heart as to the presently proposed plan).

LEAVE TO APPEAL

13 The parties agree on the test for granting leave to appeal under s. 13 of the CCAA. The moving party must show the following:

- (a) the point on appeal is of significance to the practice;
- (b) the point is of significance to the action;
- (c) the appeal is prima facie meritorious; and
- (d) the appeal will not unduly hinder the progress of the action.

14 In my view, the appellant has met this test. The point raised is a novel and important one. It concerns the jurisdiction of the supervising judge to make orders that do not merely preserve the status quo but authorize key elements of the proposed plan of arrangement. The point is of obvious

significance in this action. If the motions judge's approvals were to be set aside, it is doubtful that the Plan could proceed. On the other hand, the appellant submits that the orders have created a coercive and unfair environment and that the Plan is doomed to fail. It was therefore wrong to authorize Stelco to enter into agreements, especially the Tricap Agreement, that could further deplete the estate. The appeal is prima facie meritorious. The matter appears to be one of first impression. It certainly cannot be said that the appeal is frivolous. Finally, the appeal will not unduly hinder the progress of the action. Because of the speed with which this court is able to deal with the case, the appeal will not unduly interfere with the continuing negotiations prior to the November 15th meeting.

15 For these reasons, I would grant leave to appeal.

ANALYSIS

Jurisdiction generally

16 The thrust of the appellant's submissions is that while the judge supervising a CCAA process has jurisdiction to make orders that preserve the status quo, the judge has no jurisdiction to make an order that, in effect, entrenches elements of the proposed Plan. Rather, the approval of the Plan is a matter solely for the business judgement of the creditors. The appellant submits that the orders made by the motions judge are not authorized by the statute or under the court's inherent jurisdiction and are in fact inconsistent with the scheme and objects of the CCAA. They submit that the orders made in this case have the effect of substituting the court's judgment for that of the debt holders who, under s. 6, have exclusive jurisdiction to approve the plan. Under s. 6, it is only after a majority in number representing two-thirds in value of the creditors vote to approve the plan that the court has a role in deciding whether to sanction the plan.

17 Underlying this argument is a concern on the part of the creditors that the orders are coercive, designed to force the creditors to approve a plan, a plan in which they have had no input and of which they disapprove.

18 In my view, the motions judge had jurisdiction to make the orders he did authorizing Stelco to enter into the agreements. Section 11 of the CCAA provides a broad jurisdiction to impose terms and conditions on the granting of the stay. In my view, s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the status quo. The point of the CCAA process is not simply to preserve the status quo but to facilitate restructuring so that the company can successfully emerge from the process. This point was made by Gibbs J.A. in *Hongkong Bank v. Chef Ready Foods* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at para. 10:

The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11. [Emphasis added.]

19 In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgement of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

20 The argument that the orders are coercive and therefore unreasonably interfere with the rights of the creditors turns largely on the potential \$10.75 million break fee that may become payable to Tricap. However, the motions judge has found as a fact that the break fee is reasonable. As counsel for Ontario points out, this necessarily entails a finding that the break fee is not coercive even if it could to some extent deplete Stelco's assets.

21 Further, the motions judge both in his reasons and in his orders made it clear that he was not purporting to sanction the Plan. As he said in his reasons, "I wish to be absolutely clear that I am not ruling on or considering in any way the fairness of the plan as presented". The creditors will have the ultimate say on November 15th whether this plan will be approved.

Doomed to fail

22 The appellant submits that the motions judge had no jurisdiction to approve orders that would facilitate a Plan that is doomed to fail. The authorities indicate that a court should not approve a process that will lead to a plan that is doomed to fail. The appellant says that it has made it as clear as possible that it does not accept the proposed Plan and will vote against it. In *Re Inducon Development Corp.* (1991), 8 C.B.R. (3d) 306 (Ont. Ct. (Gen. Div.)) at 310 Farley J. said that, "It is of course, ... fruitless to proceed with a plan that is doomed to failure at a further stage."

23 However, it is important to take into account the dynamics of the situation. In fact, it is the appellant's position that nothing will happen until a vote on a Plan is imminent or a proposal from Stelco is voted down; only then will Stelco enter into realistic negotiations with its creditors. It is apparent that the motions judge is of the view that the Plan is not doomed to fail; he would not have approved steps to continue the process if he thought it was. As Austin J. said in *Bargain Harold's Discount Ltd. v. Paribas Bank of Canada* (1992), 7 O.R. (3d) 362 (Div. Ct.) at 369:

The jurisprudence is clear that if it is obvious that no plan will be found acceptable to the required percentages of creditors, then the application should be refused. The fact that Paribas, the Royal Bank and K Mart now say there is no plan that they would approve, does not put an end to the inquiry. All affected constituencies must be considered, including secured, preferred and unsecured creditors, employees, landlords, shareholders, and the public generally ... [Emphasis added.]

24 It must be a matter of judgment for the supervising judge to determine whether the Plan is doomed to fail. This Plan is supported by the other stakeholders and the independent Monitor. It is a product of the business judgment of the Stelco board as a way out of the CCAA process. It was open to the motions judge to conclude that the plan was not doomed to fail and that the process should continue. Despite its opposition to the Plan, the appellant's position inherently concedes the possibility of success, otherwise these creditors would have opposed the extension of the stay, opposed the order setting a date for approval of the plan and sought to terminate the CCAA proceedings.

25 The motions judge said this in his reasons:

It seems to me that Stelco as an ongoing enterprise is getting a little shop

worn/shopped worn. It would not be helpful to once again start a new general process to find the ideal situation [sic solution?]; rather the urgency of the situation requires that a reasonable solution be found.

He went on to state that in the month before the vote there "will be considerable discussion and negotiation as to the plan which will in fact be put to the vote" and that the present Plan may be adjusted. He urged the stakeholders and Stelco to "deal with this question in a positive way" and that "it is better to move forward than backwards, especially where progress is required". It is obvious that the motions judge has brought his judgment to bear and decided that the Plan or some version of it is not doomed to fail. I can see no basis for second-guessing the motions judge on that issue.

26 I should comment on a submission made by the appellant that no deference should be paid to the business judgment of the Stelco board. The appellant submits that the board is entitled to deference for most of the decisions made in the day-to-day operations during the CCAA process except whether a restructuring should proceed or a plan of arrangement should proceed. The appellant submits that those latter decisions are solely the prerogative of the creditors by reason of s. 6. While there is no question that the ultimate decision is for the creditors, the board of directors plays an important role in the restructuring process. Blair J.A. made this clear in an earlier appeal to this court concerning Stelco reported at (2005), 75 O.R. (3d) 5 at para. 44:

What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehdorff*, [1993] O.J. No. 14, *supra*, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts. [Emphasis added.]

27 The approvals given by the motions judge in this case are consistent with these principles. Those orders allow the company's restructuring efforts to move forward.

28 The position of the appellant also fails to give any weight to the broad range of interests in play in a CCAA process. Again to quote Blair J.A. in the earlier Stelco case at para. 36:

In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. [Emphasis added.]

29 For these reasons, I would not give effect to the submissions of the appellant.

Submissions of the equity holders

30 The equity holders support the position of the appellant. They point out that the Stelco CCAA situation is somewhat unique. While Stelco entered the process in dire straits, since then almost unprecedented worldwide prices for steel have boosted Stelco's fortunes. In an endorsement of February 28, 2005, the motions judge recognized this unusual state of affairs:

In most restructurings, on emergence the original shareholder equity, if it has not been legally "evaporated" because the insolvent corporations was so for under water, is very substantially diminished. For example, the old shares may be converted into new emergent shares at a rate of 100 to 1; 1,000 to 1; or even 12,000 to 1. ... Stelco is one of those rare situations in which a change of external circumstances ... may result in the original equity having a more substantial "recovery" on emergence than outline above."

31 The equity holders point out that while an earlier plan would have allowed the shareholders to benefit from the continued and anticipated growth in the Stelco equity, the present plan does not include any provision for the existing shareholders. I agree with counsel for Stelco that these arguments are premature. They raise issues for the supervising judge if and when he is called upon to exercise his discretion under s. 6 to sanction the Plan of arrangement.

DISPOSITION

32 Accordingly, I would dismiss the appeal. On behalf of the court, I wish to thank all counsel for their very helpful written and oral submissions that made it possible to deal with this appeal expeditiously.

M. ROSENBERG J.A.

J.I. LASKIN J.A. -- I agree.

H.S. LaFORME J.A. -- I agree.

cp/e/qw/qlsxl/qlkjg

e/drs/qlbms/qlmll

Tab 6

CITATION: Timminco Limited (Re), 2012 ONSC 2515
COURT FILE NO.: CV-12-9539-00CL
DATE: 20120427

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants

BEFORE: MORAWETZ J.

COUNSEL: James C. Orr and N. Mizobuchi, for St. Clair Penneyfeather, Plaintiff in
Class Proceeding, *Penneyfeather v. Timminco Limited et al* (Court File No:
CV-09-378701-00CP)

P. O'Kelly and A. Taylor, for the Applicants

P. LeVay, for the Photon Defendants

A. Lockhart, for Wacker Chemie AG

K. D. Kraft, for Chubb Insurance Company of Canada

D. J. Bell, for John P. Walsh

A. Hatnay and James Haraum for Mercer Canada, Administrator of the
Timminco Halcy Plan

S. Weisz, for FTI Consulting Canada Inc., Monitor

HEARD: March 26, 2012

ENDORSEMENT

[1] St. Clair Penneyfeather, the Plaintiff in the *Penneyfeather v. Timminco Limited, et al* action, Court File No. CV-09-378701-00CP (the "Class Action"), brought this motion for an order lifting the stay of proceedings, as provided by the Initial Order of January 3, 2012 and extended by court order dated January 27, 2012, and permitting Mr. Penneyfeather to continue

- Page 2 -

the Class Action against Timminco Limited ("Timminco"), Dr. Heinz Schirmmelbusch, Mr. Robert Dietrich, Mr. Rene Boisvert, Mr. Arthur R. Spector, Mr. Jack Messman, Mr. John C. Fox, Mr. Michael D. Winfield, Mr. Mickey M. Yaksich and Mr. John P. Walsh.

[2] The Class Action was commenced on May 14, 2009 and has been case managed by Perell J. The following steps have taken place in the litigation:

- (a) a carriage motion;
- (b) a motion to substitute the Representative Plaintiff;
- (c) a motion to force disclosure of insurance policies;
- (d) a motion for leave to appeal the result of the insurance motion which was heard by the Divisional Court and dismissed;
- (e) settlement discussions;
- (f) when settlement discussions were terminated, Perell J. declined an expedited leave hearing and instead declared any limitation period to be stayed;
- (g) a motion for particulars; and
- (h) a motion served but not heard to strike portions of the Statement of Claim.

[3] On February 16, 2012, the Court of Appeal for Ontario set aside the decision of Perell J. declaring that s. 28 of the *Class Proceedings Act* suspended the running of the three-year limitation period under s. 138.14 of the *Securities Act*.

[4] The Plaintiffs' counsel received instructions to seek leave to appeal the decision of the Court of Appeal for Ontario to the Supreme Court of Canada. The leave materials were required to be served and filed by April 16, 2012.

[5] On April 10, 2012, the following endorsement was released in respect of this motion:

The portion of the motion dealing with lifting the stay for the Plaintiff to seek leave to appeal the recent decision of the Court of Appeal for Ontario to the Supreme Court of Canada on the limitation period issue was not opposed. This portion of the motion is granted and an order shall issue to give effect to the foregoing. The balance of the requested relief is under reserve.

[6] Counsel to Mr. Penneyfeather submits that, apart from the leave to appeal issues, there are steps that may occur before Perell J. as a result of the Court of Appeal ruling. Counsel references that the Defendants may bring motions for partial judgment and the Plaintiff could seek to have the court proceed with leave and certification with any order to be granted *nunc pro tunc* pursuant to s. 12 of the *Class Proceedings Act*.

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[7] Counsel to Mr. Penneyfeather submits that the three principal objectives of the *Class Proceedings Act* are judicial economy, access to justice and behaviour modification. (See *Western Canadian Shopping Centres Inc. v. Dutton*, (2001) 2 S.C.R. 534 at paras. 27-29.), and under the *Securities Act*, the deterrent represented by private plaintiffs armed with a realistic remedy is important in ensuring compliance with continuous disclosure rules.

[8] Counsel submits that, in this situation, there is only one result that will not do violence to a primary legislative purpose and that is to lift the stay to permit the Class Action to proceed on the condition that any potential execution excludes Timminco's assets. Counsel further submits that, as a practical result, this would limit recovery in the Class Action to the proceeds of the insurance policies, or in the event that the insurers decline coverage because of fraud, to the personal assets of those officers and directors found responsible for the fraud.

[9] Counsel to Mr. Penneyfeather takes the position that the requested outcome is consistent with the judicial principal that the CCAA is not meant as a refuge insulating insurers from providing appropriate indemnification. (See *Algoma Steel Corp. v. Royal Bank of Canada*, (1992) O.J. No. 889 at paras. 13-15 (C.A.) and *Re Carey Canada Inc.* (2006) O.J. No. 4905 at paras. 7, 16-17.)

[10] In this case, counsel contends that, when examining the relative prejudice to the parties, the examination strongly favours lifting the stay in the manner proposed since the insurance proceeds are not available to other creditors and there would be no financial unfairness caused by lifting the stay.

[11] The position put forward by Mr. Penneyfeather must be considered in the context of the CCAA proceedings. As stated in the affidavit of Ms. Konyukhova, the stay of proceedings was put in place in order to allow Timminco and Bécancour Silicon Inc. ("BSI" and, together with Timminco, the "Timminco Entities") to pursue a restructuring and sales process that is intended to maximize recovery for the stakeholders. The Timminco Entities continue to operate as a going concern, but with a substantially reduced management team. The Timminco Entities currently have only ten active employees, including Mr. Kalins, President, General Counsel and Corporate Secretary and three executive officers (the "Executive Team").

[12] Counsel to the Timminco Entities submits that, if Mr. Penneyfeather is permitted to pursue further steps in the Class Action, key members of the Executive Team will be required to spend significant amounts of their time dealing with the Class Action in the coming months, which they contend is a key time in the CCAA proceedings. Counsel contends that the executive team is currently focussing on the CCAA proceedings and the sales process.

[13] Counsel to the Timminco Entities points out that the Executive Team has been required to direct most of their time to restructuring efforts and the sales process. Currently, the "stalking horse" sales process will continue into June 2012 and I am satisfied that it will require intensive time commitments from management of the Timminco Entities.

[14] It is reasonable to assume that, by late June 2012, all parties will have a much better idea as to when the sales process will be complete.

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[15] The stay of proceedings is one of the main tools available to achieve the purpose of the CCAA. The stay provides the Timminco Entities with a degree of time in which to attempt to arrange an acceptable restructuring plan or sale of assets in order to maximize recovery for stakeholders. The court's jurisdiction in granting a stay extends to both preserving the *status quo* and facilitating a restructuring. See *Re Stelco Inc.*, (2005) O.J. No. 1171 (C.A.) at para. 36.

[16] Further, the party seeking to lift a stay bears a heavy onus as the practical effect of lifting a stay is to create a scenario where one stakeholder is placed in a better position than other stakeholders, rather than treating stakeholders equally in accordance with their priorities. See *Canwest Global Communications Corp. (Re)*, [2011] O.J. No. 1590 (S.C.J.) at para. 27.

[17] Courts will consider a number of factors in assessing whether it is appropriate to lift a stay, but those factors can generally be grouped under three headings: (a) the relative prejudice to parties; (b) the balance of convenience; and (c) where relevant, the merits (*i.e.* if the matter has little chance of success, there may not be sound reasons for lifting the stay). See *Canwest Global Communications (Re)*, *supra*, at para. 27.

[18] Counsel to the Timminco Entities submits that the relative prejudice to the parties and the balance of convenience clearly favours keeping the stay in place, rather than to allow the Plaintiff to proceed with the SCC leave application. As noted above, leave has been granted to allow the Plaintiff to proceed with the SCC leave application. Counsel to the Timminco Entities further submits that, while the merits are vigorously disputed by the Defendants in the context of a Class Action, the Timminco Entities will not ask this court to make any determinations based on the merits of the Plaintiff's claim.

[19] I can well recognize why Mr. Penneyfeather wishes to proceed. The objective of the Plaintiff in the Class Action is to access insurance proceeds that are not available to other creditors. However, the reality of the situation is that the operating side of Timminco is but a shadow of its former self. I accept the argument put forth by counsel to the Applicant that, if the Executive Team is required to spend significant amounts of time dealing with the Class Action in the coming months, it will detract from the ability of the Executive Team to focus on the sales process in the CCAA proceeding to the potential detriment of the Timminco Entities' other stakeholders. These are two competing interests. It seems to me, however, that the primary focus has to be on the sales process at this time. It is important that the Executive Team devote its energy to ensuring that the sales process is conducted in accordance with the timelines previously approved. A delay in the sales process may very well have a negative impact on the creditors of Timminco. Conversely, the time sensitivity of the Class Action has been, to a large extent, alleviated by the lifting of the stay so as to permit the leave application to the Supreme Court of Canada.

[20] It is also significant to recognize the submission of counsel on behalf of Mr. Walsh. Counsel to Mr. Walsh takes the position that Mr. Penneyfeather has nothing more than an "equity claim" as defined in the CCAA and, as such, his claim (both against the company and its directors who, in turn, would have an equity claim based on indemnity rights) would be subordinated to any creditor claims. Counsel further submits that of all the potential claims to require adjudication, presumably, equity claims would be the least pressing to be adjudicated and do not become relevant until all secured and unsecured claims have been paid in full.

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[21] In my view, it is not necessary for me to comment on this submission, other than to observe that to the extent that the claim of Mr. Penneyfeather is intended to access certain insurance proceeds, it seems to me that the prosecution of such claim can be put on hold, for a period of time, so as to permit the Executive Team to concentrate on the sales process.

[22] Having considered the relative prejudice to the parties and the balance of convenience, I have concluded that it is premature to lift the stay at this time, with respect to the Timminco Entities, other than with respect to the leave application to the Supreme Court of Canada. It also follows, in my view, that the stay should be left in place with respect to the claim as against the directors and officers. Certain members of this group are involved in the Executive Team and, for the reasons stated above, I am satisfied that it is not appropriate to lift the stay as against them.

[23] With respect to the claim against Photon, as pointed out by their counsel, it makes no sense to lift the stay only as against Photon and leave it in place with respect to the Timminco Entities. As counsel submits, the Timminco Entities have an interest in both the legal issues and the factual issues that may be advanced if Mr. Penneyfeather proceeds as against Photon, as any such issues as are determined in Timminco's absence may cause unfairness to Timminco, particularly, if Mr. Penneyfeather later seeks to rely on those findings as against Timminco. I am in agreement with counsel's submission that to make such an order would be prejudicial to Timminco's business and property. In addition, I accept the submission that it would also be unfair to Photon to require it to answer Mr. Penneyfeather's allegations in the absence of Timminco as counsel has indicated that Photon will necessarily rely on documents and information produced by Timminco as part of its own defence.

[24] I am also in agreement with the submission that it would be wasteful of judicial resources to permit the class proceedings to proceed as against Photon but not Timminco as, in addition to the duplicative use of court time, there would be the possibility of inconsistent findings on similar or identical factual issues and legal issues. For these reasons, I have concluded that it is not appropriate to lift the stay as against Photon.

[25] In the result, the motion dealing with issues not covered by the April 10, 2012 endorsement is dismissed without prejudice to the rights of the Plaintiff to renew his request no sooner than 75 days after today's date.


MORA WETZ J.

Date: April 27, 2012

TAB 7

Case Name:
Timminco Ltd. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of
Timminco Limited and Bécancour Silicon Inc., Applicants**

[2012] O.J. No. 266

2012 ONSC 106

Court File No. 12-CL-9539-00CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: January 3, 2012.
Judgment: January 4, 2012.

(43 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Debtor company -- Where total claim exceeds \$5,000,000 -- Ex parte application by debtor for relief under the Companies' Creditors Arrangement Act ("CCAA") allowed -- Debtor faced severe liquidity issues, was unable to meet financial covenants and did not have liquidity to meet ongoing payment obligations -- Total claims against debtor entities exceeded \$89 million -- Debtor was insolvent and constituted debtor companies to which CCAA applied -- Stay of proceedings extended to directors and officers sitting on boards of intertwined companies -- Stay extended to agreement with general partner of debtor entities -- Administration charge and directors and officers charge granted -- Amount of charges sought were appropriate.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.02(3), s. 11.03, s. 11.51, s. 11.52

Ontario Pension Benefits Act,

QuÉbec Supplemental Pension Plans Act,

Counsel:

A.J. Taylor, M. Konyukhova and K. Esaw, for the Applicants.

S. Weisz, for FTI Consulting Canada Inc.

A. Kauffman, for Investissement Quebec.

ENDORSEMENT

- 1 G.B. MORAWETZ J.:**-- Timminco Limited ("Timminco") and Bécancour Silicon Inc. ("BSI") (collectively, the "Timminco Entities") apply for relief under the *Companies' Creditors Arrangement Act* (the "CCA").
- 2** Timminco produces silicon metal through Québec Silicon Limited Partnership ("QSLP") its 51% owned production partnership with Dow Corning Corporation ("DCC") for resale to customers in the chemical (silicones), aluminum, and electronics/solar industries. Timminco also produces solar-grade silicon through Timminco Solar, an unincorporated division of Timminco's wholly-owned subsidiary BSI ("Timminco Solar"), for customers in the solar photovoltaic industry.
- 3** The Timminco Entities are facing severe liquidity issues as a result of, among other things, a low profit margin realized on their silicon metal sales due to a high volume long-term supply contract at below market prices, a decrease in the demand and market price for solar-grade silicon, failure to recoup their capital expenditures incurred in connection with development of their solar-grade operations, and inability to secure additional funding. The Timminco Entities are also facing significant pension and environmental remediation legacy costs and financial costs related to large outstanding debts. A significant portion of the legacy costs are as a result of discontinued operations relating to Timminco's former magnesium business.
- 4** Counsel to the Timminco Entities submits that, as a result, the Timminco Entities are unable to meet various financial covenants set out in their Senior Secured Credit Facility and do not have the liquidity needed to meet their ongoing payment obligations. Counsel submits that, without the protection of the CCA, a shutdown of operations is inevitable, which would be extremely detrimental to the Timminco Entities' employees, pensioners, suppliers and customers. Counsel further submits that CCA protection will allow the Timminco entities to maintain operations while giving them the necessary time to consult with their stakeholders regarding the future of their business operations and corporate structure.
- 5** The facts with respect to this application are set out in the affidavit of Mr. Peter A. M. Kalins, sworn January 2, 2012.
- 6** Timminco and BSI are corporations established under the laws of Canada and Quebec respectively and, in my view, are "companies" within the definition of the CCA.
- 7** Timminco has its head office in the city of Toronto. The board of directors of Timminco authorized this application. Further, pursuant to a unanimous shareholder declaration which removed the directorial powers from the directors of BSI and consolidated the decision making with Timminco through its board of directors, the board of directors of Timminco has also authorized this filing on behalf of BSI. I am satisfied that the Applicants are properly before this court.
- 8** The affidavit of Mr. Kalins establishes that the Timminco Entities do not have the liquidity necessary to meet their obligations to creditors as they become due and, further, they have failed to pay certain obligations including, among other things, the interest payment due under the secured term loan

and the interest payment due under the AMG Note on December 31, 2011.

9 The affidavit also establishes that the Timminco Entities are affiliate debtor companies with total claims against them in excess of \$89 million.

10 The required financial statements and cash flow information are contained in the record.

11 The CCAA applies to a "debtor company" or affiliated debtor companies where the total of claims against the debtor or its affiliates exceed \$5 million. I am satisfied that the record establishes that the Timminco Entities are insolvent and are "debtor companies" to which the CCAA applies.

12 On an initial application in respect of a debtor company, s. 11.02(3) of the CCAA provides authority for the court to make an order on any terms that it may impose where the applicant satisfies the court that circumstances exist that make the order appropriate.

13 Counsel to the Applicants submits that the Timminco Entities require the protection of the CCAA to allow them to maintain operations while giving them the necessary time to consult with their stakeholders regarding the future of their business operations and corporate structure.

14 In this case, in addition to the usual stay provisions affecting creditors of the debtor, counsel submits that, to ensure the ongoing stability of the Timminco Entities' business during the CCAA period, the Timminco Entities require the continued participation of their directors, officers, managers and employees.

15 Under s. 11.03, the court has jurisdiction to grant an order staying any action against a director of the company on any claim against directors that arose before the commencement of CCAA proceedings and that relate to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or arrangement in respect of the company, if one is filed, is sanctioned by the court or refused by the creditors or the court.

16 Counsel submits that there are several directors of BSI that also serve on the board of directors of Quebec Silicon General Partner Inc. ("QSGP") and several common officers (collectively, the "QSGP/BSI Directors").

17 Due to the intertwined nature of the Timminco Entities and QSLP's businesses and in order to allow these directors and officers to focus on the restructuring of the Timminco Entities, the Timminco Entities also seek to extend the stay of proceedings in favour of those directors and officers in their capacity as directors or officers of QSGP.]

18 Counsel to the Timminco Entities submits that circumstances exist that make it appropriate to grant a stay in favour of the QSGP/BSI directors. In support of its argument, counsel relies on *Luscar Limited v. Smokey River Coal Limited* (1999), 12 C.B.R. (4th) 94 where the court indicated that its jurisdiction includes the power to stay conduct which "could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement".

19 In these circumstances, I am prepared to accept this argument and grant a stay in favour of the QSGP/BSI directors.

20 The Applicants have also requested that the stay of proceedings be extended with respect to the QSLP Agreements. Mr. Kalins' affidavit establishes that BSI's viability is directly related to its relationship with QSLP and that the relationship is governed by the QSLP Agreements. The QSLP

Agreements provide for certain events to be deemed to have taken place, for certain modification of rights, and to entitle DCC, QSLP, and/or QSGP to take certain steps for the termination of certain QSLP Agreements in the event BSI becomes insolvent or commences proceedings under the CCAA. Counsel submits that due to the highly intertwined nature of the businesses of BSI and QSLP and BSI's high dependence on QSLP, it is imperative for the Timminco Entities and for the benefit of their creditors that BSI's rights under the QSLP Agreements not be modified as a result of its seeking protection under the CCAA.

21 For the purposes of this initial hearing, I am prepared to accept this argument and extend the stay as requested.

22 The Applicants also request an Administration Charge and a D&O Charge.

23 The requested Administration Charge on the assets, property and undertaking of the Timminco Entities (the "Property") is in the maximum amount of \$1 million to secure the fees and disbursements in connection with services rendered by counsel to the Timminco Entities, the Monitor and the Monitor's counsel (the "Administration Charge").

24 The Timminco Entities request that the Administration Charge rank ahead of the existing security interest of Investissement Quebec ("IQ") but behind all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the *Ontario Pension Benefits Act* or the *Québec Supplemental Pension Plans Act* (collectively, the "Encumbrances") in favour of any persons that have not been served with notice of this application.

25 IQ has been served and does not object to the requested charge, other than to adjust priorities such that the first-ranking charge should be the Administration Charge to a maximum of \$500,000 followed by the D&O Charge to a maximum of \$400,000 followed by the Administration Charge to a maximum amount of \$500,000. This suggested change is agreeable to the Timminco Entities and has been incorporated into the draft order.

26 Section 11.52 of the CCAA provides statutory jurisdiction to grant such a charge. Under s. 11.52, factors that the court will consider include: the size and complexity of the business being restructured; the proposed role of the beneficiaries of the charge; whether there is unwarranted duplication of roles; whether the quantum of the proposed charge appears to be fair and reasonable; the position of the secured creditors likely to be affected by the charge; and the views of the monitor. *Re Canwest Publishing Inc.* (2010), 63 C.B.R. (5th) 115.

27 In this case, counsel submits that the Administration Charge is appropriate considering the following factors:

- (a) the Timminco Entities operate a business which includes numerous facilities in Ontario and Quebec, several ongoing environmental monitoring and remediation obligations, three defined benefit plans and an intertwined relationship with QSLP;
- (b) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout the Timminco Entities' CCAA proceedings;
- (c) there is no anticipated unwarranted duplication of roles;
- (d) IQ was advised of the return date of the application and does not object; and
- (e) the Administration Charge does not purport to prime any secured party or potential beneficiary of a deemed trust who has not received notice of this application.

- 28 The proposed monitor has advised that it is supportive of the Administration Charge.
- 29 I accept these submissions and find that it is appropriate to approve the requested Administration Charge. In doing so, I note that the Timminco Entities have stated that they intend to return to court and seek an order granting super-priority ranking to the Administration Charge ahead of the Encumbrances including, *inter alia*, any deemed trust created under provincial pension legislation on the comeback motion.
- 30 With respect to the D&O Charge, the Timminco Entities seek a charge over the property in favour of the Timminco Entities' directors and officers in the amount of \$400,000 (the "D&O Charge"). The directors of the Timminco Entities have stated that, due to the significant personal exposure associated with the Timminco Entities' aforementioned liabilities, they cannot continue their service with the Timminco Entities unless the Initial Order grants the D&O Charge.
- 31 The CCAA has codified the granting of directors' and officers' charges on a priority basis in s. 11.51.
- 32 In *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 at para. 48, Pepall J. applied s. 11.51 noting that the court must be satisfied that the amount of the charge is appropriate in light of obligations and liabilities that may be incurred after commencement of proceedings.
- 33 Counsel advises that the Timminco Entities maintain directors' and officers' liability insurance ("D&O Insurance") for its directors and officers and the current D&O Insurance provides a total of \$15 million in coverage. Counsel advises that it is expected that the D&O Insurance will provide coverage sufficient to protect the directors and officers and the proposed order provides that the D&O Charge shall only apply to the extent that the D&O Insurance is not adequate.
- 34 The proposed monitor has advised that it is supportive of the D&O Charge.
- 35 The Timminco Entities have also indicated their intention to return to court and seek an order granting super priority ranking to the D&O Charge ahead of the Encumbrances.
- 36 In these circumstances, I accept the submission that the requested D&O Charge is reasonable given the complexity of the Timminco Entities business and the corresponding potential exposure of the directors and officers to personal liability. The D&O Charge will also provide assurances to the employees of the Timminco Entities that obligations for accrued wages and termination and severance pay will be satisfied. The D&O Charge is approved.
- 37 In the result, CCAA protection is granted to the Timminco Entities and the stay of proceedings is extended in favour of the QSGP/BSI directors and with respect to the QSLP Agreements.
- 38 Further, the Administration Charge and the D&O Charge are granted in the amounts requested.
- 39 FTI Consulting Canada Inc., having filed its consent to act, is appointed as Monitor.
- 40 It is specifically noted that the comeback motion has been scheduled for Thursday, January 12, 2012.
- 41 The Stay Period shall be until February 2, 2012.
- 42 The Applicants acknowledge that the only party that received notice of this application was IQ.

Counsel to the Applicants advised that this step was necessary in order to preserve the operations of the Timminco Entities.

43 For the purposes of the initial application, this matter was treated as being an *ex parte* application. Accordingly, the comeback motion on January 12, 2012 will provide any interested party with the opportunity to make submissions on any aspect of the Initial Order. A total of three hours has been set aside for argument on that date.

G.B. MORAWETZ J.

cp/e/qlafr/qlvxw

**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 File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceedings commenced in Toronto

**BRIEF OF AUTHORITIES
OF THE APPLICANT,
SINO-FOREST CORPORATION
(Scope of Stay Motion returnable
May 8, 2012)**

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