Court of Appeal File No.: M42399
S.C.J. Court File No.: CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED, AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File No.: M42399
S.C.J. Court File No.: CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT and ROBERT WONG

Plaintiffs

- and -

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of America Securities LLC)

Defendants

Proceeding under the *Class Proceedings Act, 1992*

SUPPLEMENTARY BOOK OF AUTHORITIES OF THE APPELLANTS

**INVESCO CANADA LTD.,
NORTHWEST & ETHICAL INVESTMENTS L.P.,
COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC.,
MATRIX ASSET MANAGEMENT INC., GESTION FÉRIQUE, AND
MONTRUSCO BOLTON INVESTMENTS INC.**

(Motion for Leave to Appeal from E&Y Settlement Approval Order
and Representation Dismissal Order)

May 27, 2013

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TAB	AUTHORITY
1.	*CIT Financial Ltd. v. Lambert*, 2005 BCSC 1779, [2005] B.C.J. No. 2765 (B.C.S.C.)
2.	*Nexient Learning Inc. (Re)* (2009), 62 C.B.R. (5th) 248, [2009] O.J. No. 5507 (S.C.J.)

Tab 1

Case Name:

CIT Financial Ltd. v. Lambert

Between
CIT Financial Ltd., plaintiff, and
George Lambert also known as Murray George Lambert and Gordon Olafsen also known as Gordon Victor Olafsen, defendants

[2005] B.C.J. No. 2765

2005 BCSC 1779

18 C.B.R. (5th) 51

145 A.C.W.S. (3d) 683

2005 CarswellBC 3035

Vancouver Registry No. L032572

British Columbia Supreme Court
Vancouver, British Columbia

Silverman J.

Heard: August 18, 2005.
Judgment: December 19, 2005.

(55 paras.)

Creditors and debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act -- The plaintiffs were successful in an action on a personal guarantee signed by the corporate director defendants for a debt owed by their corporation to the plaintiff, as the plaintiff's actions were not found to be contrary to the spirit of the Companies' Creditors Arrangement Act -- Companies' Creditors Arrangement Act.

Creditors and debtors law -- Guarantee and indemnity -- Guarantee -- What constitutes -- Surety or guarantor -- Defences -- Ambiguity in guarantee -- The plaintiffs were successful in an action on a personal guarantee signed by the corporate director defendants for a debt owed by their corporation to the plaintiff, as when examined with the admissible parol evidence, any possible uncertainty about the date of the security agreement referenced in the guarantees was clarified.

The plaintiffs brought an action against the defendants for judgment in the amount of $255,822 plus contractual interest and costs based on several personal guarantees signed by the defendants on behalf of a corporation -- The defendants

were at all material times the directors and officers of T-Mar Industries Ltd., and the plaintiff had advanced funds to T-Mar for the purchase of equipment used in T-Mar's business -- The defendants proposed several arguments against the action, including that the claim was barred by the Companies' Creditors Arrangement Act, and that the guarantees were to vague as to be enforced -- Held: Judgment was entered against both defendants, jointly and severally, on the Guarantees, in an amount to be assessed by the Registrar, as the guarantees were valid and enforceable -- The defendants' arguments with respect to the CCAA and to the guarantees themselves failed -- The plaintiff's actions were not found to be contrary to the spirit of the Companies' Creditors Arrangement Act, nor did estoppel apply, as the plaintiff's conduct could not properly be characterized as "lying in the weeds" or misconduct of any nature -- There was nothing in the conduct of the parties that would entitle the defendant to an equitable remedy -- The defendants could not rely on any change in the plaintiff's relationship with T-Mar to minimize their responsibilities under the guarantees -- The court found that sufficient consideration was given with regard to the guarantees, and it was not necessary for that consideration be specified in the guarantees -- The argument that the guarantees failed due to vagueness failed, as when examined with the admissible parol evidence, any possible uncertainty about the date of the security agreement referenced in the guarantees was clarified.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rule 18A, Rule 57

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

Counsel:

Counsel for the Plaintiff, G.G. Plottel

Counsel for the Defendants, H.M.B. Ferris

SILVERMAN J.:--

INTRODUCTION

1 The Plaintiff applies for Judgment pursuant to Rule 18A of the Rules of Court, in the amount $255,822.21, plus contractual interest of 18% per annum from November 30, 2004 and special costs against the Defendants, jointly and severally.

2 At all material times, the Plaintiff was in the business of providing financing.

3 The Plaintiff has changed its name several times, including at times material to this case. Consequently, there is material documentation containing the Plaintiff's previous names. It is agreed between the parties that this does not create a legal issue in this case. I will refer to the Plaintiff at all times during this Judgment by the name in the style of cause (except when quoting from a document containing a different name).

4 The Defendants were at all material times directors and officers of T-Mar Industries Ltd. ("T-Mar"). Pursuant to a written security agreement (the "Security Agreement"), the Plaintiff advanced funds to T-Mar for the purchase of equipment used in T-Mar's business.

5 The Defendants signed personal guarantees (the "Guarantees") with respect to repayment of money advanced to T-Mar by the Plaintiff.

6 The Plaintiff argues that T-Mar has defaulted on its obligations to the Plaintiff, with the result that the funds owed by T-Mar are now due and owing from the Defendants, pursuant to the Guarantees.

7 T-Mar has sought protection under the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, ("CCAA"), which precludes the Plaintiff from seeking repayment of the advanced funds from T-Mar.

8 This action is brought against the Defendants for Judgment based on the Guarantees.

9 The Defendants raise a number of defences, which in general terms, fall into two categories:

1. CCAA defences; and,
2. Guarantee defences.

THE FACTS

1. Chronology

10 Relevant events occurred on the following dates:

May 11, 2000	The Plaintiff and T-Mar entered into the Security Agreement.
May 30, 2000	The Defendant Lambert signed the Guarantee with respect to any of T-Mar's debts (past and future) to the Plaintiff arising out of the Security Agreement.
May 31, 2000	The Defendant Olafsen signed the Guarantee with respect to any of T-Mar's debts (past and future) to the Plaintiff arising out of the Security Agreement.
November and December 2000	In accordance with the Security Agreement, the Plaintiff advanced $397,747.29 to T-Mar, which was used to purchase equipment.
April 23, 2001	T-Mar initiated proceedings under the CCAA by obtaining an Order from this Court that included a Stay of Proceedings with respect to any suits, actions or other proceedings against T-Mar and its directors, officers and employees.
April to December 2001	T-Mar negotiated a plan of reorganization under the CCAA (the "Plan") which its creditors, including the Plaintiff, were asked to vote upon. The Defendants, as directors and officers of T-Mar, knew and approved of the Plan.
December 18, 2001	T-Mar filed the Plan in the CCAA proceedings.
January 8, 2002	The Plaintiff filed a proof of claim in the CCAA proceedings (the "Proof of Claim") showing T-Mar's indebtedness to it as of April 1, 2001, as $397,747.29.
January 23, 2002	The Plaintiff's counsel sent to T-Mar (with copies to the Defendants personally), a letter stating that the Plaintiff confirmed its "position that clause 7.04 of the draft Plan would not affect the enforceability of the personal guarantees that Gordon Olafsen and George Lambert granted ... with respect to the liabilities of T-Mar."
January 23, 2002	The Plan was voted on and approved by T-Mar's creditors. The Plaintiff voted against the Plan.

February 15, 2002	The Plan was approved by Koenigsberg J. of this Court. T-Mar has since been operating under the Plan.
October 2002 and July 2003	T-Mar liquidated some of its equipment pursuant to the Plan, resulting in repayment to the Plaintiff of some of the funds advanced under the Security Agreement.
August 7, 2003	The Plaintiff sent the Defendants demand letters, seeking payment of T-Mar's unpaid balance pursuant to the Guarantees.
September 11, 2003	The Plaintiff commenced this action.
October 10, 2003	The Defendants made an application in this Court for a Stay of Proceedings of this action on the basis that it contravened the terms of the Plan. The application was dismissed by Koenigsberg J.
2007	T-Mar is expected to complete the terms of the Plan.

2. The Security Agreement

11 The relevant clauses of the Security Agreement are:

> 2.1 Advances. Debtor [T-Mar Industries Ltd.] has requested that Secured Party from time to time make loans or otherwise extend credit (herein individually referred to as "Advances") to or on behalf of Debtor, the proceeds of which will be used by Debtor to acquire or retain one or more Products in carrying on the business of Debtor. ...
>
> 2.9 Miscellaneous Payment Provisions. Debtor's obligation to pay Secured Party the entire amount of each Advance will be absolute and unconditional notwithstanding any agreement, modification or substitution to the contrary with any Manufacturer or any other party. ... After the maturity of any such payment or upon the acceleration of all indebtedness under this Agreement, Debtor agrees to pay interest thereon at the rate of 18% per annum. ...
>
> 6.1 Events of Default. Time is of the essence. An event of default will occur if:
>
> ...

(d) Debtor becomes insolvent or ceases to do or is prohibited by any court order or governmental action from conducting the business in which the Debtor is principally engaged on the date of this Agreement as a going concern;

...

(g) Debtor files a petition in bankruptcy, or for an arrangement, reorganization, or similar relief, or makes an assignment for the benefit of creditors, or applies for an appointment of a receiver or trustee for a substantial part of its assets or for any of the Collateral, or attempts to take advantage of any process or proceedings for the relief of Debtors;

6.2 Remedies Upon Default. Upon the occurrence of an event of default, Secured Party may at its option, with or without notice to Debtor.

(a) declare this Agreement to be in default;
(b) declare the indebtedness hereunder to be immediately due and payable ... Debtor agrees that it is liable for and will promptly pay any deficiency remaining after any disposition of Collateral after default and all costs and expenses, including reasonable fees of any lawyer incurred by Secured Party in the collection of any deficiency.

3. The Guarantees

12 There are two Guarantees, one for each Defendant. Lambert's Guarantee was signed on May 30, 2000. Olafsen's Guarantee was signed on May 31, 2000. The only difference between the Guarantees are the names of the guarantors and the dates.

13 The relevant clauses of the Guarantees are:

1. FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, the undersigned (the "Guarantor"), and each of them jointly and severally (if more than Guarantor), hereby irrevocably and unconditionally guarantees, as primary obligor and not merely as surety, without offset or deduction, the full and prompt performance and payment by T-Mar Industries Ltd. Inc. ("Debtor") to Newcourt Financial Ltd. ("Newcourt") of:

...

B. any and all Liabilities incurred by the Debtor arising out of or relating to the Security Agreement between the Debtor and Newcourt. ...

2. Guarantor also irrevocably and unconditionally guarantees, as primary debtor and not merely as a surety, all legal fees and disbursements and all other costs, charges and expenses that Newcourt incurs enforcing its rights against the Debtor.

...

5. Guarantor hereby agrees that:

(a) without affecting Guarantor's liabilities and obligations hereunder, Newcourt may from time to time:

(i) grant time, extensions, renewals, indulgences, releases and discharges to Debtor or any other person primarily or secondarily liable for the Liabilities (including any other guarantor);

...

(iii) amend, waive or supplement any agreement or instrument relating to the Liabilities;

...

(v) consent to the assignment by Debtor of any of Debtor's rights and obligations relating to the Liabilities;

(vi) take and hold, or abstain from taking and holding, any security for the payment and performance of the Liabilities or any part thereof and amend, extend, renew, enforce, waive or release any such security. ...

...

(b) Guarantor's liability hereunder shall not be impaired, affected or diminished by:

...

(ii) any repayment from time to time of the whole or any part of the Liabilities of Debtor to Newcourt;

(iii) any applicable law or regulation purporting to prohibit the payment by the Debtor of any of the Liabilities;

...

(vi) any dissolution, insolvency, bankruptcy, compromise, arrangement or plan of reorganization affecting Debtor or any other person, or any omission or refraining from proving the claim or any part thereof of Newcourt in any such proceedings relating to the Debtor, or any other person; or

(vii) any other act or omission of any kind by the Debtor, Newcourt or any other person or any other circumstance whatsoever which might otherwise constitute a defence available to, or legal or equitable discharge of, Guarantor hereunder or of Debtor or any other person in respect of the Liabilities. ...

...

(d) Guarantor shall have no right to be subrogated to Newcourt or claim or prove in any bankruptcy or insolvency of Debtor in competition with Newcourt until the Liabilities and any claim of Newcourt have been satisfied in full; and

(e) it will pay all reasonable costs, disbursements and expenses, including legal fees, incurred by Newcourt in the enforcement of this Guarantee.

...

11. In the event of a demand under this Guarantee, the Guarantor shall indemnify and save Newcourt harmless from and against any losses (including, without limitation, Liabilities otherwise payable pursuant to Section 1 and 2 of this Guarantee) which may arise by virtue of any of the Liabilities or any agreement relating to the Liabilities being or becoming for any reason whatsoever in whole or in part invalid, ineffective or otherwise unenforceable by Newcourt in accordance with their terms.

4. The Plan

14 The relevant clauses of the Plan are:

> Purpose of the Plan
>
> The purpose of this Plan is to permit the Company to remain in possession of its undertaking, property and assets, and to continue to carry on its business, as reorganized, with the intent that this Plan will result in the Company making an equitable repayment to Creditors of as much or more than on a distribution of the Company's assets in bankruptcy.
>
> 7.03 Compromise of Indebtedness
>
> > Upon acceptance of this Plan by the requisite numbers of Creditors and by the Classes and approval of the Plan by the Court, the Creditors shall have no further rights to enforce their claims except as provided in this Plan.
>
> 7.04 Releases
>
> > From and after the Final Order, each Creditor affected by this Plan shall be deemed to forever release any and all suits, claims and causes of action in relation to obligations of the Company that it may have had against any persons who are directors, officers, employees or advisors of any member of the Company as at the Filing Date, with the sole exception of Deutsche.
> >
> > ...
>
> 11.04 Successors and Assigns
>
> > This Plan is binding upon the Company, the Creditors, the Claimants and their respective heirs, executors, administrators, successors and assigns.

CCAA DEFENCES

1. The Applicable Law

15 The relevant sections of the CCAA are:

> 4. Compromise with unsecured creditors
>
> > Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 5. Compromise with secured creditors
>
> > Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

5.1(1) Claims against directors - compromise

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

(2) Exception

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

(a) relate to contractual rights of one or more creditors; or
(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

(3) Powers of court

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

(4) Resignation or removal of directors

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

6. Compromises to be sanctioned by court

Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, ... agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding.

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

16 In Starcom International Optics Corp., Re (1998) 3 C.B.R. (4th) 177 at [paragraph] 15 to 17 and 19, Saunders J. described the purpose of the CCAA:

In deciding the many issues raised, it is useful to consider the overall purpose of the Companies' Creditors Arrangement Act. The purpose has been frequently described by the courts.

Re: Alberta-Pacific Terminals Ltd., Re (8 May 1991) Vancouver A903661, (B.C.S.C.) [reported at 8 C.B.R. (3d) 99], Madam Justice Huddart described the purpose at p. 7 as being:

... to facilitate a compromise between an insolvent corporate debtor and its creditors so that the company is able to continue to do business...

She discussed the need to maintain the status quo, saying at p. 10-11:

... 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 ter-

> minal, 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.
>
> ...
>
> Mr. Justice Brenner in Pacific National Lease Holding Corp., Re, (17 August 1992) Vancouver A922870 (B.C.C.A. [in Chambers]) [reported at 72 B.C.L.R. (2d) 368], summed up the principles to consider in applications under the Act, at p. 10:
>
> (1) The purpose of the C.C.A.A. 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 the Court.
> (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.
> (3) During the stay period the Act is intended to prevent maneuvers 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-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, 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 a particular case.

2. The Defendants' Arguments

17 The Defendants make three general arguments that are rooted in the CCAA:

(a) The Plaintiff's action is contrary to the spirit of the CCAA.
(b) The Defendants, as guarantors, are protected by the provisions of the Plan.
(c) Estoppel.

(a) Contrary to the Spirit of the Act

18 The Defendants argue:

1. Permitting the Plaintiff's suit to succeed would be contrary to the spirit of the CCAA as noted by Saunders J. in Starcom where she says, "It is the company and all the interests its demise would affect that must be considered."
2. A Judgment against the Defendants could be considered a breach of the agreement that the Plaintiff has with its current major creditor, the Mercantile Bank. Such a breach would put the entire Plan in jeopardy, to the prejudice of T-Mar's other creditors.
3. The monitor appointed under the Plan provided in an affidavit that he was "aware of the terms and conditions of the Mercantile Bank financing as well as the jeopardy which the actions of the Plaintiff herein has put the Plan in."
4. The Defendants employ in excess of seventy-five skilled people; their livelihoods will be in jeopardy if the Plan does not succeed.

5. The Plaintiff should not benefit from "lying in the weeds" before bringing this application. It did not raise the Guarantees at the creditors meeting. It did not seek to have the Guarantees incorporated into the Plan. It did not oppose the court application which resulted in the Plan's approval. It never appealed nor applied to vary the Order approving the Plan.
6. It is clear that the Plaintiff could have had the issue of the Guarantees incorporated into the Plan. Another creditor did that and is included in the Plan by name. The Plan expressly notes that the Guarantees given to Deutsche Bank are not extinguished by the Plan, and remain enforceable.

19 The Plaintiff argues in reply:

1. The spirit, intent, and precise wording of the CCAA do not support the Defendants' argument in this regard. The spirit of the CCAA is to assist companies and the companies' directors *in their capacity as directors*. Nowhere does the wording, or the spirit, of the CCAA suggest that personal guarantors (who, incidentally, are also directors) are entitled to the protection of the CCAA.
2. This argument was already made before Koenigsberg J. on February 15, 2002, when the Defendants applied for a Stay of Proceedings in this action. That application was dismissed.
3. The Plaintiff agrees that it did not raise the Guarantees at the creditors' meeting or seek to have them incorporated into the Plan. This is because the Guarantees are irrelevant to the meeting or the Plan, both of which deal with the relationship between the creditors and T-Mar. The Guarantees are not related to T-Mar at all. T-Mar is not even a party to the Guarantees.
4. The Plaintiff denies "lying in the weeds" before bringing this claim. On January 23, 2002, Plaintiff's counsel advised T-Mar and the Defendants of its position on the Guarantees. That position has not changed to this day, and forms the basis of this claim. Apparently, the Defendants chose to ignore the contents of the letter.
5. The Plaintiff argues that its situation is different from that giving rise to the Deutsche Bank exception. That exception was made for the benefit of T-Mar. The monitor has deposed that the exception was included in the Plan so that Deutsche Bank would continue to extend credit to T-Mar after the Plan was approved.
6. Clause 7.04 of the Plan expressly releases claims and suits "in relation to obligations of the Company that it may have had against persons who are directors, officers, employees or advisors of any member of the Company ... with the sole exception of Deutsche." There is no mention of personal guarantors.
7. Clause 11.04 of the Plan states that: "This Plan is binding upon the Company, the Creditors, the Claimants and their respective heirs. ..." There is no mention of personal guarantors.
8. In NBD Bank, Canada v. Dofasco Inc. (1999), 181 D.L.R. (4th) 37, 15 C.B.R. (4th) 67, 47 C.C.L.T. (2d) 213 (Ont. C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 96, where an officer of the company was being sued not as a guarantor, but on the basis of misrepresentations, the Court stated at [paragraph] 53:

> In my view the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. ... [T]he appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.

9. Sections 4 and 5 of the CCAA indicate that the Act deals with compromises or arrangements "between a debtor company and its ... creditors ...." They say nothing about guarantors.
10. Section 5.1(1) of the CCAA indicates that any compromise or arrangement may include provision for the compromise of claims against directors "that relate to the obligations of

the company where the directors are by law liable in their capacity as directors for the payment of such obligations." It says nothing about personal guarantees.

11. Section 5.1(2) indicates that even such a provision for compromise as noted in s. 5.1(1) may not include claims that "relate to contractual rights of one or more creditors ...."

20 After consideration of all the foregoing, I accept the arguments of the Plaintiff that the spirit of the CCAA will not be compromised if the Guarantees survive the Plan.

(b) The Defendants, as Guarantors, are Protected by the Provisions of the Plan

21 The Defendants argue:

1. Clause 7.04 of the Plan is intended to benefit persons in the position of the Guarantors. A proper reading of clause 7.04, when the unnecessary words are omitted, is as follows: "[E]ach Creditor affected by this Plan shall be deemed to forever release any and all suits, claims and causes of action *in relation to obligations of the Company* that it may have had against any persons who are directors, officers or advisors ...."
2. The Defendants' obligations under the Guarantees are, admittedly, not obligations of T-Mar. However, they are obligations in relation to T-Mar. The Guarantees refer specifically to company debts, and cannot be described as anything but obligations "*in relation* to" T-Mar.
3. Clause 7.04 is not restricted to directors *in their capacity as directors*. Rather, it refers to directors generally. It is admitted that the Defendants were not acting in their capacity as directors when they signed the Guarantees. Nevertheless, the Guarantees are "in relation to obligations of the Company", even though it is not a direct relationship, and they are therefore encompassed by the wording of clause 7.04.
4. Clause 7.04 specifically exempts another third party, Deutsche Bank, from the Plan's releases. It is clear that the Plan's drafters specifically considered the question of third party guarantors, and that the only third party guarantor intended to be exempted is Deutsche Bank. If the Plaintiff wanted to be exempted, it should have made its position clear at the creditors' meeting, and at the time of application for court approval of the Plan. Yet, the Plaintiff did neither.
5. Both Defendants have deposed that they would not have agreed to the Plan, and would not have entered into that agreement with the creditors, if they had known that they would still be liable for debts that arose "in relation to obligations of the Company."

22 The Plaintiff argues in reply:

1. The Plaintiff repeats those arguments that were made under the heading "Contrary to the Spirit of the CCAA."
2. The wording of clause 7.04 of the Plan is really a red-herring, because the Defendants, in their personal capacities as guarantors, are not parties to the Plan.
3. The parties to the Plan are set out in clause 11.04, which notes that the Plan "is binding upon the Company, the Creditors, the Claimants and their respective heirs. ..." Guarantors are not included in clause 11.04.
4. The Plaintiff did not raise its relationship with the guarantors (the Defendants) at the creditors' meeting, or at the time of the application for court approval, simply because it is irrelevant. They are not parties to the Plan, and never were.
5. Despite the fact that the Plaintiff did not raise the matter of the Guarantees at the creditors' meeting or application for court approval of the Plan, the Defendants were well aware of the Plaintiff's position by virtue of the letter sent to them on January 23, 2002.
6. The law supports the Plaintiff's position on this matter, both at common law and by virtue of s. 5.1 of the CCAA.
7. In Guardian Trust Co. v. Gaglardi (1989), 64 D.L.R. (4th) 351 (B.C.S.C.), the Court approves of the following comments made by Barclay J. in Browne v. Southern County Power Co. Ltd. (1941), 71 B.R. 136 at 140, 23 C.B.R. 131 (C.A.):

> It is a somewhat startling proposition that a surety can avail himself of the bankruptcy of his principal debtor to avoid or modify his own obligation. ... The very special remedies authorized by law for the exclusive benefit of a debtor company are not available to third parties. ... Any delay given for payment of the company's debts as an insolvent and any modification of its debt, even with the consent of the creditors, operate as relief measures for the exclusive benefit of the company and do not and were not intended to operate as a release of any of the obligations of the company's guarantors.

8. In Keddy Motor Inns Ltd., Re (1991), 107 N.S.R. (2d) 424, (sub nom. Keddy Motor Inns Ltd. Re (No. 3)) 290 A.P.R. 424 (S.C. (T.D.)), aff'd (1992), 90 D.L.R. (4th) 175, 110 N.S.R. (2d) 246 (S.C. (A.D.)), the Court states at [paragraph] 26:

> The long title of the Act indicates that the purpose of the statute is to facilitate compromises and arrangements "between companies and their creditors". That purpose is reflected explicitly in the words of s. 4 and s. 5. A plan of arrangement, when sanctioned by the Court, is by virtue of s. 6 binding upon the company and its creditors. The Act provides relief for companies and their creditors. The remedies provided by the Act are not available to third parties. ...

9. The 1997 addition of s. 5.1 to the CCAA is statutory recognition of the principle noted above in Guardian Trust and Keddy.

23 After consideration of all the foregoing, I accept the arguments of the Plaintiff. The Defendants are not parties to the Plan in their personal capacities. The Plan was not intended to protect them, or to extinguish their personal debts, and it does not do so.

(c) Estoppel

24 The Defendants argue that:

1. The Plaintiff's claim against them should be estopped because of the Plaintiff's conduct.
2. At three critical points in time, the Plaintiff "lay in the weeds", and said nothing about its intention to sue the Defendants:

(a) At the creditors' meeting;
(b) At the application for court approval of the Plan; and
(c) At the time of the sales of T-Mar's equipment.

3. The Defendants acted to their detriment as a result of the Plaintiff's deceptive conduct. They would not have agreed to the Plan had the Plaintiff been forthcoming about its intention to seek payment from them under the Guarantees.
4. As a result of the deception, the Defendants, the Plan, the other creditors and the employees of T-Mar are all in jeopardy.
5. None of the foregoing would be the case if the Plaintiff had not acted as it did, simply because the Defendants would not have agreed to the Plan.
6. Before the sale of T-Mar's equipment, the Plaintiff granted its approval of the sale. Still, it said nothing about suing the Guarantors. As a result, the sale of the equipment occurred, and the debt owed by T-Mar to the Plaintiff was reduced substantially.
7. The Defendants acted to their detriment as a result of the Plaintiff's actions by pledging all of their personal property to the Mercantile Bank as part of T-Mar's refinancing process.
8. The Defendants and T-Mar have been above board with respect to all of their activities. The sale of T-Mar's equipment (in October of 2002 and July of 2003) was done in accordance with the Plan. The Plaintiff benefited as a result.
9. The Defendants relied on the Plan in all its activities.

25 The Plaintiff replies that:

1. It hid nothing and has done nothing wrong. On January 23, 2002, it informed T-Mar and the Defendants by letter of its intentions in relation to the Guarantees. It acted upon those intentions precisely as it said it would. It is not the fault of the Plaintiff that the Defendants chose to ignore the letter.
2. It is true the Plaintiff did not raise its intentions at the creditors' meeting or at the time of the application for court approval of the Plan, or at the time of T-Mar's equipment sale. It did not raise it because it was irrelevant. All of those processes were between the Plaintiff and T-Mar. The Defendants had nothing to do with them. The Defendants are not even parties to the Plan.
3. It was open to the Defendants to raise the issue of the Guarantees, if they considered it relevant, on each of those occasions. They were in a position to raise it because they already had the Plaintiff's letter. It is submitted they did not raise the issue for the same reason the Plaintiff did not raise it: it was irrelevant. The Defendants are not, and never were, parties to the Plan.
4. The Plaintiff had nothing to do with the sale of T-Mar's equipment other than offering its approval when asked.

26 After consideration of all the foregoing, I accept the arguments of the Plaintiff. The Defendants were aware of the Plaintiff's intentions, and the Plaintiff's conduct cannot be properly characterized as "lying in the weeds", or misconduct of any nature. There is nothing in the Plaintiff's conduct, or the Defendants', which would entitle the Defendants to an equitable remedy.

GUARANTEE DEFENCES

1. General

27 Independent of all of the CCAA issues, the Defendants argue that the Guarantees are not enforceable because of a variety of deficiencies.

28 One of the potential arguments, on the face of the Guarantees, arises from the term which indicates that the law of Ontario shall be applicable. However, counsel indicated that, by agreement, this was not an issue to be argued before me, and that the law of British Columbia applies. I have proceeded accordingly.

2. The Defendants' Arguments

29 The deficiencies in the Guarantees that the Defendants urge upon the Court are:

(a) Lack of Consideration.
(b) Vagueness.
(c) No Debt Identified.
(d) Change in Relationship.
(e) The Amount to be Repaid.
(a) Lack of Consideration

30 The Defendants argue that:

I. The Guarantees are deficient because they do not specify, within the Guarantees themselves, what consideration passed, or would pass, from the Plaintiff to the Defendants.
2. The extent to which the Guarantees refer to consideration is their opening words: "FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged. ..."
3. Kevin Patrick McGuiness, in The Law of Guarantee: A Treatise on Guarantee, Indemnity and the Standby Letter of Credit, 2nd ed. (Scarborough, Ont.: Carswell, 1996) states at s. 4.16:

> [T]he consideration given by the creditor must be the consideration stipulated under the terms of the guarantee agreement - this being a matter of interpretation.

31 The Plaintiff replies that:

1. The law does not require, in every case, that a guarantee expressly specify what consideration has passed.
2. In addition to the foregoing comment by McGuiness, he states at s. 4.164:

> Where the creditor does not give an express binding promise, evidence may be introduced to show that the required consideration was in fact given by way of the acts (or inaction) of the creditor. ...

3. In this case, the consideration is sufficiently specified in the Guarantees by reference in clause 1(b) to "Liabilities incurred by the Debtor arising out of or relating to the Security Agreement between the Debtor and [the Plaintiff] ...."
4. Even if the Guarantees are deficient in their expression of the consideration passed, the Plaintiff is entitled to rely upon other evidence to prove that there was consideration. In this case, that consideration was the advancement of funds to T-Mar pursuant to the Security Agreement.
5. McGuiness notes at s. 4.163:

> Although the consideration may benefit the surety directly, it is not necessary that it do so. Since the purpose of a guarantee generally is to ensure that credit in one form or another will be afforded to the principal (or that an existing credit will be renewed on its expiry), the surety often will not receive any direct benefit from the transaction. However, it is sufficient if the entire consideration flows from the creditor to the principal, as is frequently the case. As noted above, for instance, the surety may give a guarantee to ensure that an advance of money is made to the principal. ...

6. Attached to the affidavit of an assistant vice-president of the Plaintiff are letters exchanged between the Plaintiff and Defendants which make it clear that the Guarantees are considered by the parties to be an essential aspect of the agreement to advance funds to T-Mar pursuant to the Security Agreement.
7. The chronology of the parties' interactions is significant. The Guarantees were signed on May 30 and 31, 2000. The funds were advanced in November and December of 2000, that is, after the signing the Guarantees.

32 With respect to the foregoing, I conclude as matters of law:

1. A guarantee need not, in every case, expressly specify what consideration has passed.
2. Evidence may be introduced to show that the required consideration was given.
3. The consideration need not pass directly from the creditor to the guarantor. It is sufficient if the entire consideration flows from the creditor to the principal.

33 Applying these principles to the evidence in this case, I conclude as follows:

1. The combination of the phrases "FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged" and "any and all Liabilities incurred by the Debtor arising out of or relating to the Security Agreement between the Debtor and [the Plaintiff]" are sufficient reference within the Guarantees themselves to satisfy the requirements that consideration be specified.
2. If I am wrong with respect to the above finding, then I conclude that the Plaintiff is entitled to prove with evidence that consideration was in fact given. That evidence is the correspondence between the Plaintiff and the Defendants regarding why the Guarantees were sought, and why they were provided. The evidence establishes that the Guarantees were sought and provided so that the Plaintiff would advance funds to T-Mar pursuant to the Security Agreement.

3. Therefore, I find that consideration was given and that the Plaintiff has proven the requirements for consideration under these Guarantees.

(b) Vagueness

34 The Defendants argue that:

1. The Guarantees are hopelessly deficient and vague in failing to identify which liabilities are guaranteed.
2. Omitting the irrelevant words, the Guarantees identify the liabilities in the following way:

> [T]he undersigned (the "Guarantor") ... guarantees ... the full and prompt performance and payment by T-Mar Industries Ltd. Inc. ("Debtor") to [the Plaintiff] of:
>
> B. any and all Liabilities incurred by the Debtor arising out of or relating to the Security Agreement between the Debtor and [the Plaintiff] dated the _____ day of _____, 2000 ....

3. The spaces for the day and the month of the security agreement have been left blank on both Guarantees. No explanation for the blank spaces was provided to this Court.
4. The Defendants argue that these omissions create sufficient vagueness to make the Guarantees unenforceable. It is impossible to know what security agreement is referred to and is, therefore, impossible to know what liabilities are guaranteed.
5. McGuiness notes at s. 4.3 and 4.4:

> In general, the courts will not enforce a guarantee (any more than they will enforce any other type of contract) unless the terms of the contract are both certain and complete. Thus a guarantee may be void for vagueness. ... A guarantee which is incomplete (in that it requires further agreement on vital points which have been left open) is of no legal effect.
>
> In the case of a guarantee, both the principal contract or other obligation and the guarantee itself must be sufficiently specific to constitute enforceable obligations. ...

6. In GE Commercial Distribution Finance Canada Inc. v. Francks (2003), 188 B.C.A.C. 32, 2003 BCCA 546, the Court of Appeal upheld a ruling concluding that a guarantee was unenforceable because the blank on the face of the guarantee where the name of the debtor was to be filled in was not completed. The Court was unwilling to consider evidence of another document that would have identified the debtor.

35 The Plaintiff replies that:

1. It is agreed that the blank spaces on the Guarantees with respect to the dates should have been completed.
2. The Plaintiff seeks to introduce parol evidence to complete the blank spaces on the Guarantees.
3. Parol evidence is not admissible for the purpose of varying, changing or adding to any term of a guarantee. However, it is admissible if its purpose is simply to eliminate an ambiguity.
4. Therefore, if parol evidence is admitted and it indicates that there were *two* security agreements between the Plaintiff and T-Mar, then the Plaintiff would agree that the Guarantees would be hopelessly ambiguous and incapable of having only one potential meaning.
5. However, if the parol evidence indicates that there has been only one security agreement, ever, between the Plaintiff and T-Mar, then taken together with the year "2000", which is

present in the Guarantees, it can only refer to the Security Agreement that is the basis T-Mar's debt to the Plaintiff, and is the basis of the CCAA proceeding. It would be impossible for it to refer to anything else.

36 With respect to parol evidence, the Plaintiff argues that:

1. McGuiness states at s. 4.207:

> Where it is clear that a document or group of documents creates a Guarantee relationship, but the precise terms of that relationship are ambiguous, oral evidence may be introduced to eliminate that ambiguity but not to alter or vary the terms of the guarantee. ...

2. In Gallen v. Allstate Grain Co. (1984), 9 D.L.R. (4th) 496 at 506, 53 B.C.L.R. 38, 25 B.L.R. 314 (B.C.C.A.), leave to appeal to S.C.C. refused, [1984] 1 S.C.R. v. Lambert J.A. for the majority states:

> The parol evidence rule is not only a rule about the admissibility of evidence. It reaches in to questions of substantive law. But it is a rule of evidence, as well as a body of principles of substantive law, and if the evidence of the oral representation in this case was improperly admitted, the appeal should be allowed.
>
> The rule of evidence may be stated in this way: Subject to certain exceptions, when the parties to an agreement have apparently set down all its terms in a document, extrinsic evidence is not admissible to add to, subtract from, vary or contradict those terms.
>
> So the rule does not extend to cases where the document may not embody all the terms of the agreement. And even in cases where the document seems to embody all the terms of the agreement, there is a myriad of exceptions to the rule. I will set out some of them. Evidence of an oral statement is relevant and maybe admitted, even where its effect may be to add to, subtract from, vary or contradict the document:
>
> ...
>
> (b) to dispel ambiguities, to establish a term implied by custom, or to demonstrate the factual matrix of the agreement. ...

3. The parol evidence offered by the Plaintiff in this case indicates that there was only one security agreement ever between the Plaintiff and T-Mar. That evidence arises from the Answers to Interrogatories provided by the two Defendants, in which they acknowledge that: the only security agreement between the Plaintiff and T-Mar in the year 2000 was the Security Agreement; and, the only guarantees the Defendants granted to the plaintiffs were the Guarantees. It follows that since the Guarantees include the year "2000", they are only capable of one possible interpretation with respect to the blank spaces: they refer to the only security agreement that was completed by the Defendants in the year 2000.
4. This parol evidence does not vary, contradict, or add to the terms of the Guarantees. It merely explains what appears to be an uncertainty, and explains it in such a way as to make all uncertainty disappear.

37 With respect to parol evidence, the Defendants argue in reply that:

1. Parol evidence should not be admissible in this case because of clause 8 in the Guarantees, which states:

Guarantor acknowledges that there are no agreements, promises, representations or stipulations, oral or written, express or implied, with respect to the subject matter hereof other than those expressly stated herein.

2. The Defendant argues that the evidence is unclear as to whether there was more than one security agreement and more than one guarantee from each of the Defendants in the year 2000. While the Defendants' Answers to Interrogatories are as the Plaintiff has stated, there are also other affidavits in evidence from the Defendants which indicate that the deponents "cannot be certain that [the Security Agreement] is the only security agreement between T-Mar and the Plaintiff."
3. Therefore, the parol evidence does not resolve the uncertainty.

38 I conclude:

1. The Guarantees are, on their faces, too vague to be understood to be referring to the Security Agreement.
2. Parol evidence is admissible in this case to attempt to clarify the uncertainty, which relates only to the date of the Security Agreement. It is not admissible to vary, alter, or add to any terms of the Guarantees.
3. The Defendants' affidavits provide evidence which conflicts with the evidence in their Answers to Interrogatories.
4. The affidavits were sworn before the Answers to Interrogatories. I conclude that, when swearing the affidavits, the Defendants' minds were not sufficiently focused on the issue at hand. The question put to them in the Interrogatories is much clearer and I am satisfied that the answers given in reply to the Interrogatories are correct. I am not prepared to conclude that the Defendants' affidavits contain information which was deliberately misleading. However, the information in those affidavits is wrong.
5. When the parol evidence is considered together with the Guarantees, there is only one possible conclusion with respect to the dates. The year "2000", the date of the Security Agreement, is present on the face of the Guarantees. When considered in light of the Answers to Interrogatories, the Guarantees can only refer to the security agreement in evidence, that is, the Security Agreement of May 11, 2000.
6. The parol evidence does not alter, add or vary the terms of the Guarantees. It merely clarifies any possible uncertainty about the date of the security agreement, referenced in the Guarantees.
7. Therefore, the Defendants' argument of vagueness as a result of the incomplete dates on the faces of the Guarantees, fails.

(c) No Debt Identified

39 The Defendants argue that the Security Agreement did not create a monetary obligation on the part of T-Mar, because the amount of funds to be advanced was not known at the time the Security Agreement and the Guarantees were signed. Therefore, there was no monetary obligation for the Guarantees to refer to. The Defendants argue that the Security Agreement simply creates a security interest against certain personal property and sets out the parties' agreement in relation to that security interest.

40 I am satisfied this argument must fail for the following reasons:

1. The Security Agreement sufficiently relates to debts to be incurred in the future by advances. These arise from clauses 2.1 and 2.9 of the Security Agreement which are titled "Advances" and "Miscellaneous Payment Provisions" respectively.
2. The Guarantees themselves refer to specific debts in the Security Agreement:

    (a) Clause 1(B) refers to "any and all Liabilities incurred by the debtor arising out of or relating to the Security Agreement. ..."
    (b) Clause 4 states: "This guarantee is a continuing one and covers and secures the present and future amounts due or that may become due. ..."

3. In addition to the specific items referred to in the Guarantees, the Plaintiff is entitled to rely upon the general indemnity set out in clause 11 of the Guarantees.

(d) Change in Relationship

41 The Defendants argue that, because the relationship between T-Mar and the Plaintiff has changed, they are discharged as guarantors.

42 In Pax Management Ltd. v. CIBC, [1992] 2 S.C.R. 998 at 1017, 95 D.L.R. (4th) 1, 71 B.C.L.R. (2d) 164, 14 C.B.R. (3d) 145, Iaccobucci J. for the Court states:

> In Wilder, [1986] 2 S.C.R. 551, Wilson J. was faced with the question of the effect on the surety's liability of a breach of the principal contract between the creditor and the debtor. Wilson J. began by observing that a variation in the principal contract which prejudices the Guarantor will discharge the Guarantor (at p. 562):
>
> > It is trite law that any material variation of the terms of the contract between the creditor and the principal debtor to the prejudice of the guarantor without the guarantor's consent will discharge the guarantor.
>
> [emphasis in original]

43 In Unisource Canada Inc. v. Clarke Printing Ltd., [2004] B.C.J. No. 2462, 2004 BCSC 1545, Sinclair Prowse J. states at [paragraph] 16:

> As far as the governing legal principles are concerned, a Guarantor will be discharged without further inquiry if there has been a material alteration in the contract that is the subject of the guarantee; if that alteration is not beneficial to the guarantor; and if the guarantor did not consent to that alteration: Holme v. Brunskill (1877), 3 Q.B. 495 and Cyanamid Canada Inc. v. Eagle Distributors Ltd., [1985] B.C.J. No. 2918 (S.C.).

44 The principles in Pax Management Ltd., supra, and in Unisource Canada, supra, cannot benefit the Defendants in the case at bar. The Defendants not only knew in advance of, and consented to, the changes between T-Mar and the Plaintiff, but they were also responsible for those changes. They cannot now rely upon any such change to their advantage, as the change is wholly the product of their own efforts, that is, the Plan and its effect upon the amount of T-Mar's debt to the Plaintiff.

45 In my view, the Defendants cannot rely upon any change in the Plaintiff's relationship with T-Mar to minimize their responsibilities under the Guarantees.

(e) The Amount to be Repaid

46 The Defendants argue that the principal amount to be repaid under the Guarantees is not capable of determination for the following reasons:

1. The Plaintiff has provided varying accountings of the principal amount still owing, such that the Defendants are unable to determine what the correct amount is.
2. The Defendants cannot determine if they were credited for the proceeds of the equipment sales that were forwarded to the Plaintiff.
3. The Defendants cannot determine what interest rates have been charged on the principal amount owing. It appears that the interest rates changed from time to time, and the Defendants are unable to determine when or why.
4. The Defendants have requested particulars of same from the Plaintiff but have never received satisfactory answers regarding the principal amount owing or regarding why each such answer from the Plaintiff seems to differ from the previous one.
5. It is unclear if the Plaintiff's accountings include legal fees, which clearly cannot be acceptable prior to a proper assessment of such costs.

47 The Plaintiff replies that:

1. There were errors made in some earlier accountings, but that the Plaintiff has now forwarded to the Defendants the final accounting, as well as full explanations as to how it has been arrived at, and why there were previous errors. The Defendants are well aware of this.
2. The Defendants are not in a position to dispute the principal amount of the debt as of January 18, 2002. That amount, $397,747.29, is contained in the Proof of Claim. T-Mar accepted that figure. Therefore, that is the figure which must be taken as accurate as of that date.
3. The Plaintiff acknowledges that the Defendants are to be given credit for the proceeds of the equipment sales which were forwarded to the Plaintiff, and the proceeds were so credited in the final accounting.
4. The Defendants are well aware that upon default on the Security Agreement, the interest rate on the principal amount changed to 18% per annum pursuant to clause 2.9 of the Security Agreement.

48 In any event, the Plaintiff argues that any uncertainty as to quantum does not invalidate the Guarantees and is simply a matter that can be determined by a Registrar. Therefore, the Plaintiff suggests that Judgment be granted in its favour with a reference to the Registrar to determine the amount owing.

49 I conclude that:

1. The amount accepted as correct in the Proof of Claim is not binding upon the Defendants. The Proof of Claim was filed in proceedings involving T-Mar, not the Defendants. The Defendants are not a party to the CCAA proceedings in which that Proof of Claim was filed.
2. While there may be sufficient evidence to determine the exact amount owed, I would need further submissions, and possibly evidence, in order to be satisfied in this respect.
3. I agree with the Plaintiff that, if Judgment is granted for the Plaintiff, quantum can be determined by a Registrar.

DECISION

50 I conclude as follows:

1. The Defendants' arguments with respect to the CCAA issues fail. I accept the arguments of the Plaintiff as correct.
2. The Defendants' arguments with respect to the Guarantee issues fail. I accept the arguments of the Plaintiff as correct.
3. The Guarantees are valid and enforceable against the Defendants.
4. Judgment will be entered against both Defendants, jointly and severally, on the Guarantees in an amount to be assessed.
5. The matter is referred to a Registrar for assessment.

COSTS

51 The Plaintiff seeks costs pursuant to clause 2 of the Guarantees, which states:

> Guarantor also irrevocably and unconditionally guarantees, as primary debtor and not merely as a surety, all legal fees and disbursements and all other costs, charges and expenses that Newcourt incurs enforcing its rights against the Debtor.

52 The Defendants argue that clause 5(e) of the Guarantees is inconsistent with clause 2, and that its application would result in a much reduced payment. Clause 5(e) states:

> [Guarantor] will pay all reasonable costs, disbursements and expenses, including legal fees, incurred by Newcourt in the enforcement of this Guarantee.

53 The Defendants also rely upon the Security Agreement and note that it also refers to "reasonable fees of any lawyer" rather than actual legal fees. In this regard, I was referred to and have considered Re United Used Auto & Truck Parts Ltd. (2003), 35 B.L.R. (3d) 110, 2003 BCSC 1008.

54 I have also considered Rule 57 of the Rules of Court which deals with costs, and in particular those provisions of the Rule that deal with special costs.

55 In view of all of the foregoing, I am not satisfied that the Plaintiff is entitled to special costs. Rather, the Plaintiff shall have party and party costs at Scale 3, to be assessed.

SILVERMAN J.

cp/i/qw/qlrds/qlbrl/qlhjk

Tab 2

Case Name:

Nexient Learning Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Nexient Learning Inc. and Nexient Learning Canada Inc.

[2009] O.J. No. 5507

62 C.B.R. (5th) 248

2009 CarswellOnt 8071

2009 CanLII 72037

Court File No. CV-09-8257-00CL

Ontario Superior Court of Justice

H.J. Wilton-Siegel J.

Heard: November 30, 2009.
Judgment: December 23, 2009.

(102 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act matters -- Compromises and arrangements -- Directions -- Motion for authorization of assignment of contract by debtor to purchaser dismissed -- The debtor was insolvent -- Its assets were sold to the purchaser -- Post-sale, the debtor sought to assign a licensing agreement to the purchaser with a permanent stay binding the licensor from terminating the agreement due to the debtor's insolvency -- The court found that the proposed relief did not advance the protection proceedings or the reorganization -- The court's discretion was not available to competitively disadvantage a licensor to the debtor in favour of a purchaser of the debtor's assets -- Companies' Creditors Arrangement Act, s. 11(4).

Motion by the insolvent companies, Nexient Learning and Nexient Learning Canada, for an order authorizing assignment of a contract to Global Knowledge Network. Nexient was a Canadian company that provided corporate training and consulting. Certain of its curriculum and course materials were licensed to Nexient by the respondent, ESI International. Two licensing agreements granted Nexient an exclusive right to offer the course materials in Canada in exchange for certain royalty and one-time payments. ESI regarded its contracts with Nexient as part of an umbrella agreement including both written agreements, oral understandings and a course of dealings in the context of a strategic partnership. The insolvency of Nexient was one of three trigger events that gave rise to a right to termination of the licensing agreements. Global was one of ESI's largest competitors and was the successful bidder for the purchase of Nexient's assets as a going concern. The potential purchase received court approval and closed. In co nnection with the purchase, Nexient sought assignment of one of its agreements with ESI to Global on terms that would permanently stay the right of ESI to

exercise rights of termination arising from Nexient's insolvency. Following the entry of Nexient into creditor protection, ESI had purported to terminate the agreement on the grounds of insolvency. Nexient owed ESI approximately $733,000 in royalties. ESI further alleged that the disclosure to potential purchasers of Nexient's assets breached the confidentiality provisions of the agreement. Nexient took the position that the stay of proceedings in the protection order rendered ESI's notice of termination of no force or effect.

HELD: Motion dismissed. The court had jurisdiction to authorize assignment of the agreement to Global notwithstanding any provision to the contrary in the agreement. However, it was not appropriate to exercise discretion to authorize the proposed assignment. The requested relief would not further the protection proceedings or reorganization process, and had no impact on Nexient or its stakeholders given that the sale transaction with Global had already completed. The only impact of the proposed relief was to adversely affect ESI's right to terminate the agreement. There was no evidence that, upon entering the sale process, Nexient and Global intended an assignment on the basis of a permanent stay preventing ESI from terminating the agreement. There was thus no basis to rectify the sale approval order to include such provisions. Global failed to demonstrate circumstances that would justify imposition of a permanent stay against ESI. ESI based on its business model on delivering all of its product lines through a strategic partnership. The court's discretion was not available to competitively disadvantage ESI, as licensor to the debtor, Nexient, in favour of Global, as purchaser of the debtor's assets.

Statutes, Regulations and Rules Cited:

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

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 57.01(6)

Counsel:

George Benchetrit, for Nexient Learning Inc. and Nexient Learning Canada Inc.

Margaret Sims and Arthi Sambasivan, for Global Knowledge Network (Canada) Inc.

Catherine Francis, David T. Ullman and Melissa McCready, for ESI International Inc.

Lynne O'Brien, for the Monitor, RSM Richter Inc.

ENDORSEMENT

1 **H.J. WILTON-SIEGEL J.**:-- On this motion, the applicants, Nexient Learning Inc. and Nexient Learning Canada Inc. (collectively, "Nexient") and Global Knowledge Network (Canada) Inc. ("Global Knowledge"), seek an order authorizing the assignment of a contract from Nexient to Global Knowledge on terms that would permanently stay the right of the other party to the contract, ESI International Inc. ("ESI"), to exercise rights of termination that arose as a result of the insolvency of Nexient. ESI is the respondent on the motion, which is brought under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") as a result of Nexient's earlier filing for protection under that statute.

Background

The Parties

2 Nexient Learning Inc. and Nexient Learning Canada Inc. are corporations incorporated under the laws of Canada.

3 Global Knowledge is a corporation incorporated under the laws of Ontario carrying on business across Canada.

4 ESI is a United States corporation having its head office in Arlington, Virginia.

5 Nexient was the largest provider of corporate training and consulting in Canada. It had three business lines, which had roughly equal revenue in 2008: (1) information technology ("IT"); (2) business process improvements ("BPI"); and (3) leadership business solutions. The BPI line of business was principally comprised of three subdivisions -- business analysis ("BA"), project management ("PM") and IT Infrastructure Library Training.

6 The curriculum and course materials offered by Nexient in respect of its PM programmes were licenced to Nexient by ESI pursuant to an agreement dated March 29, 2004, as extended by a first amendment dated January 16, 2006 (collectively, the "PM Agreement"). The PM Agreement granted Nexient an exclusive licence to offer the ESI PM course materials in Canada in return for royalty payments. The PM Agreement expires on December 31, 2009.

7 Similarly, the curriculum and course materials offered by Nexient in respect of its BA programmes were licenced to Nexient by ESI pursuant to an agreement dated January 16, 2006 ("BA Agreement"). The BA Agreement was executed in connection with a transaction pursuant to which ESI received the rights to BA materials from a predecessor of Nexient in return for payment of $2.5 million and delivery of the BA Agreement to the Nexient predecessor. The BA Agreement provided for a perpetual, exclusive royalty-free licence to use such BA materials in Canada.

8 ESI is a significant participant in the market for project management, business analysis, sourcing management training and business skills training. It offers classroom, on-site, e-training and professional services. To deliver its services, ESI typically enters into distributorship arrangements with distributors in countries around the world, which it describes as "strategic partnering arrangements". In Canada, ESI considers Nexient to be its "strategic partner". That arrangement is defined by the PM Agreement, the BA Agreement and, according to ESI, oral understandings and a course of dealings between ESI and Nexient that collectively constitute an "umbrella" agreement.

9 Global Knowledge Training LLC, a United States corporation ("Global Knowledge U.S."), is the parent corporation of Global Knowledge. Together with its affiliates, Global Knowledge U.S. is one of ESI's largest competitors.

Relevant Provisions Of The BA Agreement

10 Despite the grant of a perpetual licence in section 2.1, the BA Agreement provides for three "trigger" events giving rise to a right to terminate the contract. Of the three termination events, the following two are relevant:

> 6. Term and Termination
>
> 6.2 Upon written notice to [Nexient], ESI will have the right to terminate this Agreement in the event of any of the following:
>
> ...
>
> 6.2.2 [Nexient] commits a material breach of any provision of this Agreement and such material breach remains uncured for thirty (30) days after receipt of written notification of such material breach, such written notice to include full particulars of the material breach.
>
> 6.2.3 [Nexient] (i) becomes insolvent, (ii) makes an assignment for the benefit of creditors, (iii) files a voluntary petition in bankruptcy, (iv) an involuntary petition in bankruptcy filed against it is not dismissed within ninety (90) days of filing, or (v) if a receiver is appointed for a substantial portion of its assets.

11 Pursuant to section 8.5, the BA Agreement is not assignable by either party except in the event of a merger, acquisition, reorganization, change of control, or sale of all or substantially all of the assets of a party's business.

12 Section 8.7 of the BA Agreement provides that the agreement is governed by the laws of Virginia in the United States. Section 8.8 provides that the federal and state courts within Virginia have the exclusive jurisdiction over any dispute, controversy or claim arising out of or in connection with the BA Agreement or any breach thereof.

Proceedings Under The CCAA

13 On June 29, 2009, Nexient was granted protection under the CCAA by this Court. The initial order made on that day was subsequently amended and restated on two occasions, the latest being August 19, 2009 (as so amended and restated, the "Initial Order").

14 On July 8, 2009, the Court approved a stalking horse sales process involving a third party offeror. The sales process was conducted by the monitor RSM Richter Inc. (the "Monitor"). Both ESI and Global Knowledge participated in that process. In this connection, ESI signed a non-disclosure agreement on July 13, 2009 (the "NDA").

15 By letter dated July 24, 2009 (the "Termination Notice"), ESI purported to terminate the BA Agreement effective immediately on the grounds of breaches of sections 6.2.2 and 6.2.3 of the Agreement (the "Insolvency Defaults"). In respect of section 6.2.2, ESI alleged that the disclosure to potential purchasers of Nexient's assets of the BA Agreement, and of information relating to the BA materials offered by Nexient thereunder, constituted a breach of the confidentiality provisions of the BA Agreement. By the same letter, ESI purported to grant Nexient a temporary licence to continue acting as ESI's distributor in Canada for the BA materials solely to fulfill Nexient's existing obligations. Such licence was expressed to terminate on August 21, 2009.

16 No similar termination notice was sent in respect of the PM Agreement. As noted, the PM Agreement expires on December 31, 2009.

17 It is undisputed that Nexient owes ESI approximately $733,000 on account of royalties for the use of ESI's corporate training materials. ESI says that this amount includes royalties in respect of two BA courses that are not covered by the BA Agreement and are therefore payable in accordance with the "umbrella" agreement that governs the strategic partnership between ESI and Nexient.

18 By letter dated July 28, 2009, counsel for Nexient informed ESI of its client's view that, given the stay of proceedings in the Initial Order, the Termination Notice was of no force or effect.

19 The existence and content of the Termination Notice and the letter of Nexient's legal counsel dated July 28, 2009 were communicated orally to Brian Branson ("Branson"), the chief executive officer of Global Knowledge U.S., by Donna De Winter ("De Winter"), the president of Nexient, some time between July 28 and July 31, 2009. Both documents were sent to Global Knowledge on or about August 25, 2009.

The Sale Transaction

20 Global Knowledge was the successful bidder in the sales process. In connection with the sale transaction, Nexient and Global Knowledge entered into an asset purchase agreement dated August 5, 2009 (the "APA") and a transition and occupation services agreement dated August 17, 2009 (the "Transition Agreement").

21 Under the APA, Global Knowledge agreed to acquire all of Nexient's assets as a going concern pursuant to the terms of the APA (the "Sale Transaction"). As Global Knowledge had not completed its due diligence of Nexient's contracts, the APA provided for a ninety-day period after the closing date (the "Transaction Period") during which, among other things, Global Knowledge could review the contracts to which Nexient was a party and determine whether it wished to take an assignment of any or all of such contracts. The APA also provided that, prior to the closing date, Global Knowledge had the right to designate any or all of the contracts as "Excluded Assets" which would not be assigned at the closing but would instead be dealt with pursuant to the Transition Agreement. At the Closing, Global Knowledge elected to treat all contracts of Nexient (the "Contracts") as "Excluded Assets".

22 Significantly, section 2.7 of APA provided that the purchase price would not be affected by designation of any assets, including any Contracts, as "Excluded Assets":

> 2.7 Purchaser's Rights to Exclude
>
> Notwithstanding anything to the contrary in this Agreement, the Purchaser may, at its option, exclude any of the Assets, including any Contracts, from the Transaction at any time prior to Closing upon written notice to the Vendors, whereupon such Assets shall be Excluded Assets, provided, however, that there shall be no reduction in the Purchase Price as a result of such exclusion. For greater certainty, the Purchaser may, at its option, submit further and/or revised lists of Excluded Assets at any time prior to Closing.

Accordingly, there was no reduction in the purchase price under the Sale Transaction as a result of the exclusion of the BA Agreement from the assets that were sold and assigned to Global Knowledge at the Closing (as defined below).

23 It was a condition of completion of the Sale Transaction in favour of both parties that a vesting order, in form and substance acceptable to Nexient and Global Knowledge acting reasonably, be obtained vesting in Global Knowledge all

of Nexient's right, title and interest in the Nexient assets, including the Contracts to be assumed, free and clear of all "Claims" (as defined below). As described below, the Sale Order (defined below) addressed the vesting of all Contracts that Nexient might decide to assume at the end of the Transition Period. It did not, however, include a provision that permanently stayed ESI's rights of termination based on the Insolvency Defaults.

24 Under section 4 of the Transition Agreement, Global Knowledge had the right to review the Contracts and was obligated to notify Nexient of the Contracts it wished to assume not less than seven days prior to the end of the Transition Period. Under section 14(ii), Nexient was obligated to assign to Global Knowledge all of Nexient's right, benefit and interest in such Contracts provided all required consents or waivers in respect of the Contracts to be assigned had been obtained. Upon such assignment, section 6 provided that Global Knowledge would assume all obligations and liabilities of Nexient under such Contracts, whether arising prior to or after Closing. The Transition Agreement further provided that, during the Transition Period, Global Knowledge would perform the Contracts on behalf of Nexient.

25 On or about August 17, 2009, subsequent to submitting Global Knowledge's bid and prior to the hearing of this Court to approve the Sale Transaction, Branson spoke to John Elsey ("Elsey"), the president and chief executive officer of ESI, regarding ESI's right to terminate the BA Agreement. ESI continued to assert that it was entitled to terminate the BA Agreement on the grounds of the Insolvency Defaults. Branson advised Elsey that Global Knowledge had a different interpretation of ESI's right to terminate the BA Agreement. As discussed below, it is unclear whether the parties were addressing the same issue in this and other conversations described below regarding the right of ESI to terminate the Agreement. However, nothing turns on this issue. During that conversation, Branson advised Elsey of the proposed closing date of August 21, 2009 for the Sale Transaction.

26 Branson also spoke to De Winter and Scott Williams of Nexient regarding the enforceability of the Termination Notice (in respect of De Winter, it is unclear whether this is a reference to the telephone conversation referred to above or another conversation). Branson says he was also advised by Nexient's counsel that ESI could not terminate the BA Agreement under Canadian bankruptcy law. In addition, Branson says he also spoke to a representative of the Monitor and its legal counsel. He says their view on the enforceability of the Termination Notice was consistent with the view expressed by De Winter.

27 Following this conversation, Elsey wrote a letter to Branson in which he reiterated that the parties did not agree on the legal effect of the Termination Notice. Elsey went on in that letter to extend the purported interim licence of the BA materials granted in the Termination Notice to September 30, 2009 in view of future discussions concerning possible future collaboration between ESI and Global Knowledge scheduled for the week of September 7, 2009.

Court Approval Of The Sale Transaction

28 The Sale Transaction, together with the APA and the Transition Agreement, was approved by the Court on August 19, 2009 pursuant to the sale approval and vesting order of that date (the "Sale Order"). ESI did not file an appearance in the CCAA proceedings of Nexient. Nexient did not give notice of the Court hearing to ESI. Therefore, ESI did not receive notice of the Court hearing on August 19, 2009 nor did it receive copies of the APA or the Transition Agreement at that time. It did not attend the hearing to approve the Sale Transaction and therefore did not oppose the Order.

29 The Sale Order provided that, upon delivery of the "First Monitor's Certificate" at the time of Closing, the Nexient assets other than the Contracts would vest in Global Knowledge free and clear of any "Claims". Similarly, the Sale Order provided that, upon delivery of the "Second Monitor's Certificate" at the end of the Transition Period, the Contracts to be assigned to Global Knowledge would vest free and clear of any "Claims".

30 "Claims" is defined in the Sale Order to be all security interests, charges or other financial or monetary claims of every nature or kind. "Claims" do not, however, include any rights of termination of the BA Agreement in favour of ESI based on the Insolvency Defaults. Global Knowledge does not dispute this interpretation. Accordingly, it has brought this proceeding to seek an order directed against ESI permanently staying ESI's rights to terminate the BA Agreement on such basis after the proposed assignment to Global Knowledge.

31 The Sale Transaction closed on August 21, 2009 (the "Closing"). Global Knowledge paid the full purchase price for the Nexient assets at that time. At the same time, the Monitor delivered the First Monitor's Certificate thereby transferring the assets to Global Knowledge free of all Claims.

32 At the time of the Sale Order, the stay under the Initial Order was also extended until the end of the Transition Period. The stay and the Transaction Period were further extended until the hearing of this motion and, at such hearing, were further extended until two days after the release of this Endorsement.

33 Nexient does not intend to file a plan of arrangement under the CCAA. As a result of the completion of the Sale Transaction, it no longer has any operations and all employees as of November 1, 2009 were assumed by Global Knowledge on that date. Upon the lifting of the stay at the end of the Transition Period, it is understood that Nexient intends to make an assignment in bankruptcy.

Events Subsequent To The Closing

34 At the time that Global Knowledge and Nexient entered into the APA, Global Knowledge marketed a few BA courses in Canada, although it says its courses approached the subject-matter in a different manner from ESI's BA courses. Global Knowledge did not offer PM courses in Canada. However, it had access to PM materials from Global Knowledge U.S. that it believed it could readily adapt for the Canadian market.

35 According to De Winter, Nexient did not regard Global Knowledge as a competitor in Canada in the BA and PM product lines at that time. By acquiring the Nexient assets including the BA Agreement, however, Global Knowledge became, in effect, a new competitor in the Canadian market for BA and PM products. At the same time, as described below, ESI, which had previously marketed its products through its strategic arrangement with Nexient, also decided to enter the Canadian market in its own right.

36 Although it had not yet determined to reject the PM Agreement, on or about September 4, 2009, Global Knowledge also commenced discussions with McMaster University regarding recognition of its training facilities and eventual accreditation of its proposed PM courses. The BA and PM courses of ESI offered by Nexient were already accredited by McMaster University.

37 Subsequent to August 21, 2009, ESI and Global Knowledge had discussions regarding their possible future relationship. In a telephone conference on September 11, 2009, attended by representatives of ESI, Global Knowledge and Nexient, Global Knowledge indicated that it did not intend to acquire the PM Agreement.

38 As a result, given the anticipated competition with Global Knowledge, ESI concluded that it would need to find a new strategic partner in Canada or begin delivering its products directly in Canada. It chose to pursue the latter option. In response to ESI commencing direct operations in Canada, Global Knowledge and Nexient commenced the motions described below seeking various orders pertaining to the BA Agreement and the NDA including injunctive relief relating to alleged breaches of these agreements.

39 In early November 2009 Global Knowledge formally advised Nexient pursuant to the Transition Agreement that it proposed to take an assignment of the BA Agreement and the NDA but did not propose to take an assignment of the PM Agreement. Its notice was unconditional -- that is, it did not make such assignment conditional on receiving the requested relief in this proceeding.

40 ESI opposes the assignment of the BA Agreement to Global Knowledge on the basis sought by Global Knowledge, which would permanently stay the exercise of any termination rights of ESI based on the Insolvency Defaults.

Procedural Matters

Motions Brought By The Parties

41 Nexient commenced this motion on October 30, 2009. The notice of motion seeks a declaration that the BA Agreement and the PM Agreement remain in force and are both assignable to Global Knowledge, and an order restraining ESI from interfering with Nexient's rights under the BA Agreement and PM Agreement and from carrying on BA and PM training programmes in Canada.

42 On November 3, 2009, Global Knowledge served its own notice of motion seeking the same relief. In addition, Global Knowledge seeks a declaration that the NDA is assignable to it, an order restraining ESI from breaching certain covenants in the NDA that Global Knowledge alleges have been breached relating to ESI's commencement of direct operations in Canada since September 21, 2009, and ancillary relief related to such order.

43 ESI responded by a notice of cross-motion dated November 17, 2009 seeking an order staying or dismissing the Nexient and Global Knowledge motions to the extent the relief sought (1) relates to contracts that have not been assigned to Global Knowledge; (2) does not benefit the Nexient estate; and (3) relates to contracts subject to the exclusive jurisdiction of the courts of Virginia in the United States. ESI takes the position that the BA Agreement is not assignable to Global Knowledge, that the relief sought by Nexient and Global Knowledge benefits only Global Knowledge, and that all matters pertaining to the BA Agreement are within the exclusive jurisdiction of courts in Virginia pursuant

to the exclusive jurisdiction clause in that agreement. It therefore also seeks an order staying the motions of Nexient and Global Knowledge insofar as they involve the BA Agreement pending a determination by the appropriate court in Virginia of the disputes, controversies or claims pertaining to the BA Agreement asserted by the parties in their respective motions.

Narrowing Of The Issues For The Court On This Hearing

44 As a result of the following three developments before and at the hearing of this motion, the issues for the Court on this motion have been narrowed considerably.

45 First, as mentioned, Global Knowledge has advised Nexient that it does not intend to assume the PM Agreement. Accordingly, neither Nexient nor Global Knowledge now seeks any relief in respect of the PM Agreement.

46 Second, the parties agreed at the hearing that, on the filing of the Second Monitor's Certificate, the NDA would be assigned to Global Knowledge.

47 Third, the motion of Global Knowledge for injunctive relief in respect of alleged interference with Global Knowledge's rights under the BA Agreement, and in respect of alleged breaches of the NDA, was adjourned to December 21, 2009, by which date it is intended that Global Knowledge shall have commenced a separate application for the relief it seeks against ESI apart from the declaration sought on the present motion.

48 I think it is inappropriate for the Global Knowledge motion respecting injunctive relief to be adjudicated in the Nexient CCAA proceedings. Global Knowledge's claim flows from its rights against ESI under the BA Agreement and the NDA. This claim is entirely a matter between ESI and Global Knowledge. It therefore falls outside the Nexient CCAA proceedings, which will effectively terminate upon the lifting of the stay under the Initial Order at the end of the Transition Period. While Global Knowledge will not formally take an assignment of the BA Agreement and the NDA until such time, I accept that Global Knowledge may have a sufficient interest in these agreements at the present time to obtain injunctive relief, in view of Nexient's obligation under the Sale Agreement to assign them to Global Knowledge. However, to obtain such relief, Global Knowledge must first commence its own proceeding against ESI and move for such interim injunctive relief in that proceeding.

49 Similarly, ESI's request for a stay of the Global Knowledge motion is adjourned to the hearing of the motion on December 21, 2009. At that time, ESI is at liberty to bring any motion in the proceeding to be commenced by Global Knowledge it may choose addressing the jurisdictional issues raised in its cross-motion in the present proceeding.

Issues On This Motion

50 Accordingly, the issues that are addressed on this motion are:

1. Is the BA Agreement assignable to Global Knowledge, on its terms or by order of this Court?
2. If it is, is Global Knowledge entitled to an order in connection with such assignment that permanently stays the exercise of any rights that ESI may have to terminate the BA Agreement based on the Insolvency Defaults?

51 The issue of the assignability of the BA Agreement has two elements -- the assignability of the agreement as a matter of interpretation of the contract which, as noted, is governed by the laws of the Virginia, and the authority of the Court to authorize an assignment to Global Knowledge if the contract is not assignable on its terms. In view of the determination below regarding the authority of the Court to authorize an assignment, it is unnecessary to consider the assignabilty of the BA Agreement as a matter of contractual interpretation and I therefore decline to do so.

52 I would note, however, that if I had concluded that Global Knowledge was entitled to the requested relief effectively deleting the Insolvency Defaults, I would also have concluded, for the same reasons, that Global Knowledge was entitled to an order authorizing the assignment of the BA Agreement to the extent it was not otherwise assignable under the laws of Virginia.

Applicable Law

Authority Of The Court To Grant The Requested Relief

53 The Court has authority to authorize an assignment of an agreement to which a debtor under CCAA protection is a party and to permanently stay termination of the agreement by the other party to the contract by reason of either the assignment or any insolvency defaults that arose in the context of the CCAA proceedings: see *Playdium Entertainment Corp. (Re)*, [2001] O.J. No. 4459 (S.C.J.).

54 In *Playdium*, Spence J. grounds that authority in the provisions of section 11(4)(c) of the CCAA and, alternatively, in the inherent jurisdiction of the Court. The reasoning, which I adopt, is set out in paragraphs 32 and 42:

> So it is necessary for the order to have such positive effect if the jurisdiction of the court to grant the order under s. 11(4)(c) is to be exercised in a manner that is both effective and fair. To the extent that the jurisdiction to make the order is not expressed in the CCAA, the approval of the assignment may be said to be an exercise by the court of its inherent jurisdiction. But the inherent jurisdiction being exercised is simply the jurisdiction to grant an order that is necessary for the fair and effective exercise of the jurisdiction given to the court by statute....
>
> Having regard to the overall pnrpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose, and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

Consideration Of The Applicable Standard In Previous Decisions

55 However, the test that must be satisfied in order to obtain an order authorizing assignment remains unclear after *Playdium*. In that decision, it was clear that the sale of the debtor's assets could not proceed without the requested order. This would seem to suggest that demonstration of that fact was the applicable test.

56 On the other hand, in para. 39, Spence J. quotes with approval a statement of Tysoe J. in *Re Woodwards Ltd.*, [1993] B.C.J. No. 42 (S.C.) that suggests that it may not be a requirement that the insolvent company would be unable to complete a proposed reorganization without the exercise of the Court's discretion. Tysoe J. framed the test as requiring a demonstration that the exercise of the Court's discretion be "important to the reorganization process". In my opinion, this is the governing test.

57 In addition, in para. 43 of *Playdium*, Spence J. appears to grant the requested relief after determining that the relief did not subject the third party to an inappropriate imposition or an inappropriate loss of claims having regard to the overall purpose of the CCAA of allowing businesses to continue.

58 Moreover, Spence J. also considered a number of factors in assessing whether the relief was consistent with the purpose and spirit of the CCAA: whether sufficient efforts had been made to obtain the best price such that the debtor was not acting improvidently; whether the proposal takes into consideration the interests of the parties; the efficacy and integrity of the process by which the offers were obtained; and whether there had been unfairness in the working out of the process.

Standard Applied On This Motion

59 It is clear from *Playdium* and *Woodwards* that the authority of the Court to interfere with contractual rights in the context of CCAA proceedings, whether it is founded in section 11(4) of the CCAA or the Court's inherent jurisdiction, must be exercised sparingly. Before exercising the Court's jurisdiction in this manner, the Court should be satisfied that the purpose and spirit of the CCAA proceedings will be furthered by the proposed assignment by analyzing the factors identified by Spence J. and any other factors that address the equity of the proposed assignment. The Court must also be satisfied that the requested relief does not adversely affect the third party's contractual rights beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party.

The Specific Legal Issue Presented On This Motion

60 This motion raises an important issue concerning the extent of the authority of the Court to authorize the assignment of a contract in the face of an objection from the other party to the contract. ESI argues that a Court should not permit a purchaser under a "liquidating CCAA" to "cherry pick" the contracts it wishes to assume.

61 Insofar as the result would be to prevent a debtor subject to CCAA proceedings from selling only profitable business divisions or would prevent a purchaser from deciding which business divisions it wishes to purchase, I do not think ESI's proposition is either correct or practical. The purpose of the CCAA is to further the continuity of the business of the debtor to the extent feasible. It does not, however, mandate the continuity of unprofitable businesses.

62 However, the situation in which a purchaser seeks to assume less than all of the contracts between a debtor and a particular third party with whom the debtor has a continuing or multifaceted arrangement is more problematic. In many instances in which a purchaser wishes to discriminate among contracts with the same third party, the Court will not exercise its authority under the CCAA, or its inherent jurisdiction, to authorize an assignment and/or permanently stay termination rights based on insolvency defaults. In such circumstances, the purchaser must assume all contracts with the third party or none at all.

63 There can be many reasons why it would be inappropriate or unfair to authorize the assignment of less than all of a debtor's contracts with a third party. In many instances, there is an interconnection between such contracts created by express terms of the contracts. Similarly, there may be an operational relationship between the subject-matter of such contracts even if there is no express contractual relationship. Courts are also reluctant to authorize an assignment that would prevent a counterparty from exercising set-off rights in contracts that are not to be assigned. In respect of financial contracts between the same parties, for example, it would be highly inequitable to permit a purchaser to take only "in the money" contracts leaving the counterparty with all of the "out of the money" contracts and only an unsecured claim against the debtor for its gross loss. It would also be inappropriate in many circumstances to permit a selective assignment of a debtor's contracts if the competitive position of the third party relative to the assignee would be materially and adversely affected, at least to the extent the third party is unable to protect itself against such result.

Analysis and Conclusions

Preliminary Observations

64 Before addressing the issues on this motion, I propose to set out the following observations which inform the conclusions reached below.

65 First, being a perpetual, royalty-free licence, the BA Agreement represents a valuable contract to Nexient except to the extent that ESI is entitled to terminate it. It represents part of the sales proceeds received in an earlier transaction by Nexient for the BA materials developed by a predecessor of Nexient. While there is an issue as to whether the current BA materials are still subject to the BA Agreement, that issue requires a determination of facts that cannot be made in the present proceeding. It must be addressed, if necessary, in another proceeding. For the purposes of this motion, I assume that such materials could be subject to the BA Agreement, which would therefore have significant value in Nexient's hands.

66 Second, Global Knowledge was well aware that ESI's position was that it had the right to terminate the BA Agreement. As a consequence, Global Knowledge was also well aware that ESI would use any means available to it to terminate the BA Agreement after it had been assigned to Global Knowledge if ESI and Global Knowledge were unable to establish a satisfactory working relationship. Global Knowledge did not, however, seek any protections against such action by ESI in either the APA or the Sale Order.

67 In particular, as mentioned, section 4.3 of the Sale Agreement provided that the obligation of the parties to close the Sale Transaction was subject to receipt of a vesting order of this Court satisfactory in form to both parties. However, the Sale Order that was actually sought by Nexient and Global Knowledge, and was granted by the Court, did not address deletion of any of ESI's termination rights based on the Insolvency Defaults.

68 There is no explanation in the record for the failure of the Sale Order to address this matter notwithstanding the fact that, as a matter of law as set out above, there could have been no misunderstanding as to the legal requirement for terms in the Sale Order imposing a permanent stay if, at the time of the sale approval hearing, Global Knowledge in fact intended to receive a transfer of the BA Agreement on such terms. As both parties were represented by experienced legal counsel, I assume the form of the Sale Order reflected a conscious decision on the part of Global Knowledge not to address this issue explicitly at the time of the hearing.

69 Third, while Nexient and Global Knowledge allege that their intention at the time of the hearing was that the BA Agreement was to be assigned on the basis that ESI's rights to terminate it on the basis of the Insolvency Defaults would be permanently stayed, there is no evidence of such intention in the record apart from Branson's bald statements to this effect in his affidavit, which is insufficient.

70 Moreover, the evidence of Branson exhibits a lack of precision regarding his understanding of the applicable law and Global Knowledge's intentions. In both his affidavit and the transcript of his cross-examination, Branson refers to his understanding that the stay in the Initial Order prevented ESI from terminating its contractual relationship with Nexient without an order of the Court. In his affidavit, he added that he understood that, as a consequence, to the extent that contracts did not contain restrictions on assignment, they could be assigned to the successful bidder and would remain in force and effect after the assignment. This implies that he thought the Initial Order would also prevent ESI from terminating its contractual relationship with Global Knowledge, as the assignee of the Nexient contracts, without a further order of the Court.

71 As *Playdium* demonstrates, there are two different issues involved here. The stay in the Initial Order did prevent ESI from terminating the BA Agreement under Ontario Law as loug as the CCAA proceedings are continuing. Indeed, because delivery of the Termination Notice contravened the Initial Order, I think the Termination Notice must be regarded as totally ineffective under Ontario Law with the result that ESI could not rely on it subsequently if ESI became entitled to terminate the BA Agreement after the assignment to Global Knowledge or otherwise.

72 The stay did not, however, by itself have the consequence of staying enforcement of any right of ESI to terminate the BA Agreement based on the Insolvency Defaults after it had been assigned to Global Knowledge. That is, of course, the reason for the present motion. Any such order would constitute, in effect, a re-writing of the BA Agreement to remove ESI's rights. As *Playdium* illustrates, a further order of the Court would be required to permanently stay ESI's rights to terminate the BA Agreement based on the Insolvency Defaults. Not only did Global Knowledge not seek such an order as mentioned above, it also did not require Nexient to give ESI formal notice of the Court hearing to approve the Sale Transaction.

73 In the absence of such notice, I do not think any order of this Court to permanently stay ESI's rights to terminate the BA Agreement based on the Insolvency Defaults would have been binding on ESI, even though ESI had not filed an appearance in the CCAA Proceedings and had been orally advised as to the date of the hearing. Nexient and Global Knowledge therefore cannot argue that ESI's failure to oppose the Sale Order at the hearing constituted "lying in the weeds," which disentitles ESI to sympathetic consideration on this motion. Moreover, in addition to the fact that it is not established on the record that either Nexient or Global Knowledge specifically advised ESI of an intention to seek an order permanently staying ESI's termination rights based on the Insolvency Defaults, the Sale Order does not have that effect in any event, as mentioned above. There was, therefore, nothing for ESI to oppose on this issue even if it had appeared at the approval hearing.

74 Fourth, given the structure of the Sale Transaction, there is no impact on the Sale Transaction of au exclusion of the BA Agreement from the Contracts assigned to Global Knowledge. Global Knowledge has already paid the purchase price uuder the Sale Agreement. The effect of section 2.7 of the APA is that there will no adjustment to the purchase price if, as transpired, Global Knowledge was unable to reach agreement with ESI on acceptable terms for the assignment of the BA Agreement. There is similarly no material impact on Nexient's customers - the BA product will be delivered in Canada by either Global Knowledge or ESI depending upon the outcome of this litigation. As such, at the present time, the requested relief will have no impact on the CCAA proceedings, or on the distributions realized by Nexient's creditors uuder these proceedings.

75 Fifth, although there is no contractual connection between the subject matter of the PM Agreement and the BA Agreement, there is a significant operational relationship between the PM and BA product lines. They comprise two of the three product lines of Nexient's BPI division. Both products are licenced by Nexient from ESI. In many instances, both products are marketed to the same customers. In addition, Nexient's facilitators provide educational services in respect of both products. There may also be certain economies of scale associated with offering both products. In her cross-examinatiou, De Winter summarized the situation succinctly in stating that "one product line can't operate without the other".

76 There is also a significant business relationship between ESI and Nexient. Nexient was the Canadian distributor through which ESI marketed and sold its BA and PM products. At the preseut time, Nexient owes ESI in excess of $733,000 in respect of royalties payable under the PM Agreement. ESI says that this amount also includes royalties for two BA courses that are not governed by the BA Agreement. It also asserts that the BA materials described in the BA

Agreement no longer are included in the current BA materials as a result of subsequent revisions. There are, therefore, several issues relating to the provision of the BA materials currently distributed by Nexient that would remain to be resolved if the BA Agreement were transferred to Global Knowledge.

77 Sixth, in his affidavit, Branson gave three reasons for Global Knowledge's decision not to assume the PM Agreement: (1) the PM Agreement terminates on December 31, 2009; (2) Global Knowledge would have to assume the amounts outstanding under the PM Agreement; and (3) Global Knowledge has access to similar course materials for which it would pay lower or no royalties. Although Branson says that the outstanding liability under the PM Agreement was not the principal factor in Global Knowledge's decision, it would appear that it was an important consideration.

78 There is no suggestion that Global Knowledge was unaware of the amount outstanding under the PM Agreement at a time of signing the APA or at the time of Closing. Although Global Knowledge did not decide against taking an assignment of the PM Agreement until later, it appears that, from the time of signing the APA if not earlier, Global Knowledge proceeded on the basis that it was not prepared to assume the PM Agreement unless ESI agreed to significantly different terms, including a reduction in the amount owing under the agreement and a reduction in the royalties payable for the PM materials. If it had intended instead to assume the PM Agreement with its outstanding liability, or to keep open that possibility, Global Knowledge could simply have provided for a reduction in the purchase price in such amount in the event it assumed the PM Agreement.

79 This is significant because, as discussed below, the issue before the Court would have been considerably different, and simpler, if Nexient had proposed to assign, and Global Knowledge had proposed to assume, both the PM Agreement and the BA Agreement as they stand. In such event, the question of whether a purchaser could "cherry pick" contracts of a debtor with the same third party on a sale of the debtor's assets would not have arisen. Moreover, given the expiry date of the PM Agreement and Global Knowledge's need to adapt the PM courses to which it had access, it would have been able to implement essentially the same business plan as it is currently proposing to implement without the need for any Court order provided its interpretation of the conflict provisions in the BA Agreement is correct. In such circumstances, the principal effect of assuming the PM Agreement would have been the assumption of the liability of approximately $733,000 owed to ESI, which Global Knowledge alleges was not the principal factor in its decision to reject the PM Agreement.

80 Seventh, Global Knowledge seeks relief that is related solely to the BA Agreement. It treats the BA Agreement and the PM Agreement as completely unrelated to each other. This treatment is not entirely unjustified in view of the wording of these agreements. Section 6.6.1 of the BA Agreement does not expressly refer to the provision of services or products that compete with PM products delivered under the PM Agreement. Whether this interpretation is affected by the course of dealing or the alleged "umbrella" agreement between the parties is not an issue that can be addressed on this motion.

81 However, given that, on this motion, Global Knowledge and Nexient seek relief that requires the exercise of the Court's discretion under section 11(4) of the CCAA or pursuant to its inherent jurisdiction, I think the contractual arrangements between the parties, while important, are not the only factors to be considered by the Court. Instead, the Court should look to the entirety of the arrangement between ESI and Nexient and assess (1) the extent of the adverse impact on ESI of the order sought by Nexient and Global Knowledge and (2) whether there are any alternatives to the proposed relief that achieve the same result with less encroachment on ESI's rights.

Analysis and Conclusions

82 The applicants' request for relief is denied for the following three reasons.

83 First, because of the structure of the Sale Transaction, the requested relief will not further the CCAA proceedings and will have no impact on Nexient or its stakeholders. The Sale Transaction has been completed and cannot be unwound. At the present time, the only impact of the proposed relief is to adversely affect ESI's rights to terminate the BA Agreement after the proposed assignment to Global Knowledge.

84 The evidence is, therefore, insufficient to satisfy the test noted by Spence J., and adopted above, that the requested order be important to the reorganization process. The time to request such relief was either at the time of negotiation of the Sale Agreement or at the time of the Sale Order. Given the terms of the Sale Transaction - in particular, the fact that the purchase price has been paid and is not subject to adjustment in respect of any exclusion of assets - it is impossible to demonstrate that the requested order is important to the reorganization after closing of the Sale Transaction. The proposed relief also cannot satisfy the requirement that it adversely affect ESI's contractual rights only to the extent neces-

sary to further the reorganization process. Accordingly, it also cannot be said that such interference with ESI's contractual rights does not entail an inappropriate imposition upon ESI.

85 Second, there is no evidence that Nexient and Global Knowledge intended at the time of entering into the Sale Transaction, or at the time of the approval hearing, to assign the BA Agreement to Global Knowledge on the basis of a permanent stay preventing ESI from terminating the BA Agreement based on the Insolvency Defaults. There is, therefore, no basis for an order rectifying the Sale Order to include such provisions at the present time. In reaching this conclusion, the following considerations are relevant.

86 The structure of the Sale Transaction contradicts the existence of the alleged intention. At Closing, Global Knowledge elected to treat all Contracts as "Excluded Assets". Consequently, given the structure of the Sale Transaction, Global Knowledge assumed the risk that it might be unable to reach an acceptable accommodation with ESI with whatever consequences that entailed. The evidence before the Court does not explain the thinking behind Global Knowledge's decision to take this calculated risk but the actual reason is irrelevant to the determination of this motion. It is impossible to conclude that the parties intended at the time of Closing to transfer the BA Agreement on the basis of a permanent stay given that Global Knowledge had not yet reached a conclusion as to whether it even wished to take the BA Agreement. The most that can be said is that the parties may have had an intention to transfer the BA Agreement on the basis of a permanent stay *if* Global Knowledge decided later to take an assignment. This does not constitute an intention at the time of the Court approval hearing. It also begs the question of why, even on such a conditional intention, the parties did not seek appropriate conditional relief at the time of the hearing on the Sale Order.

87 More generally, the evidence suggests that, at the time of Closing, Global Knowledge had not decided between two options -- to attempt to renegotiate the BA Agreement and the PM Agreement on favorable terms, including the financial arrangements, or to assume the BA Agreement only and seek a Court order permanently staying ESI's rights of termination based on the Insolvency Defaults. Global Knowledge pursued the first option until the September 11, 2009 telephone conference, after which it appears to have decided to pursue the second. On this scenario, Global Knowledge cannot say that, at the time of Closing or of the Court approval hearing, it intended to take an assignment of the BA Agreement on the basis of a permanent stay.

88 In any event, to obtain rectification, Nexient and Global Knowledge must demonstrate that ESI shared the alleged intention, or alleged understanding, or that ESI acquiesced in the alleged intention or understanding. They cannot do so on the evidence before the Court.

89 It is impossible to infer from the relative significance of the BA Agreement to Nexient that all the parties must have understood that Global Knowledge would be receiving an assignment of the BA Agreement free of any risk of termination by ESI. The BA product line represented less than one-third of the total revenues of Nexient. There is no evidence in the record of its relative contribution to profit. The only evidence are unsupported statements in Branson's affidavit to the effect that the BA Agreement was a "highly material contract" in Global Knowledge's consideration of its bid for the Nexient assets. There is nothing in the description of the conversation between Elsey and Branson on or about August 17, 2009 or otherwise in the record to support Branson's statement.

90 Global Knowledge submits that this intention should be inferred from the fact that the Sale Transaction was on a "going-concern" basis. Such an inference might be reasonable if Global Knowledge was, in fact, purchasing all of the Nexient assets on a "going-concern" basis. Its failure to take all of the Contracts, including the PM Agreement, however, excludes such an inference in the present circumstances.

91 Third, Global Knowledge has failed to demonstrate circumstances that would justify the exercise of the Court's discretion to order a permanent stay against ESI in respect of its rights of termination based on the Insolvency Defaults in the BA Agreement given Global Knowledge's decision not to take an assignment of the PM Agreement. In reaching this conclusion, I have taken the following factors into consideration.

92 I acknowledge that there are factors weighing in favour of authorizing an assignment of the BA Agreement on the requested terms of a permanent stay against ESI. As mentioned, the BA Agreement appears to constitute a valuable asset of Nexient. It is in the interests of Nexient's creditors that value be received for such asset by way of an assignment. In addition, the sale price for the Nexient assets, including the BA Agreement, was arrived at in a sales process previously approved by this Court. There is no suggestion that the process lacked integrity, that the price for the assets did not represent fair market value or that it was an improvident sale.

93 However, by taking an assignment of the BA Agreement but not the PM Agreement, ESI is adversely affected in two respects.

94 First, in any negotiations between Global Knowledge and ESI relating to issues under the BA Agreement, including the two issues relating to the BA materials described above and the extent to which, if at all, the conflict provisions of section 6.2.1 of the BA Agreement prevent the marketing of Global Knowledge's PM products, ESI's bargaining position has been weakened by the exclusion of its claim for royalties owing under the PM Agreement.

95 Second, and more generally, ESI will be competitively disadvantaged in the Canadian marketplace if it is unable to deliver both its PM products and its BA products either directly or through a new "strategic partner". As discussed above, the evidence in the record indicates that there is a significant benefit to having a common entity market both BA products and PM products. This was reflected in Nexient's BPI business line and in Global Knowledge's own business plan, both of which involved marketing both product lines together.

96 This raises the issue of whether the Court should refuse to exercise its discretion to order a permanent stay of ESI's rights to terminate the BA Agreement based on the Insolvency Defaults in the circumstances in which Global Knowledge does not intend to take an assignment of the PM Agreement. In my view, such order should not be granted for three reasons.

97 First, as mentioned, in the present circumstances, the purposes of the CCAA will not be furthered by the proposed relief. Given the structure of the Sale Transaction, it is unnecessary to grant the requested relief to complete the Sale Transaction at the agreed sale price. Moreover, the effect of such an order would be to destroy the overall relationship between ESI and Nexient. rather than to continue the BPI business line of Nexient in its form prior to the CCAA proceedings.

98 Second, as mentioned, whether intentional or not, Global Knowledge is seeking to use the CCAA proceedings as a means of competitively disadvantaging ESI in Canada. ESI and Global Knowledge are already competitors in the United States. ESI will be competitively disadvantaged in Canada if it can offer only its PM products and not its BA products and Global Knowledge will be correspondingly advantaged. The Court's discretion should not be invoked to competitively disadvantage a licensor to the debtor in favour of a purchaser of the debtor's assets where the licensor has bargained for protection against such event in its contract with the debtor.

99 ESI bargained for the right to ensure that its BA courses and PM courses were marketed by an entity of its own choosing after an insolvency of Nexient through the inclusion of the insolvency termination provisions in the BA Agreement and PM Agreement. I do not think that the Court's authority should be invoked to remove that right as a result of Nexient's CCAA proceedings in the present circumstances where the PM Agreement is not to be assumed by Global Knowledge. ESI cannot expect to improve its competitive position as a result of the CCAA proceedings. Conversely, the Court's discretion should not be invoked in CCAA proceedings to weaken the competitive position of ESI in favour of a competitor.

100 Third, the discretion of the Court should not be invoked after failed negotiations between the purchaser and the third party respecting the feasibility of an on-going relationship. As mentioned above, Global Knowledge excluded the BA Agreement and the PM Agreement at Closing pending not only a review of the agreements themselves but, more importantly, pending the outcome of negotiations between Global Knowledge and ESI regarding the possibility of a workable relationship. Among other things, such a relationship required a renegotiation of the financial terms of the PM Agreement to the benefit of Global Knowledge that ESI was not prepared to accept. Those negotiations were conducted on the basis that the Sale Order did not include any terms providing for a permanent stay of ESI's termination rights in respect of the BA Agreement. In entering into the APA and closing on an unconditional basis, Global Knowledge accepted the risk that such negotiations would prove unsuccessful. It is not appropriate for the Court to exercise its discretion at this stage to re-write the terms of the BA Agreement to the detriment of ESI in order to adjust the financial benefits of the Sale Transition in favour of Global Knowledge. To do so would be to change the relative bargaining positions of the parties after their negotiations had terminated.

Conclusion

101 Based on the foregoing, I conclude that, while the Court has authority to authorize an assignment of the BA Agreement to Global Knowledge notwithstanding any provision to the contrary in that agreement, it should not exercise its discretion to authorize the proposed assignment on the basis requested by Global Knowledge, which involves the issue of a permanent stay against the exercise of any rights of ESI to terminate the BA Agreement based on the Insolvency Defaults.

Costs

102 The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter, and a further 15 days from the date of receipt of the other party's submission to provide the Court with any reply submission they may choose to make. Submissions seeking costs shall include the costs outline required by Rule 57.01(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended. To the extent not reflected in the costs outline, such submissions shall also identify all lawyers on the matter, their respective years of call, and rates actually charged to the client, with supporting documentation as to both time and disbursements.

H.J. WILTON-SIEGEL J.

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

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

AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File No.: M42399
Superior Court File No.: CV-10-414302CP

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, et al.

Plaintiffs

-and-

SINO-FOREST CORPORATION, et al.

Defendants

COURT OF APPEAL FOR ONTARIO

(Proceeding Commenced at Toronto)

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