Court File No. CV-15-11192-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C-43, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VICTORIAN ORDER OF NURSES FOR CANADA, VICTORIAN ORDER OF NURSES FOR CANADA – EASTERN REGION AND VICTORIAN ORDER OF NURSES FOR CANADA – WESTERN REGION

BRIEF OF AUTHORITIES THE ONTARIO NURSES' ASSOCIATION

(Returnable August 30, 2016)

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2008 CarswellOnt 2652
Ontario Superior Court of Justice [Commercial List]

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

2008 CarswellOnt 2652, [2008] O.J. No. 1818, 168 A.C.W.S. (3d) 245, 42 C.B.R. (5th) 90, 45 B.L.R. (4th) 201

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT Involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits Listed In Schedule "A" Hereto

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO (Applicants) and METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 6932819 CANADA INC. AND 4446372 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO (Respondents)

C. Campbell J.

Heard: March 17, 2008
Judgment: April 8, 2008
Docket: 08-CL-7440

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Ian D. Collins for Desjardins Group
Harvey Chaiton for CIBC
Kevin McEicheran, Geoff R. Hall for Bank of Montreal, Bank of Nova Scotia, CIBC, Royal Bank of Canada, Toronto Dominion Bank
Marc S. Wasserman for Blackrock Financial
S. Richard Orzy for CIBC Mellon, Computershare, Bank of New York as Indenture Trustee
Dan Macdonald, Andrew Kent for Bank of Nova Scotia
Virginie Gauthier, Mario Forte for Caisse de Dépôt
Junior Sirivar for Navcan

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Subject: Insolvency; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Each debtor was corporation that was trustee of one or more conduits, was legal owner of assets held for each series in conduit of which it was trustee, and was debtor with respect to Asset Backed Commercial Paper ("ABCP") issued by trustee of conduit — Creditors held more than $21 billion of approximately $32 billion of ABCP at issue in proceeding — Each debtor was insolvent — Original trustees that were trust companies were replaced by certain of debtors to facilitate application under Companies' Creditors Arrangement Act ("CCAA") — Creditors brought application for initial order under CCAA — Application granted — Application complied with requirements of CCAA — Replacement of trust entities that did not qualify as "companies" under CCAA by debtors that did was appropriate exercise of legally available rights to satisfy threshold requirements of CCAA — Debtors were "debtor companies" within meaning of CCAA — Joining of claims in one proceeding promoted convenient administration of justice — Relief sought was available under, and was consistent with purpose and policy of, CCAA — Failure of plan would cause far-reaching negative consequences to investors — Classification of creditors set out in plan for voting and distribution purposes, involving single class of creditors, was appropriate — Plan treated all ABCP holders equitably — Fragmentation of classes would render it excessively difficult to obtain approval of plan and so was contrary to purpose of CCAA.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Table of Authorities

Cases considered by *C. Campbell J.*:

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Calpine Canada Energy Ltd., Re (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 (Alta. Q.B.) — considered

Calpine Canada Energy Ltd., Re (2007), 2007 ABQB 49, 2007 CarswellAlta 156, 28 C.B.R. (5th) 185 (Alta. Q.B.) — referred to

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — referred to

Campeau Corp., Re (1991), 10 C.B.R. (3d) 100, 86 D.L.R. (4th) 570, 1991 CarswellOnt 155 (Ont. Gen. Div.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — referred to

Citibank Canada v. Chase Manhattan Bank of Canada (1991), 1991 CarswellOnt 182, 5 C.B.R. (3d) 165, 2 P.P.S.A.C. (2d) 21, 4 B.L.R. (2d) 147 (Ont. Gen. Div.) — referred to

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Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1990 CarswellOnt 139, 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282 (Ont. C.A.) — referred to

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) — referred to

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APPLICATION by creditors for initial order under *Companies' Creditors Arrangement Act*.

***C. Campbell J.*:**

1 These are the reasons for this Court having granted on March 17, 2008 an Initial Order under the *Companies Creditors Arrangement Act* ("CCAA") in respect of various corporate trustees in respect of what is known as Asset Backed Commercial Paper ("ABCP.")

2 This highly unusual and hopefully not to be repeated procedure (given its magnitude and implications) represents the culmination of a great deal of work and effort on the part of the Applicants known informally as the Investors' Committee under the leadership of a leading Canadian lawyer and businessman, Purdy Crawford.

3 Assuming approval of the proposed Plan under the CCAA, the process will result in the successful restructuring of the ABCP market in Canada and avoid a liquidity crisis that would result in certain loss to many of the various participants in the ABCP market.

4 It is neither necessary nor appropriate in these Reasons to describe in detail just what is involved in the products and operation of the ABCP market.

5 The Information Circular that is part of the Application and will be sent to each of the affected Noteholders (and is also found on the website of the Monitor, Ernst & Young), contains a complete description of the nature of the products, the various market participants, the problem giving rise to the liquidity crisis and the proposed Plan that, if approved, will allow for recovery by most Noteholders of at least their capital over time in return for releases of other market participant parties.

6 An equally informative but less detailed description of the market for ABCP and its problems can be found in the affidavit of Mr. Crawford in the sites referred to above.

7 The Applicants include Crown corporations, business corporations, pension funds and financial institutions. Together, they hold more than $21 billion of the approximately $32 billion of ABCP at issue in this proceeding. Each Applicant holds ABCP for which at least one of the Respondents is the debtor. Each Applicant has a significant ABCP claim.

8 Each series of ABCP was issued pursuant to a trust indenture or supplemental trust indenture. Each trust indenture appointed an "Indenture Trustee" to serve as trustee for the investors, and gave that trustee certain rights, on behalf of investors, to enforce obligations under ABCP. However, the Indenture Trustee has no economic interest in the underlying debt and, under the circumstances, it is neither practical nor realistic to expect the Indenture Trustees to put forward a restructuring plan.

9 In this proceeding, the Applicants seek to put forward and obtain approval of the restructuring plan they have developed in their own right as holders of ABCP and as the real creditors of the Respondents.

10 Each Respondent is a corporation which is the trustee of one or more Conduits. Each Respondent is the legal owner of the assets held for each series in the Conduit of which it is the trustee, and is the debtor with respect to the ABCP issued by the trustee of that Conduit. The ABCP debt for which each Respondent is liable exceeds $5 million.

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11 Each ABCP note provides that recourse under it is limited to the assets of the trust. The trust indentures pursuant to which each series of notes were issued provide that each note is to be repaid from the assets held for that series.

12 Since mid-August, 2007, the trustees of each of the Conduits have, in respect of each series of ABCP, had insufficient liquidity to make payments that were due and payable on their maturing ABCP. Each remains unable to meet its liabilities to the Applicants and to the other holders of each series of ABCP as those obligations become due, from assets held for that series. Accordingly, each of the Respondents is insolvent.

13 Most of the Conduits originally had trustees that were trust companies. The original trustees that were trust companies were replaced by certain of the Respondents, in accordance with applicable law and the terms of the applicable declarations of trust, in order to facilitate the making of this Application. The Respondents that replaced the trust companies assumed legal ownership of the assets of each Conduit for which they serve as trustees and assumed all of the obligations of the original trustees whom they replaced.

14 The Applicants chose court proceedings under the CCAA because the issuer trustees of the Conduits, as currently structured, are insolvent because they cannot satisfy their liabilities as they become due. The CCAA process allows meaningful efficiencies by restructuring all of the affected ABCP simultaneously while also providing stakeholders, including Noteholders, with more certainty that the Plan will be implemented. In addition, the CCAA provides a process to obtain comprehensive releases, which releases bind Noteholders and other parties who are not directly affected by the Plan. The granting of these comprehensive releases is a condition of participation by certain key parties.

15 The CCAA expresses a public policy favouring compromise and consensual restructuring over piecemeal liquidation and the attendant loss of value. It is designed to encourage and facilitate consensual compromises and arrangements among businesspeople; indeed the essence of a CCAA proceeding is the determination of whether a sufficient consensus exists among them to justify the imposition of a statutory compromise. It is only after this determination is made that the Court will examine whether a plan is otherwise fair and reasonable.

16 On the first day of a CCAA proceeding, the Court should strive to maintain the *status quo* while the plan is developed. The Court will exercise its power under the statute and at common law in order to maintain a level playing field while allowing the debtor the breathing space it needs to develop the required consensus. At this stage, the goal is to seek consensus — to allow the business people and individual investors to make their judgments and to express those judgments by voting. The Court's primary concern on a first day application is to ensure that the business people have a chance to exercise their judgment and vote on the Plan.

17 The Applicants submitted that the Initial Order sought should be granted and the creditors given an opportunity to vote on the Plan, because (a) this application complies with all requirements of the CCAA and is properly brought as a single proceeding; (b) the relief sought is available under the CCAA. It is also consistent with the purpose and policy of the CCAA and essential to the resolution of the ABCP crisis; and (c) the classification of creditors set out in the Plan for voting and distribution purposes is appropriate.

18 ABCP programs have been used to fund the acquisition of long-term assets, such as mortgages and auto loans. Even when funding short-term assets such as trade receivables, ABCP issuers still face the inherent timing mismatch between cash generated by the underlying assets and the cash needed to repay maturing ABCP. Maturing ABCP is typically repaid with the proceeds of newly issued ABCP, a process commonly referred to as "rolling." Because ABCP is a highly rated commercial obligation with a long history of market acceptance, market participants in Canada formed the view that, absent a "general market disruption," ABCP would readily be saleable without the need for extraordinary funding measures.

19 There are three questions that need to be answered before the Court makes an Order accepting an Initial Plan under the CCAA.

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20 The first question is, does the Application comply with the requirements of the CCAA? The second question involves determining that the relief sought in the circumstances is available under the CCAA and is consistent with the purpose and policy of the statute. The third question asks whether the classification of creditors set out in the Plan for voting and distribution purposes is appropriate.

21 I am satisfied that all three questions can be answered in the affirmative.

22 The CCAA, despite its relative brevity and lack of specifics, has been accepted by the Courts across Canada as a vehicle to encourage and facilitate consensual compromise and arrangements among various creditor interests in circumstances of insolvent corporations.

23 At the stage of accepting a Plan for filing, the Court seeks to maintain a status quo and provide a "structured environment for the negotiation of compromises between a company and its creditors." The ultimate decision on the acceptance of a Plan will be made by those directly affected and vote in favour of it. [1]

24 Section 3(1) of the CCAA applies in respect of a "debtor company" or "affiliate debtor companies" with claims against them of $5 million.

25 The problem faced by the applicants in this proceeding is that the terms "company" and "debtor company" as defined in s. 2 of the CCAA do not include trust entities.

26 For the purpose of this Application and proposed Plan, those entities that did not qualify as "companies" for the purposes of the CCAA were replaced by Companies (the Respondents) that do meet the definition.

27 I am satisfied in the circumstances that these steps are an appropriate exercise of legally available rights to satisfy the threshold requirements of the CCAA. I am satisfied that the change in trustees was undertaken in good faith to facilitate the making of this application.

28 The use of what have been called "instant" trust deeds has been judicially accepted as legitimate devices that can satisfy the requirement of s. 3 of the CCAA as long as they reflect legitimate transactions that actually occurred and are not shams. [2]

29 I am satisfied that the Respondents are "debtor companies" within the meaning of the CCAA because they are companies that meet the s. 2 definition and they are insolvent. The Conduits (referred to above) are trusts and the Respondents are trustees of those trusts. The trustee is the obligor under the trusts covenant to pay. I am satisfied that the trustee corporations are "insolvent" within the judicially accepted meaning under the CCAA.

30 The decision in *Stelco Inc., Re* [3] sets out three disjunctive tests. A company will be an insolvent "debtor company" under the CCAA if: (a) it is for any reason unable to meet its obligations as they generally become due; or (b) it has ceased paying its current obligations in the ordinary course of business as they generally become due; or (c) the aggregate of its property is not, at a fair valuation, sufficient or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all its obligations, due and accruing due.

31 I am satisfied that on the material filed as of August 13, 2007 and the stoppage of payment by trustees of the Conduits (which continues), the Conduits and now the Respondents remain unable to meet their liabilities at the present time.

32 The Conduits and now trustees in my view meet the test accepted by the Court in *Stelco Inc., Re* of being "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring." [4] Indeed, it was that very circumstance that brought about the standstill agreement and the ensuing discussions and negotiations to formulate a Plan.

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33 Finally on this point I am satisfied that the insolvency of the Respondents is not affected or negated by contractual provisions in the applicable notes and trust indentures that limit Noteholders' recourse to the trust assets held in the Conduits. This statement should not be taken as a determination of the rights or remedies of any creditor.

34 It was urged and I accept that the applicants are creditors under ss. 4 and 5 of the CCAA and as such are entitled to standing to propose a Plan for restructuring the ABCP.

35 On the return of the motion for the Initial Order, while the proceeding was technically "ex parte," a significant number of interested parties were represented. None of those parties opposed the making of the Initial Order and since then no one has come forward to challenge the entitlement of the Applicants to the Initial Order.

36 S. 8 of the CCAA renders ineffective any provisions in the trust indentures that otherwise purport to restrict, directly or indirectly, the rights of the Applicants to bring this application:

> 8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

37 See also the following for the proposition that a trust indenture cannot by its terms restrict recourse to the CCAA. [5]

38 Another feature of this Application is the joining within a single proceeding of claims by many parties against each of the Respondents. Rules 5.01 and 5.02 of the *Rules of Civil Procedure* allow for the joinder of claims by multiple applicants against multiple respondents. It is not necessary that all relief claimed by each applicant be claimed against each respondent. Here the Applicants assert claims for relief against the Respondents involving common questions of law and fact. Joining of the claims in one proceeding promotes the convenient administration of justice.

39 I am satisfied that in the unique circumstances that prevail here, the practical restructuring of the ABCP claims can only be implemented on a global basis; accordingly, if there were separate proceedings, each individual plan would of necessity have been conditional upon approval of all the other plans.

40 One further somewhat unusual aspect of this Application has been the filing of the proposed Plan along with the request for the Initial Order. This is not unusual in what have come to be known as "liquidating" CCAA applications where the creditors are in agreement when the matter first comes to Court. It is more unusual where there are a large number of creditors who are agreed but a significant number of investors who have yet to be consulted.

41 In general terms, besides complying with the technical requirements of the CCAA, this Application is consistent with the purpose and policy underlying the Act. It is well established that the CCAA is remedial legislation, intended to facilitate compromises and arrangements. The Court should give the statute a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

42 The CCAA is to be broadly interpreted as giving the Court a good deal of power and flexibility. The very brevity of the CCAA and the fact that it is silent on details permits a wide and liberal construction to enable it to serve its remedial purpose.

43 A restructuring under the CCAA may take any number of forms, limited only by the creativity of those proposing the restructuring. The courts have developed new and creative remedies to ensure that the objectives of the CCAA are met.

> [45] The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. ... It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has been made! *Nonetheless, the orders*

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> *are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.* [Emphasis added.] [6]

44 Similarly, the courts have acknowledged the need to maintain flexibility in CCAA matters, discouraging importation of any statutory provisions, restrictions or requirements that might impede creative use of the CCAA without a demonstrated need or statutory direction.

45 I am satisfied that a failure of the Plan would cause far-reaching negative consequences to investors, including pension funds, governments, business corporations and individuals.

46 All those involved, particularly the individuals, may not yet appreciate the consequences involved with a Plan failure.

47 In order that those who are affected have an opportunity to consider all the consequences and decide whether or not they are prepared to vote in favour of the proposed or any other Plan, the stay of proceedings sought in favour of those parties integrally involved in the financial management of the Conduits or whose support is essential to the Plan is appropriate.

48 S. 11 of the CCAA provides for stays of proceedings against the debtor companies. It is silent as to the availability of stays in favour of non-parties. The granting of stays in favour of non-parties has been held to be an appropriate exercise of the Court's jurisdiction. A number of authorities have supported the concept of a stay to enable a "global resolution." [7]

49 More recently in *Calpine Canada Energy Ltd., Re* [8], Romaine J. of the Alberta Court of Queens Bench permitted not only an initial order, but also one that extended after exit from CCAA without a plan so that the process of the CCAA would not be undermined against orders made during an unsuccessful plan.

50 Finally, I am satisfied at this stage of the approval of filing of the Initial Plan that all creditors be placed in a single class. The CCAA provides no statutory guidance to assist the Court in determining the proper classification of creditors. The tests for proper classification of creditors for the purpose of voting on a CCAA plan of arrangement have been developed in the case law. [9]

51 The Plan is, in essence, an offer to all investors that must be accepted by or made binding on all investors. In light of this reality, the Applicants propose that there be a single class of creditors consisting of all ABCP holders. It is urged that all holders of ABCP invested in the Canadian marketplace with its lack of transparency and other common problems. The Plan treats all ABCP holders equitably. While the risks differ as among traditional assets, ineligible assets and synthetic assets, I am advised that the calculation of the differing risks and corresponding interests has been taken into account consistently across all of the ABCP in the Plan.

52 I am satisfied that, at least at this stage, fragmentation of classes would render it excessively difficult to obtain approval of a CCAA plan and is therefore contrary to the purpose of the CCAA.

> Not every difference in the nature of a debt due to a creditor or a group of creditors warrants the creation of a separate class. What is required is some community of interest and rights which are not so dissimilar as to make it impossible for the creditors in the class to consult with a view toward a common interest. [10]

53 The Court of Appeal for Ontario in *Stelco, Re* noted that a "commonality of interest" applied. Likely fact-driven circumstances were at the heart of classification.

> It is clear that classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the nature of the CCAA process and the underlying flexibility of that process — a flexibility which is its genius — there can be no fixed rules that must apply in all cases. [11]

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54 For the above reasons the Initial Order and Meeting Ordered will issue in the form filed and signed.

55 I note that the process includes sending to each investor a detailed and comprehensive description of the problems that developed in the ABCP market as well as its proposed solution. In a recognition that the understanding of the problem and its proposed solution might be difficult to understand, the Investor Committee is to be commended for arranging to hold information meetings across Canada.

56 I am of the view that resolution of this difficult and complex problem will be best achieved by those directly affected reaching agreement in a timely fashion for a lasting resolution.

Schedule A

Conduits

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

Schedule B

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Applicants

ATB Financial

Caisse de Dépôt et Placement du Québec

Canaccord Capital Corporation

Canada Post Corporation

Credit Union Central of Alberta Limited

Credit Union Central of British Columbia

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank Financial Inc./National Bank of Canada

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

Application granted.

Footnotes

1 See *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at 31 contrasted with *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) at 316.

2 *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.) per Doherty J.A. (in dissent on result but not on this point); also cases referred to in *Cadillac Fairview Inc., Re* (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List])

3 *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]) at paras 21-22; leave to appeal to C.A. refused, (Ont. C.A.); leave to appeal to S.C.C. refused (S.C.C.)

4 *Supra* at (2004) paragraphs 26 and 28.

5 Instruments such as trust deeds may give specified rights to creditors or any class of them in certain circumstances. Some instruments may purport to provide that a creditor may not circumvent any limitation in the rights contained in the instrument by proposing an arrangement under the CCAA and thereby obtaining wider or extended rights. ... Relief under the CCAA is available notwithstanding the terms of any instrument. [Footnote omitted.] (John D. Honsberger, *Debt Restructuring: Principles*

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and Practice, vol. 1 (Aurora: Canada Law Book, 1997+) at 9-18). See also *Citibank Canada v. Chase Manhattan Bank of Canada* [1991 CarswellOnt 182 (Ont. Gen. Div.)], *supra*, at paras. 25-26; *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) at para. 11

6 *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 45

7 *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at paras. 23-25; *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) at para. 3

8 *Calpine Canada Energy Ltd., Re* (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.) at paras. 33-34; *Calpine Canada Energy Ltd., Re* [2007 CarswellAlta 156 (Alta. Q.B.)] (8 February 2007), Calgary 0501-17864 at 5

9 *Campeau Corp., Re* (1991), 10 C.B.R. (3d) 100 (Ont. Gen. Div.) at para. 18

10 *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at paras. 13-14

11 *Stelco Inc., Re* (2005), 15 C.B.R. (5th) 307 (Ont. C.A.), at para. 22

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TAB 2

2009 CarswellOnt 7169
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 7169, 183 A.C.W.S. (3d) 325

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Pepall J.

Judgment: November 12, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Jeremy Dacks for Applicants

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Whether proposal subject to s. 36 of Companies' Creditors Arrangement Act — C Inc. owned various businesses including newspaper publisher, N Co. — In 2005, as part of income trust spin off, Limited Partnership (LP) was formed to acquire certain C Inc. businesses — N Co. was excluded from spin off — Despite spin off, C Inc. and LP entered agreements to share certain services (shared services agreements) — In 2007, LP became wholly owned indirect subsidiary of C Inc. — In 2009, N Co. and certain other C Inc. entities (applicants) were granted protection under Companies' Creditors Arrangement Act (Act) — LP did not seek protection but negotiated forbearance agreement with its lenders — Both applicants' recapitalization transaction as well as LP's forbearance agreement contemplated restructuring that involved disentanglement of shared services and transfer of N Co. to LP — Applicants and LP entered into Transition and Reorganization Agreement (TRA), which addressed such restructuring — Applicants brought motion for order approving TRA — Motion granted — Transfer of N Co. was not subject to requirements of s. 36 of Act — Section 36 applied to N Co. despite fact that it was general partnership and was therefore not "debtor company" as defined by Act — However, s. 36 was inapplicable in specific circumstances of case at bar — Businesses of N Co. and applicants were highly integrated and this business structure predated applicants' insolvency — TRA was internal reorganization transaction designed to realign shared services and assets — TRA provided framework for applicants and LP entities to restructure their inter-entity arrangements for benefit of their respective stakeholders — It would be commercially unreasonable to require third party sale of N Co. under s. 36 of Act before permitting realignment of shared services agreements.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

C Inc. owned various businesses including newspaper publisher, N Co. — In 2005, as part of income trust spin off, Limited Partnership (LP) was formed to acquire certain C Inc. businesses — N Co. was excluded from spin off — Despite spin off, C Inc. and LP entered agreements to share certain services (shared services agreements) — In 2007, LP became wholly owned indirect subsidiary of C Inc. — In 2009, N Co. and certain other C Inc. entities (applicants)

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were granted protection under Companies' Creditors Arrangement Act (Act) — LP did not seek protection but negotiated forbearance agreement with its lenders — Both applicants' recapitalization transaction as well as LP's forbearance agreement contemplated restructuring that involved disentanglement of shared services and transfer of N Co. to LP — Applicants and LP entered into Transition and Reorganization Agreement (TRA), which addressed such restructuring — Applicants brought motion for order approving TRA — Motion granted — Proposed transfer of N Co. facilitated restructuring and was fair — Recapitalization transaction was designed to restructure C Inc. into viable industry participant — This preserved value for stakeholders and maintained employment for as many of applicants' employees as possible — TRA was entered into after extensive negotiation and consultation among applicants, LP and their respective financial, legal advisers and restructuring advisers — There was no prejudice to applicants' major creditors of the CMI entities — Monitor supported TRA as being in best interests of broad range of stakeholders — In absence of TRA, it was likely that N Co. would be required to shut down and lay off most or all its employees — Under TRA, all N Co. employees would be offered employment and it pension obligations and liabilities would be assumed — No third party expressed any interest in acquiring N Co.

Table of Authorities

Cases considered by *Pepall J.*:

Millgate Financial Corp. v. BCED Holdings Ltd. (2003), 2003 CarswellOnt 5547, 47 C.B.R. (4th) 278 (Ont. S.C.J. [Commercial List]) — considered

Pacific Mobile Corp., Re (1985), 1985 CarswellQue 106, [1985] 1 S.C.R. 290, 55 C.B.R. (N.S.) 32, 16 D.L.R. (4th) 319, 57 N.R. 63, 1985 CarswellQue 30 (S.C.C.) — considered

Stelco Inc., Re (2005), 204 O.A.C. 216, 78 O.R. (3d) 254, 2005 CarswellOnt 6283, 15 C.B.R. (5th) 288 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Bulk Sales Act, R.S.O. 1990, c. B.14
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 2(1) "company" — referred to

s. 2(1) "debtor company" — referred to

s. 36 — considered

s. 36(1) — considered

s. 36(4) — considered

s. 36(7) — considered

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Pension Benefits Act, R.S.O. 1990, c. P.8
Generally — referred to

APPLICATION by corporations under protection of *Companies' Creditors Arrangement Act* for order approving Transition and Reorganization Agreement.

***Pepall J.*:**

Relief Requested

1 The CMI Entities move for an order approving the Transition and Reorganization Agreement by and among Canwest Global Communications Corporation ("Canwest Global"), Canwest Limited Partnership/Canwest Societe en Commandite (the "Limited Partnership"), Canwest Media Inc. ("CMI"), Canwest Publishing Inc./Publications Canwest Inc ("CPI"), Canwest Television Limited Partnership ("CTLP") and The National Post Company/ La Publication National Post (the "National Post Company") dated as of October 26, 2009, and which includes the New Shared Services Agreement and the National Post Transition Agreement.

2 In addition they ask for a vesting order with respect to certain assets of the National Post Company and a stay extension order.

3 At the conclusion of oral argument, I granted the order requested with reasons to follow.

Backround Facts

(a) Parties

4 The CMI Entities including Canwest Global, CMI, CTLP, the National Post Company, and certain subsidiaries were granted *Companies' Creditors Arrangement Act ("CCAA")* protection on Oct 6, 2009. Certain others including the Limited Partnership and CPI did not seek such protection. The term Canwest will be used to refer to the entire enterprise.

5 The National Post Company is a general partnership with units held by CMI and National Post Holdings Ltd. (a wholly owned subsidiary of CMI). The National Post Company carries on business publishing the National Post newspaper and operating related on line publications.

(b) History

6 To provide some context, it is helpful to briefly review the history of Canwest. In general terms, the Canwest enterprise has two business lines: newspaper and digital media on the one hand and television on the other. Prior to 2005, all of the businesses that were wholly owned by Canwest Global were operated directly or indirectly by CMI using its former name, Canwest Mediaworks Inc. As one unified business, support services were shared. This included such things as executive services, information technology, human resources and accounting and finance.

7 In October, 2005, as part of a planned income trust spin-off, the Limited Partnership was formed to acquire Canwest Global's newspaper publishing and digital media entities as well as certain of the shared services operations. The National Post Company was excluded from this acquisition due to its lack of profitability and unsuitability for inclusion in an income trust. The Limited Partnership entered into a credit agreement with a syndicate of lenders and the Bank of Nova Scotia as administrative agent. The facility was guaranteed by the Limited Partner's general partner, Canwest (Canada) Inc. ("CCI"), and its subsidiaries, CPI and Canwest Books Inc. (CBI") (collectively with the Limited Partnership, the "LP Entities"). The Limited Partnership and its subsidiaries then operated for a couple of years as an income trust.

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8 In spite of the income trust spin off, there was still a need for the different entities to continue to share services. CMI and the Limited Partnership entered into various agreements to govern the provision and cost allocation of certain services between them. The following features characterized these arrangements:

- the service provider, be it CMI or the Limited Partnership, would be entitled to reimbursement for all costs and expenses incurred in the provision of services;

- shared expenses would be allocated on a commercially reasonable basis consistent with past practice; and

- neither the reimbursement of costs and expenses nor the payment of fees was intended to result in any material financial gain or loss to the service provider.

9 The multitude of operations that were provided by the LP Entities for the benefit of the National Post Company rendered the latter dependent on both the shared services arrangements and on the operational synergies that developed between the National Post Company and the newspaper and digital operations of the LP Entities.

10 In 2007, following the Federal Government's announcement on the future of income fund distributions, the Limited Partnership effected a going-private transaction of the income trust. Since July, 2007, the Limited Partnership has been a 100% wholly owned indirect subsidiary of Canwest Global. Although repatriated with the rest of the Canwest enterprise in 2007, the LP Entities have separate credit facilities from CMI and continue to participate in the shared services arrangements. In spite of this mutually beneficial interdependence between the LP Entities and the CMI Entities, given the history, there are misalignments of personnel and services.

(c) Restructuring

11 Both the CMI Entities and the LP Entities are pursuing independent but coordinated restructuring and reorganization plans. The former have proceeded with their *CCAA* filing and prepackaged recapitalization transaction and the latter have entered into a forbearance agreement with certain of their senior lenders. Both the recapitalization transaction and the forbearance agreement contemplate a disentanglement and/or a realignment of the shared services arrangements. In addition, the term sheet relating to the CMI recapitalization transaction requires a transfer of the assets and business of the National Post Company to the Limited Partnership.

12 The CMI Entities and the LP Entities have now entered into the Transition and Reorganization Agreement which addresses a restructuring of these inter-entity arrangements. By agreement, it is subject to court approval. The terms were negotiated amongst the CMI Entities, the LP Entities, their financial and legal advisors, their respective chief restructuring advisors, the Ad Hoc Committee of Noteholders, certain of the Limited Partnership's senior lenders and their respective financial and legal advisors.

13 Schedule A to that agreement is the New Shared Services Agreement. It anticipates a cessation or renegotiation of the provision of certain services and the elimination of certain redundancies. It also addresses a realignment of certain employees who are misaligned and, subject to approval of the relevant regulator, a transfer of certain misaligned pension plan participants to pension plans that are sponsored by the appropriate party. The LP Entities, the CMI Chief Restructuring Advisor and the Monitor have consented to the entering into of the New Shared Services Agreement.

14 Schedule B to the Transition and Reorganization Agreement is the National Post Transition Agreement.

15 The National Post Company has not generated a profit since its inception in 1998 and continues to suffer operating losses. It is projected to suffer a net loss of $9.3 million in fiscal year ending August 31, 2009 and a net loss of $0.9 million in September, 2009. For the past seven years these losses have been funded by CMI and as a result, the National Post Company owes CMI approximately $139.1 million. The members of the Ad Hoc Committee of Noteholders had agreed to the continued funding by CMI of the National Post Company's short-term liquidity needs but advised that they were no longer prepared to do so after October 30, 2009. Absent funding, the National Post, a national newspaper, would shut

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down and employment would be lost for its 277 non-unionized employees. Three of its employees provide services to the LP Entities and ten of the LP Entities' employees provide services to the National Post Company. The National Post Company maintains a defined benefit pension plan registered under the Ontario Pension Benefits Act. It has a solvency deficiency as of December 31, 2006 of $1.5 million and a wind up deficiency of $1.6 million.

16 The National Post Company is also a guarantor of certain of CMI's and Canwest Global's secured and unsecured indebtedness as follows:

Irish Holdco Secured Note- $187.3 million

CIT Secured Facility- $10.7 million

CMI Senior Unsecured Subordinated Notes- US$393.2 million

Irish Holdco Unsecured Note- $430.6 million

17 Under the National Post Transition Agreement, the assets and business of the National Post Company will be transferred as a going concern to a new wholly-owned subsidiary of CPI (the "Transferee"). Assets excluded from the transfer include the benefit of all insurance policies, corporate charters, minute books and related materials, and amounts owing to the National Post Company by any of the CMI Entities.

18 The Transferee will assume the following liabilities: accounts payable to the extent they have not been due for more than 90 days; accrued expenses to the extent they have not been due for more than 90 days; deferred revenue; and any amounts due to employees. The Transferee will assume all liabilities and/or obligations (including any unfunded liability) under the National Post pension plan and benefit plans and the obligations of the National Post Company under contracts, licences and permits relating to the business of the National Post Company. Liabilities that are not expressly assumed are excluded from the transfer including the debt of approximately $139.1 million owed to CMI, all liabilities of the National Post Company in respect of borrowed money including any related party or third party debt (but not including approximately $1,148,365 owed to the LP Entities) and contingent liabilities relating to existing litigation claims.

19 CPI will cause the Transferee to offer employment to all of the National Post Company's employees on terms and conditions substantially similar to those pursuant to which the employees are currently employed.

20 The Transferee is to pay a portion of the price or cost in cash: (i) $2 million and 50% of the National Post Company's negative cash flow during the month of October, 2009 (to a maximum of $1 million), less (ii) a reduction equal to the amount, if any, by which the assumed liabilities estimate as defined in the National Post Transition Agreement exceeds $6.3 million.

21 The CMI Entities were of the view that an agreement relating to the transfer of the National Post could only occur if it was associated with an agreement relating to shared services. In addition, the CMI Entities state that the transfer of the assets and business of the National Post Company to the Transferee is necessary for the survival of the National Post as a going concern. Furthermore, there are synergies between the National Post Company and the LP Entities and there is also the operational benefit of reintegrating the National Post newspaper with the other newspapers. It cannot operate independently of the services it receives from the Limited Partnership. Similarly, the LP Entities estimate that closure of the National Post would increase the LP Entities' cost burden by approximately $14 million in the fiscal year ending August 31, 2010.

22 In its Fifth Report to the Court, the Monitor reviewed alternatives to transitioning the business of the National Post Company to the LP Entities. RBC Dominion Securities Inc. who was engaged in December, 2008 to assist in considering and evaluating recapitalization alternatives, received no expressions of interest from parties seeking to acquire the National Post Company. Similarly, the Monitor has not been contacted by anyone interested in acquiring

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the business even though the need to transfer the business of the National Post Company has been in the public domain since October 6, 2009, the date of the Initial Order. The Ad Hoc Committee of Noteholders will only support the short term liquidity needs until October 30, 2009 and the National Post Company is precluded from borrowing without the Ad Hoc Committee's consent which the latter will not provide. The LP Entities will not advance funds until the transaction closes. Accordingly, failure to transition would likely result in the forced cessation of operations and the commencement of liquidation proceedings. The estimated net recovery from a liquidation range from a negative amount to an amount not materially higher than the transfer price before costs of liquidation. The senior secured creditors of the National Post Company, namely the CIT Facility lenders and Irish Holdco, support the transaction as do the members of the Ad Hoc Committee of Noteholders.

23 The Monitor has concluded that the transaction has the following advantages over a liquidation:

- it facilitates the reorganizaton and orderly transition and subsequent termination of the shared services arrangements between the CMI Entities and the LP Entities;
- it preserves approximately 277 jobs in an already highly distressed newspaper publishing industry;
- it will help maintain and promote competition in the national daily newspaper market for the benefit of Canadian consumers; and
- the Transferee will assume substantially all of the National Post Company's trade payables (including those owed to various suppliers) and various employment costs associated with the transferred employees.

Issues

24 The issues to consider are whether:

(a) the transfer of the assets and business of the National Post is subject to the requirements of section 36 of the *CCAA*;

(b) the Transition and Reorganization Agreement should be approved by the Court; and

(c) the stay should be extended to January 22, 2010.

Discussion

(A) Section 36 of the CCAA

25 Section 36 of the *CCAA* was added as a result of the amendments which came into force on September 18, 2009. Counsel for the CMI Entities and the Monitor outlined their positions on the impact of the recent amendments to the *CCAA* on the motion before me. As no one challenged the order requested, no opposing arguments were made.

26 Court approval is required under section 36 if:

(a) a debtor company under CCAA protection

(b) proposes to sell or dispose of assets outside the ordinary course of business.

27 Court approval under this section of the Act [1] is only required if those threshold requirements are met. If they are met, the court is provided with a list of non-exclusive factors to consider in determining whether to approve the sale or disposition. Additionally, certain mandatory criteria must be met for court approval of a sale or disposition of assets to a related party. Notice is to be given to secured creditors likely to be affected by the proposed sale or disposition. The court may only grant authorization if satisfied that the company can and will make certain pension and employee related payments.

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28 Specifically, section 36 states:

(1) Restriction on disposition of business assets - A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

(2) Notice to creditors - A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(3) Factors to be considered - In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

(4) Additional factors — related persons - If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

(5) Related persons - For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

(6) Assets may be disposed of free and clear - The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

(7) Restriction — employers - The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement. [2]

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29 While counsel for the CMI Entities states that the provisions of section 36 have been satisfied, he submits that section 36 is inapplicable to the circumstances of the transfer of the assets and business of the National Post Company because the threshold requirements are not met. As such, the approval requirements are not triggered. The Monitor supports this position.

30 In support, counsel for the CMI Entities and for the Monitor firstly submit that section 36(1) makes it clear that the section only applies to a debtor company. The terms "debtor company" and "company" are defined in section 2(1) of the *CCAA* and do not expressly include a partnership. The National Post Company is a general partnership and therefore does not fall within the definition of debtor company. While I acknowledge these facts, I do not accept this argument in the circumstances of this case. Relying on case law and exercising my inherent jurisdiction, I extended the scope of the Initial Order to encompass the National Post Company and the other partnerships such that they were granted a stay and other relief. In my view, it would be inconsistent and artificial to now exclude the business and assets of those partnerships from the ambit of the protections contained in the statute.

31 The CMI Entities' and the Monitor's second argument is that the Transition and Reorganization Agreement represents an internal corporate reorganization that is not subject to the requirements of section 36. Section 36 provides for court approval where a debtor under *CCAA* protection proposes to sell or otherwise dispose of assets "outside the ordinary course of business". This implies, so the argument goes, that a transaction that is in the ordinary course of business is not captured by section 36. The Transition and Reorganization Agreement is an internal corporate reorganization which is in the ordinary course of business and therefore section 36 is not triggered state counsel for the CMI Entities and for the Monitor. Counsel for the Monitor goes on to submit that the subject transaction is but one aspect of a larger transaction. Given the commitments and agreements entered into with the Ad Hoc Committee of Noteholders and the Bank of Nova Scotia as agent for the senior secured lenders to the LP Entities, the transfer cannot be treated as an independent sale divorced from its rightful context. In these circumstances, it is submitted that section 36 is not engaged.

32 The *CCAA* is remedial legislation designed to enable insolvent companies to restructure. As mentioned by me before in this case, the amendments do not detract from this objective. In discussing section 36, the Industry Canada Briefing Book [3] on the amendments states that "The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse." [4]

33 The term "ordinary course of business" is not defined in the *CCAA* or in the *Bankruptcy and Insolvency Act* [5]. As noted by Cullity J. in *Millgate Financial Corp. v. BCED Holdings Ltd.* [6], authorities that have considered the use of the term in various statutes have not provided an exhaustive definition. As one author observed in a different context, namely the *Bulk Sales Act* [7], courts have typically taken a common sense approach to the term "ordinary course of business" and have considered the normal business dealings of each particular seller [8]. In *Pacific Mobile Corp., Re* [9], the Supreme Court of Canada stated:

> It is not wise to attempt to give a comprehensive definition of the term "ordinary course of business" for all transactions. Rather, it is best to consider the circumstances of each case and to take into account the type of business carried on by the debtor and creditor.
>
> We approve of the following passage from Monet J.A.'s reasons discussing the phrase "ordinary course of business"...
>
> 'It is apparent from these authorities, it seems to me, that the concept we are concerned with is an abstract one and that it is the function of the courts to consider the circumstances of each case in order to determine how to characterize a given transaction. This in effect reflects the constant interplay between law and fact.'

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34 In arguing that section 36 does not apply to an internal corporate reorganization, the CMI Entities rely on the commentary of Industry Canada as being a useful indicator of legislative intent and descriptive of the abuse the section was designed to prevent. That commentary suggests that section 36(4),which deals with dispositions of assets to a related party, was intended to:

> ...prevent the possible abuse by "phoenix corporations". Prevalent in small business, particularly in the restaurant industry, phoenix corporations are the result of owners who engage in serial bankruptcies. A person incorporates a business and proceeds to cause it to become bankrupt. The person then purchases the assets of the business at a discount out of the estate and incorporates a "new" business using the assets of the previous business. The owner continues their original business basically unaffected while creditors are left unpaid. [10]

35 In my view, not every internal corporate reorganization escapes the purview of section 36. Indeed, a phoenix corporation to one may be an internal corporate reorganization to another. As suggested by the decision in *Pacific Mobile Corp.* [11]., a court should in each case examine the circumstances of the subject transaction within the context of the business carried on by the debtor.

36 In this case, the business of the National Post Company and the CP Entities are highly integrated and interdependent. The Canwest business structure predated the insolvency of the CMI Entities and reflects in part an anomaly that arose as a result of an income trust structure driven by tax considerations. The Transition and Reorganization Agreement is an internal reorganization transaction that is designed to realign shared services and assets within the Canwest corporate family so as to rationalize the business structure and to better reflect the appropriate business model. Furthermore, the realignment of the shared services and transfer of the assets and business of the National Post Company to the publishing side of the business are steps in the larger reorganization of the relationship between the CMI Entities and the LP Entities. There is no ability to proceed with either the Shared Services Agreement or the National Post Transition Agreement alone. The Transition and Reorganization Agreement provides a framework for the CMI Entities and the LP Entities to properly restructure their inter-entity arrangements for the benefit of their respective stakeholders. It would be commercially unreasonable to require the CMI Entities to engage in the sort of third party sales process contemplated by section 36(4) and offer the National Post for sale to third parties before permitting them to realign the shared services arrangements. In these circumstances, I am prepared to accept that section 36 is inapplicable.

(b) Transition and Reorganization Agreement

37 As mentioned, the Transition and Reorganization Agreement is by its terms subject to court approval. The court has a broad jurisdiction to approve agreements that facilitate a restructuring: *Stelco Inc., Re* [12] Even though I have accepted that in this case section 36 is inapplicable, court approval should be sought in circumstances where the sale or disposition is to a related person and there is an apprehension that the sale may not be in the ordinary course of business. At that time, the court will confirm or reject the ordinary course of business characterization. If confirmed, at minimum, the court will determine whether the proposed transaction facilitates the restructuring and is fair. If rejected, the court will determine whether the proposed transaction meets the requirements of section 36. Even if the court confirms that the proposed transaction is in the ordinary course of business and therefore outside the ambit of section 36, the provisions of the section may be considered in assessing fairness.

38 I am satisfied that the proposed transaction does facilitate the restructuring and is fair and that the Transition and Reorganization Agreement should be approved. In this regard, amongst other things, I have considered the provisions of section 36. I note the following. The CMI recapitalization transaction which prompted the Transition and Reorganization Agreement is designed to facilitate the restructuring of CMI into a viable and competitive industry participant and to allow a substantial number of the businesses operated by the CMI Entities to continue as going concerns. This preserves value for stakeholders and maintains employment for as many employees of the CMI Entities

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as possible. The Transition and Reorganization Agreement was entered into after extensive negotiation and consultation between the CMI Entities, the LP Entities, their respective financial and legal advisers and restructuring advisers, the Ad Hoc Committee and the LP senior secured lenders and their respective financial and legal advisers. As such, while not every stakeholder was included, significant interests have been represented and in many instances, given the nature of their interest, have served as proxies for unrepresented stakeholders. As noted in the materials filed by the CMI Entities, the National Post Transition Agreement provides for the transfer of assets and certain liabilities to the publishing side of the Canwest business and the assumption of substantially all of the operating liabilities by the Transferee. Although there is no guarantee that the Transferee will ultimately be able to meet its liabilities as they come due, the liabilities are not stranded in an entity that will have materially fewer assets to satisfy them.

39 There is no prejudice to the major creditors of the CMI Entities. Indeed, the senior secured lender, Irish Holdco., supports the Transition and Reorganization Agreement as does the Ad Hoc Committee and the senior secured lenders of the LP Entities. The Monitor supports the Transition and Reorganization Agreement and has concluded that it is in the best interests of a broad range of stakeholders of the CMI Entities, the National Post Company, including its employees, suppliers and customers, and the LP Entities. Notice of this motion has been given to secured creditors likely to be affected by the order.

40 In the absence of the Transition and Reorganization Agreement, it is likely that the National Post Company would be required to shut down resulting in the consequent loss of employment for most or all the National Post Company's employees. Under the National Post Transition Agreement, all of the National Post Company employees will be offered employment and as noted in the affidavit of the moving parties, the National Post Company's obligations and liabilities under the pension plan will be assumed, subject to necessary approvals.

41 No third party has expressed any interest in acquiring the National Post Company. Indeed, at no time did RBC Dominion Securities Inc. who was assisting in evaluating recapitalization alternatives ever receive any expression of interest from parties seeking to acquire it. Similarly, while the need to transfer the National Post has been in the public domain since at least October 6, 2009, the Monitor has not been contacted by any interested party with respect to acquiring the business of the National Post Company. The Monitor has approved the process leading to the sale and also has conducted a liquidation analysis that caused it to conclude that the proposed disposition is the most beneficial outcome. There has been full consultation with creditors and as noted by the Monitor, the Ad Hoc Committee serves as a good proxy for the unsecured creditor group as a whole. I am satisfied that the consideration is reasonable and fair given the evidence on estimated liquidation value and the fact that there is no other going concern option available.

42 The remaining section 36 factor to consider is section 36(7) which provides that the court should be satisfied that the company can and will make certain pension and employee related payments that would have been required if the court had sanctioned the compromise or arrangement. In oral submissions, counsel for the CMI Entities confirmed that they had met the requirements of section 36. It is agreed that the pension and employee liabilities will be assumed by the Transferee. Although present, the representative of the Superintendent of Financial Services was unopposed to the order requested. If and when a compromise and arrangement is proposed, the Monitor is asked to make the necessary inquiries and report to the court on the status of those payments.

Stay Extension

43 The CMI Entities are continuing to work with their various stakeholders on the preparation and filing of a proposed plan of arrangement and additional time is required. An extension of the stay of proceedings is necessary to provide stability during that time. The cash flow forecast suggests that the CMI Entities have sufficient available cash resources during the requested extension period. The Monitor supports the extension and nobody was opposed. I accept the statements of the CMI Entities and the Monitor that the CMI Entities have acted, and are continuing to act, in good faith and with due diligence. In my view it is appropriate to extend the stay to January 22, 2010 as requested.

Application granted.

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Footnotes

1 Court approval may nonetheless be required by virtue of the terms of the Initial or other court order or at the request of a stakeholder.

2 The reference to paragraph 6(4)a should presumably be 6(6)a.

3 Industry Canada "Bill C-55: Clause by Clause Analysis — Bill Clause No. 131 — CCAA Section 36".

4 Ibid.

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

6 (2003), 47 C.B.R. (4th) 278 (Ont. S.C.J. [Commercial List]) at para.52.

7 R.S.O. 1990, c. B. 14, as amended.

8 D.J. Miller "Remedies under the Bulk Sales Act: (Necessary, or a Nuisance?)", Ontario Bar Association, October, 2007.

9 [1985] 1 S.C.R. 290 (S.C.C.).

10 Supra, note 3.

11 Supra, note 9.

12 (2005), 15 C.B.R. (5th) 288 (Ont. C.A.).

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TAB 3

2016 ONSC 595
Ontario Superior Court of Justice [Commercial List]

Essar Steel Algoma Inc., Re

2016 CarswellOnt 1040, 2016 ONSC 595, 263 A.C.W.S. (3d) 301, 33 C.B.R. (6th) 313

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA

Newbould J.

Heard: January 14, 2016
Judgment: January 25, 2016
Docket: 15-CV-0011169-00CL

Counsel: Eliot Kolers, Maria Konyukhova, Yannick Katirai, for Applicants
Andrew Kent, Markus Koehnen, Jeffery Levine, for Moving Parties, Cleveland-Cliffs Iron Company, Cliffs Mining Company and Northshore Mining Company ("Cliffs")
Derrick Tay, Clifton Prophet, Nicholas Kluge, for Monitor
L. Joseph Latham, Bradley Whiffen, for Ad Hoc Committee of Noteholders
Natalie E. Levine, for Ad Hoc Committee of senior and junior secured Noteholders
Sarah-Anne Van Allen, for Wilmington Trust, National Association
Evan Cobb, for Directors of the applicants
Andrea Lockhart, for Deutsche Bank
Ronald Carr, for Her Majesty the Queen in right of Ontario

Subject: Civil Practice and Procedure; Contracts; Insolvency; International

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Jurisdiction — Steel company E and group of mining companies C were parties to supply agreement governed by Ohio law — Dispute arose regarding amount of iron ore pellets E was obliged to take from 2013 to 2015 — C commenced action in Ohio for damages for breach of contract — E commenced counterclaim for damages for breach of contract — C purported to terminate agreement in October 2015 based on E's alleged multiple breaches and repudiation — E commenced application for relief under Companies' Creditors Arrangement Act (CCAA) in November 2015 — Action in Ohio was essentially stayed — E commenced motion in Ontario essentially seeking resolution of prior dispute as part of CCAA proceedings — C brought motion for dismissal or stay of E's motion on basis of lack of jurisdiction or forum non conveniens — Motion dismissed — Court acting under CCAA clearly had power to make procedural orders of kind sought by E in this case — Issues between E and C were subject to "single control" model that favoured litigation involving insolvent company to be dealt with in one jurisdiction — C was not stranger to present insolvency proceedings — C's action against E in Ohio made C purported creditor of E — C's termination of agreement had been important factor that led to E filing for protection under CCAA — Single control model required C's claim against E to be dealt with in this CCAA proceeding — Issues between E and C were completely interwoven so it made no sense to require E to litigate its claim against C in United States

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when C's claim had to be considered here — Ontario court also had jurisdiction simpliciter, and C failed to establish Ontario was not convenient forum.

Conflict of laws --- Contracts — Choice of law — Forum conveniens — Miscellaneous

Steel company E and group of mining companies C were parties to supply agreement governed by Ohio law — Dispute arose regarding amount of iron ore pellets E was obliged to take from 2013 to 2015 — C commenced action in Ohio for damages for breach of contract — E commenced counterclaim for damages for breach of contract — C purported to terminate agreement in October 2015 based on E's alleged multiple breaches and repudiation — E commenced application for relief under Companies' Creditors Arrangement Act (CCAA) in November 2015 — Action in Ohio was essentially stayed — E commenced motion in Ontario essentially seeking resolution of prior dispute as part of CCAA proceedings — C brought motion for dismissal or stay of E's motion on basis of lack of jurisdiction or forum non conveniens — Motion dismissed — Ontario court had jurisdiction simpliciter, and C failed to establish Ontario was not convenient forum — Cost of proceeding in Ontario was neutral factor — Lawyers from United States could appear in Ontario courts in certain circumstances — Proving Ohio law would be relatively minor expense — Familiarity of Ohio judge with case was neutral factor, since no determination had been made on relevant issues — Nothing indicated Ohio court was in better position to hear case sooner than Ontario court — Distance from court was neutral factor, since E was geographically farther from present court than C — Ohio law was not substantially different from Ontario law regarding material breach — Nothing indicated standards of good faith and fair dealing that would be applied in Ohio would necessarily reflect Ohio standards rather than Ontario standards — Enforcement of Ontario judgment in Ohio, even with injunctive relief, did not raise insurmountable barriers — Risk of non-enforcement did not rise to level that would render Ontario forum non conveniens.

Table of Authorities

Cases considered by *Newbould J.*:

Black v. Breeden (2012), 2012 SCC 19, 2012 CarswellOnt 4272, 2012 CarswellOnt 4273, 343 D.L.R. (4th) 629, 17 C.P.C. (7th) 1, 91 C.C.L.T. (3d) 153, 429 N.R. 192, 291 O.A.C. 311, (sub nom. *Breeden v. Black*) [2012] 1 S.C.R. 666, 114 O.R. (3d) 78 (note) (S.C.C.) — followed

Eagle River International Ltd., Re (2001), 2001 SCC 92, 2001 CarswellQue 2725, 2001 CarswellQue 2726, 30 C.B.R. (4th) 105, (sub nom. *Sam Lévy & Associates Inc. v. Azco Mining Inc.*) 207 D.L.R. (4th) 385, (sub nom. *Lévy (Sam) & Associés Inc. v. Azco Mining Inc.*) 280 N.R. 155, (sub nom. *Sam Lévy & Associés Inc. v. Azco Mining Inc.*) [2001] 3 S.C.R. 978, 2001 CSC 92 (S.C.C.) — followed

Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente (1999), 1999 CarswellOnt 2807, 178 D.L.R. (4th) 409, (sub nom. *Eastern Power Ltd. v. Azienda Communale Energia & Ambiente*) 125 O.A.C. 54, 50 B.L.R. (2d) 33, 39 C.P.C. (4th) 160, 82 O.T.C. 313 (Ont. C.A.) — referred to

Hilton v. Guyot (1895), 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (U.S. N.Y. Sup.) — followed

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — followed

Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re (2013), 2013 QCCS 5194, 2013 CarswellQue 10709 (C.S. Que.) — considered

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Nortel Networks Corp., Re (2014), 2014 ONSC 6973, 2014 CarswellOnt 17291, 20 C.B.R. (6th) 171, 17 C.C.P.B. (2nd) 10 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2015), 2015 ONSC 1354, 2015 CarswellOnt 2936, 23 C.B.R. (6th) 264 (Ont. S.C.J. [Commercial List]) — referred to

Ontario v. Rothmans Inc. (2013), 2013 ONCA 353, 2013 CarswellOnt 7000, 115 O.R. (3d) 561, 305 O.A.C. 261, 363 D.L.R. (4th) 506 (Ont. C.A.) — referred to

SNV Group Ltd., Re (2001), 2001 BCSC 1644, 2001 CarswellBC 2662, 95 B.C.L.R. (3d) 116 (B.C. S.C.) — considered

Sea Search Armada v. Republic of Colombia (2011), 821 F.Supp.2d 268 (U.S. Dist. Ct.) — followed

Smoky River Coal Ltd., Re (1999), 1999 CarswellAlta 491, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94, 1999 ABCA 179 (Alta. C.A.) — referred to

Stewart v. LePage (1916), 53 S.C.R. 337, 29 D.L.R. 607, 1916 CarswellPEI 1 (S.C.C.) — referred to

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Trillium Motor World Ltd. v. General Motors of Canada Ltd. (2014), 2014 ONCA 497, 2014 CarswellOnt 8775, 53 C.P.C. (7th) 1, 120 O.R. (3d) 598, 374 D.L.R. (4th) 411, 322 O.A.C. 161 (Ont. C.A.) — referred to

Tucows.Com Co. v. Lojas Renner S.A. (2011), 2011 ONCA 548, 2011 CarswellOnt 8081, 7 C.P.C. (7th) 35, 95 C.P.R. (4th) 49, 106 O.R. (3d) 561, 336 D.L.R. (4th) 443, 87 B.L.R. (4th) 42, 281 O.A.C. 379, 18 P.P.S.A.C. (3d) 296 (Ont. C.A.) — referred to

Van Breda v. Village Resorts Ltd. (2012), 2012 SCC 17, 2012 CarswellOnt 4268, 2012 CarswellOnt 4269, 343 D.L.R. (4th) 577, 91 C.C.L.T. (3d) 1, 17 C.P.C. (7th) 223, 10 R.F.L. (7th) 1, 429 N.R. 217, 291 O.A.C. 201, (sub nom. *Club Resorts Ltd. v. Van Breda*) [2012] 1 S.C.R. 572, (sub nom. *Charron Estate v. Village Resorts Ltd.*) 114 O.R. (3d) 79 (note) (S.C.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

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s. 11(4) — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 17.02 — considered

R. 17.02(f)(i) — considered

R. 17.02(p) — considered

MOTION by mining companies for dismissal or stay of steel company's motion on basis of lack of jurisdiction or forum non conveniens.

***Newbould J.*:**

1 The Cleveland-Cliffs Iron Company, Cliffs Mining Company and Northshore Mining Company (collectively "Cliffs") move to object to the jurisdiction of this Court to hear a motion brought by the applicants (together "Essar Algoma") for relief in connection with a supply contract under which Cliffs supplied Essar Algoma for a number of years with all of its iron ore pellets until Cliffs purported to terminate the contract on October 5, 2015, shortly before this CCAA proceeding was commenced. Cliffs submits in the alternative that Ontario is not the convenient forum in which to determine the dispute between Cliffs and Essar Algoma, and in the further alternative a ruling that a summary procedure for the determination of the dispute is inappropriate.

2 For the reasons that follow, I have concluded that this Court does have jurisdiction over the claim of Essar Algoma against Cliffs and that Cliffs has not established that Ontario is not the convenient forum for the dispute. What the procedure will be to determine the dispute has not yet been settled.

Relevant history

3 In 2001 Algoma Steel Inc. ("Old Algoma") began proceedings under the CCAA and eventually put forward and had approved a plan of compromise and arrangement. As part of its restructuring, Old Algoma divested itself of certain non-core assets, including its interest in a mine in Michigan (the "Tilden Mine") from which Old Algoma sourced its iron ore pellets. In January 2002 Old Algoma sold its interest in the Tilden Mine to Cliffs in consideration for an assumption by Cliffs of certain Old Algoma liabilities and future obligations in respect of the Tilden Mine and Old Algoma and Cliffs entering into a long-term supply agreement effective January 31, 2002 (the "Cliffs Contract"). The Cliffs Contract has been amended a number of times. Essar Algoma succeeded to Old Algoma's rights and obligations under the Cliffs Contract in 2007. The Cliffs Contract is governed by Ohio law.

4 The Cliffs Contract provides that Essar Algoma will source its long-term needs for iron ore pellets exclusively from Cliffs to 2016. As last amended by term sheet in 2013, the Cliffs Contract obliged Essar Algoma to purchase iron ore pellets exclusively from Cliffs until and including 2016. From 2017 to 2024 it obliged Essar Algoma to purchase a portion of its pellets each year from Cliffs. The Cliffs Contract provides that Essar Algoma is obliged in November of each year to provide to Cliffs its good faith estimate of its iron ore requirements (or nomination) for the next year. After Essar Algoma has set its nomination, it has certain rights to modify its nomination to increase or decrease its nomination within a specified range of percentages if it provides written notice to Cliffs by certain deadlines.

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5 The Cliffs Contract specifies: (a) a formula for calculating the price of iron ore pellets for the 2013 calendar year; (b) a price for the purchase and sale of iron ore pellets for the 2014 calendar year; (c) a formula for fixing the price of iron ore pellets in 2015 and 2016; and (d) a separate pricing formula for calendar years 2017 to 2024.

6 Cliffs mines the iron ore in Michigan at its mines at the Tilden site and then processes and delivers iron ore pellets by rail to a dock in Michigan known as the Marquette dock or a railway yard in Michigan known as the Partridge rail yard, from which points Essar Algoma takes delivery. Essar Algoma then arranges delivery to Sault Ste. Marie by ship or train.

7 There have been several disputes between Cliffs and Essar Algoma under the Cliffs Contract. The most recent and relevant of such disputes relates to the timing and volume of shipments of iron ore pellets from Cliffs to Essar Algoma beginning in late 2013. At the end of 2013, Essar Algoma advised Cliffs of its nomination for the 2014 calendar year. However, it soon became apparent that the 2013/2014 winter season was one of the coldest and longest in recent history. As a result, the Great Lakes thawed later than usual and the 2014 shipping season was accordingly shortened and Essar Algoma determined that it would not be able to take and use all of the iron ore pellets that it had nominated for 2014. It met with Cliffs to discuss the situation.

8 Whether an agreement was reached to reduce the 2014 shipments became contested, Cliffs saying there was no agreement and Essar Algoma saying there was. The number of tons to be taken by Essar Algoma in 2014 remained a question of debate when Essar Algoma nominated in October 2014 what it would take in 2015 and when it reduced its nomination in July 2015. Cliffs took the position that Essar Algoma had to take the entire tonnage that it had nominated in 2014. Essar Algoma took the position that there was an agreement to reduce the tonnage for 2014.

9 On January 12, 2015, Cliffs filed a complaint in the United States District Court for the Northern District of Ohio (Eastern Division) (the "Ohio Court"). On August 31, 2015, Cliffs amended its complaint. In its Amended Complaint, Cliffs claimed, among other things, damages plus interest and costs for alleged breaches of the Cliffs Contract, including Essar Algoma's alleged failure to take timely delivery of iron ore pellets in the requisite amounts, and a declaratory judgment that Essar Algoma had materially breached the Cliffs Contract by failing to take delivery of or pay for the full amount of ore that it nominated it would require in 2013, 2014 and 2015 by the end of each calendar. Cliffs did not claim any order or direction permitting it to terminate the Cliffs Contract.

10 In response to the Amended Complaint, Essar Algoma filed an Answer to Plaintiffs' Amended Complaint and Counterclaim on September 14, 2015, wherein it denied Cliffs' allegations and counterclaimed against Cliffs, seeking damages, including a claim for a long-term contract renewal credit payment payable to Essar Algoma pursuant to the Cliffs Contract and a claim for damages for alleged underreporting of moisture levels in pellets delivered by Cliffs.

11 On July 31, 2015, Cliffs filed a motion for partial summary judgment, seeking judgment on its claim that Essar Algoma breached a contractual duty to take its 2014 nomination and to dismiss Essar Algoma's claim for damages related to Cliffs' underreporting of moisture levels to Algoma since 2010. The Cliffs motion was scheduled to be heard on October 6, 2015.

12 On October 5, 2015 Cliffs purported to terminate the Cliffs Contract by letter which stated that as a result of multiple and material breaches and repudiation of the Cliffs Contract by Essar Algoma, Cliffs was treating the Cliffs Contract as terminated effective immediately. The termination came with no advance notice and within days of the next adjustment in price and at a time of year that Essar Algoma has historically begun building up inventory before the winter freeze.

13 On October 7, 2015, Cliffs offered to resume supplying Essar Algoma on a "just in time basis" at a materially higher price than provided for in the Cliffs Contract. The next day Essar Algoma notified Cliffs that the proposed price was commercially unfeasible for it. On October 14, 2015 Cliffs proposed a slightly lower price to Essar Algoma that was still materially higher than the price Essar Algoma had been paying.

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14 The Cliffs summary judgment motion in the Ohio Court was heard on October 6, 2015. On the following day, Judge Nugent released his reasons. He granted Cliffs motion in part and denied it in part. He held that there had been no agreement reached in an exchange of emails in April 2014 regarding Essar Algoma's request to decrease its 2014 nomination and that Essar Algoma had thus failed to meet its annual requirements by a margin of at least 500,000 tons. He held however that there were issues as to whether Essar Algoma had given effective notice to reduce a further amount of tons for 2014, whether a force majeure clause gave Essar Algoma a defence to any liability for damages stemming from its alleged failure to meet its annual requirements nomination amounts for 2014, and whether any outstanding damages remained following any allowable off-sets for alleged over-billing caused by Cliffs' use of the 2014 pricing structure in its 2015 sales. In the result he dismissed Cliffs' motion for summary judgment for breach of contract relating to Essar Algoma's 2014 nomination. He also granted Cliffs' motion to dismiss the counterclaim of Essar Algoma with respect to moisture content.

15 On October 6, 2015, one day after Cliffs purported to terminate the Cliffs Contract, Essar Algoma moved in the Ohio Court for a temporary restraining order and a preliminary injunction requiring Cliffs to supply Essar Algoma with iron ore pellets. On October 15, 2015 Essar Algoma filed a notice of withdrawal of its motion. In the notice, Essar Algoma stated that it had obtained supply from another supplier that would provide it with supply for the next several weeks and that this supply removed the need for immediate injunctive relief.

16 A trial for all of the issues in the Ohio litigation was scheduled for December 7, 2015. On October 30, 2015 Essar Algoma filed a motion to adjourn the trial, essentially on the grounds that too much work, particularly documentary production, the conducting of depositions and the production of expert reports, was required for the parties to be ready to start the trial as scheduled.

17 This CCAA proceeding commenced on November 9, 2015 when the Initial Order was made. On November 10, 2015, Essar Algoma commenced ancillary insolvency proceedings under chapter 15 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware. On that day the foreign representative of Essar Algoma sought and obtained, among other things, orders recognizing and enforcing in the United States the orders granted in the CCAA proceeding which was recognized as a foreign main proceeding. The foreign representative of Essar Algoma also filed a complaint for a declaratory judgment against Cliffs and a motion for entry of an order compelling Cliffs to resume supplying iron ore pellets under the Cliffs Contract. Judge Shannon who heard the motions in Delaware was advised by counsel for the foreign representative that this motion was filed as a "placeholder" in the event that the Canadian Court declined to assume jurisdiction to hear Essar Algoma's motion for injunctive relief against Cliffs.

18 On November 11, 2015 Essar Algoma filed with the Ohio Court a notice pursuant to 11 U.S.C. Section 362 that the Ohio action was automatically stayed as to the defendant Essar Algoma. On December 3, 2015 Judge Nugent of the Ohio Court on his own without argument dismissed the case without prejudice. The order stated that upon application, the action may be reinstated, if necessary, when the bankruptcy proceedings have concluded.

19 On December 4, 2015 Cliffs moved in the Ohio Court for an order vacating the without prejudice dismissal of the action and instead placing the case on the suspense docket until the claim is resolved by the bankruptcy court. No decision on that motion has been rendered by Judge Nugent.

Relevant motions in the CCAA proceeding

20 In mid-November 2015 Essar Algoma served a motion seeking a critical supplier order against Cliffs under section 11.4 of the CCAA. The motion was adjourned to December 3, 2015 and then ultimately not proceeded with. The explanation given by Essar Algoma is that following the filing of the motion, it was able to find alternative suppliers for the shorter term. It now has supply of pellets to the end of March. What is at issue on its motion is the right of Essar Algoma under Cliffs Contract to the end of 2024.

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21 On December 8, 2015 the applicants served a motion for an order (i) declaring that the CCAA proceedings are the correct forum for the determination of issues relating to the Cliffs Contract; (ii) declaring that the purported termination of the Cliffs Contract was not effective and that it remains in full force and effect and that Cliffs must supply iron ore pellets to Essar Algoma at the price payable under the Cliffs Contract; (iii) directing Cliffs to comply with its obligations under the Cliffs Contract, and (iv) directing Cliffs to pay damages resulting from its purported termination of the Cliffs Contract.

22 On December 23, 2015 Cliffs delivered a notice of motion for an order (i) dismissing or staying the applicants' motion on the grounds that this Court does not have jurisdiction to grant the relief sought by Essar Algoma; (ii) in the alternative, an order staying the applicants' motion on the grounds that Ontario is not a convenient forum for the hearing of the applicants' motion and (iii) in the further alternative, an order dismissing the applicants' motion without prejudice to the applicants to seek the same relief in the form of an action. It is this motion that was heard on January 14, 2016.

Analysis

23 Cliffs raises a number of issues, including (i) the lack of power to deal with this matter under the CCAA, (ii) a lack of jurisdiction to deal with the claim against Cliffs in Ontario, (iii) Ontario is *forum non conveniens* and (iv) the relief sought is inappropriate for a summary CCAA proceeding.

Jurisdiction under the CCAA

24 Cliffs takes the position that there is no jurisdiction in the CCAA to grant the relief sought by Essar Algoma declaring the termination of the Cliffs Contract to be ineffective and requiring Cliffs to deliver iron ore pellets as required by that contract. It says that the Cliffs Contract was terminated before the CCAA proceedings were commenced and thus the powers of the Court given under the CCAA cannot be used in this case. It relies on *SNV Group Ltd., Re*, 2001 BCSC 1644 (B.C. S.C.) in which Justice Pitfield refused to make an order under the CCAA ordering the repayment of money paid before the CCAA proceeding was brought that was said to have been in breach of an agreement that the debtor had with a third party. In that case, Pitfield J. stated:

> The capacity to stay, whether pursuant to section 11 or by virtue of the Court's inherent jurisdiction, applies to prospective proceedings. By its very nature, a proceeding that has been carried to completion cannot be stayed. An order to repay an amount obtained in contravention of a stay granted by the Court would be appropriate, but it is my opinion that the Court cannot rely on the CCAA or its inherent jurisdiction to compel repayment of an amount alleged to have been obtained in reliance upon a contract in a manner that would amount to adjudication of a claim. The CCAA is not intended to give the Court the capacity to undo transactions completed before the effective date of the initial or subsequent orders.

25 Essar Algoma takes the position that Cliffs has misconstrued what Essar Algoma seeks. Rather, it says that it is requesting the Court to invoke its broad and inherent jurisdiction in exercising its territorial jurisdiction, retaining its territorial jurisdiction under the principles of *forum non conveniens*, and determining the appropriate procedures for the determination of the substantive issues in dispute between the parties. It is the consequent modification of Cliffs' procedural rights that Essar Algoma seeks under the CCAA which it says is routinely granted.

26 I do not see the *SNV Group* case as being apposite. Essar Algoma is not asking the Court on its motion to declare the Cliffs Contract as operative because of some provision of the CCAA, which is what the situation was in *SNV Group*.

27 The CCAA is skeletal in nature and does not contain a comprehensive code that lays out all that is permitted or barred. A court under the CCAA has both statutory authority granted under the CCAA and an inherent and equitable jurisdiction when supervising a reorganization. The most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the CCAA text before turning to inherent or equitable jurisdiction to

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anchor measures taken in a CCAA proceeding. See *Ted Leroy Trucking Ltd., Re*, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services] at paras. 57, 64 and 65.

28 The CCAA provides in section 11 that a court has jurisdiction to make any order "that it considers appropriate in the circumstances" [1] . A CCAA court clearly has the power as per *Century Services* to make the procedural orders of the kind sought by Essar Algoma in this case. See also *Smoky River Coal Ltd., Re* (1999), 12 C.B.R. (4th) 94 (Alta. C.A.) at paras. 60 and 67 per Hunt J.A. in which he held that a judge has the discretion under the CCAA to permit issues to be decided in another forum (in that case arbitration) but is under no obligation to do so.

29 The "single control" model also favours a CCAA court to deal with the issues between Essar Algoma and Cliffs. In *Eagle River International Ltd., Re*, [2001] 3 S.C.R. 978 (S.C.C.) ["*Sam Lévy*"] Binnie J. referred to and adopted a "single control" model that favours litigation involving an insolvent company to be dealt with in one jurisdiction. He stated:

> **26** The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage* (1916), 53 S.C.R. 337, at p. 345, "if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation"...
>
> **27** Stewart was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse...

30 *Sam Lévy*, involved a BIA proceeding. In it, Binnie J. referred to *Stewart v. LePage* [1916 CarswellPEI 1 (S.C.C.)], a winding-up application. I see no reason why the principles in *Sam Lévy*, should not be applicable in a CCAA proceeding. In *Century Services* it was noted that the harmonization of insolvency law common to the BIA and CCAA is desirable to the extent possible. The central nature of insolvency and the resolution of issues caused by insolvency are common to both BIA and CCAA proceedings and so too should the underlying principles. See my comments in *Nortel Networks Corp., Re* (2015), 23 C.B.R. (6th) 264 (Ont. S.C.J. [Commercial List]) at para. 24.

31 In this case Cliffs has sued in Ohio for damages claiming material breaches of the Cliffs Contract. It is thus a party that has claimed to be a creditor of Essar Algoma [2] . The single control model requires that its claim against Essar Algoma be dealt with in this CCAA proceeding. Essar Algoma claims in this Court a declaration that the Cliffs Contract has not been legally terminated. Cliffs says that the material breaches by Essar Algoma that it claimed in the Ohio litigation to have occurred permit it to terminate the Cliffs Contract. These issues are completely interwoven and it would make no sense to require Essar Algoma to litigate its claim against Cliffs in the United States [3] when Cliffs' claim against Essar Algoma must be dealt with in this Court in Ontario. The claim of Essar Algoma against Cliffs is an asset of the applicants to be dealt with in this Court.

32 In *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re*, 2013 QCCS 5194 (C.S. Que.), a CCAA proceeding arising out of the Lac-Mégantic rail disaster, it was held that a claim by the debtor against its American insurer under a policy governed by Maine law with a forum selection clause in favour of Maine was an asset of the debtor and should be dealt with in Quebec. Dumas J.C.S. referred to the single control model for insolvencies and stated:

> In the present case, we deal with the contrary. It concerns a bankrupt's claim (via the trustee) against its insurance company. Without a shadow of a doubt, this is an asset of the debtor over which the Bankruptcy Court has jurisdiction. [4]

33 For the single control model to apply, the third-party, in this case Cliffs, must not be a stranger to the insolvency proceedings. Cliffs has raised significant damage claims against Essar Algoma and seeks to have those claims remain

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alive and dealt with in Ohio. Its purported termination of the Cliffs Contract was an important factor that led to Essar Algoma filing for protection under the CCAA. Cliffs is not a stranger to these proceedings.

Jurisdiction simpliciter

34 Jurisdiction must be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. See *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17 (S.C.C.) at para. 82 per LeBel J. See also para. 79 in which LeBel J. referred to the link between the subject matter of the litigation and the defendant to the forum.

35 To establish jurisdiction *simpliciter*, a plaintiff need only establish that there is a good arguable case for assuming jurisdiction. See *Ontario v. Rothmans Inc.*, 2013 ONCA 353 (Ont. C.A.) at para. 54, 110, 118-19. The phrase a "good arguable case" is not a high threshold and means no more than a "serious question to be tried" or a "genuine issue" or that the case has "some chance of success". See *Tucows.Com Co. v. Lojas Renner S.A.*, 2011 ONCA 548 (Ont. C.A.) at para. 36.

36 It is for the plaintiff to establish that there is a presumptive connecting factor to the forum. If the plaintiff establishes that, the defendant has the burden of rebuttal and must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them. See *Van Breda* at paras. 95 and 100.

37 Apart from this test of the connection between the subject matter of the litigation and the forum, traditional tests for basing jurisdiction continue to exist. See *Van Breda* at para. 79 in which LeBel J. stated:

> However, jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.

38 The subject matter of the dispute is whether the Cliffs Contract has been breached and by whom. Cliffs claims Essar Algoma has materially breached provisions of the contract, which if proven, would be grounds to terminate it under Ohio law. Essar Algoma claims that Cliffs had no basis to terminate the contract. Counsel for Cliffs in argument contended that the subject matter of the dispute is a request for specific performance of the contract in Ohio where the ore is mined and delivered to Essar Algoma. I do not agree with that contention. The subject matter of the dispute is the Cliffs Contract and who breached it. While the relief sought by Essar Algoma includes mandatory injunctive relief, that does not make that prayer for relief the subject matter of the dispute. LeBel J. in *Van Breda* stated that it was the legal situation or the subject matter of the litigation that must be connected to the forum. The legal situation is the contention that the Cliffs Contract has been breached and by whom.

39 Rule 17.02 provides a guide to what may be a presumptive factor. LeBel J. stated:

> **83** At this stage, I will briefly discuss certain connections that the courts could use as presumptive connecting factors. Like the Court of Appeal, I will begin with a number of factors drawn from rule 17.02 of the Ontario Rules of Civil Procedure. These factors relate to situations in which service *ex juris* is allowed, and they were not adopted as conflicts rules. Nevertheless, they represent an expression of wisdom and experience drawn from the life of the law. Several of them are based on objective facts that may also indicate when courts can properly assume jurisdiction...Thus they offer guidance for the development of this area of private international law.

40 Rule 17.02 refers to the following in dealing with contract claims:

> **17.02** A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,
>
> (f) in respect of a contract where,

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(i) the contract was made in Ontario,...

41 Essar Algoma takes the position that the Cliffs Contract was made in Ontario.

42 The genesis of the Cliffs Contract was the 2001 CCAA proceeding of Old Algoma. As part of that restructuring, Old Algoma sold Cliffs its interest in the Tilden Mine and concurrently entered into the Cliffs Contract. Old Algoma's restructuring, including the Cliffs Contract, required the approval of the CCAA court which was given by order of Chief Justice LeSage of this Court in 2002.

43 There are traditional rules governing where a contract is made. The general rule of contract law is that a contract is made in the location where the offeror receives notification of the offeree's acceptance. See *Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente* (1999), 50 B.L.R. (2d) 33 (Ont. C.A.) at para. 22 per MacPherson J.A. When acceptance of a contract is transmitted electronically and instantaneously, the contract is usually considered to be made in the jurisdiction where the acceptance is received. See *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2014 ONCA 497 (Ont. C.A.) at para. 66 per Lauwers J.A. There is an exception to this rule which is the postal acceptance rule that when contracts are to be concluded by post the place of mailing the acceptance is to be treated as the place where the contract was made. See *Eastern Power Ltd.* at para. 22.

44 There is no provision in the Cliffs Contract or any of its amendments that would give rise to the postal acceptance rule. Thus the traditional rule that a contract is made in the location where the offeror receives notification of the offeree's acceptance would apply. The evidence as to how the original Cliffs Contract or its amendments was concluded is somewhat unclear but unlikely to get better. Mr. Mee of Cliffs in his affidavit stated:

> I no longer have a specific recollection of where the Agreement and each of its amendments was negotiated or signed. My general recollection is that Essar would sign amendments first and that Cliffs would sign them in Cleveland, Ohio after they had been signed by Essar. I have looked back in my calendar for face to face meetings with Essar in which I participated since 2002. I found a total of 50 meetings 20 of which were in Canada and 30 of which were in the United States.

45 Neither the original Cliffs Contract nor the amendments provide that the contract or amendments becomes binding when signed without delivery. The original Cliffs Contract states in the first recital that "concurrently with the execution *and delivery* of this Agreement [the parties] are entering into that Purchase and Sale Agreement in which [Cliffs is acquiring the interest of Algoma in the Tilden Mine Company]" (Underlining added). This language would indicate that the parties expected delivery of the contract to the other to be required for it to be binding.

46 Therefore if the evidence of Mr. Mee of Cliffs is accepted, it would mean that Essar Algoma generally signed the contract and amendments first, then sent them to Cliffs in Cleveland who then signed them and then sent them back to Essar Algoma. That would mean that the contract was formed when Essar Algoma received notice from Cliffs in Ontario of the acceptance of its offer.

47 There is no date of execution on the original Cliffs Contract effective January 31, 2002 or many of the amendments. There are exceptions. The second amendment was signed and dated by Algoma three days after it was signed by Cliffs. The third amendment was signed and dated by Algoma one day before it was signed by Cliffs. Some were signed the same day. The final amendment that extended the term to 2014 that was produced by Cliffs has an execution date by Essar Algoma of June 7, 2013 and no execution by Cliffs.

48 Based on the evidence led by Cliffs, I find that based on the traditional rules governing where a contract is made, Essar Algoma has at least an arguable case, and likely a stronger case than that, that the Cliffs Contract and its amendments generally were contracts made in Ontario.

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49 Beyond this, the fact that the original Cliffs Contract became effective only when approved in Ontario by Justice LeSage under the CCAA is a strong indicator that there is a strong and substantial connection of the Cliffs Contract to Ontario. In *Trillium* Lauwers J.A. referred to Professor Waddams and consideration whether the traditional rules in determining the place of contract are appropriate for jurisdictional cases. He stated:

> **70** Should the traditional rules for determining the place of the contract be determinative in applying the fourth PCF [presumptive connecting factor]? This is perhaps an issue for another case, but I agree with the observation of Professor Waddams, at paras. 108-109, that the arbitrary common law rules for determining the place of a contract may not always be apposite in jurisdictional cases. The traditional contract placement rules respond to concerns that are different from those engaged by a jurisdictional analysis. A broader, more contextual analysis is required, which would inevitably engage the same considerations as the real and substantial connection test itself.

50 One may ask why a technical rule as to where an e-mail or fax was sent or received should determine the local of an international piece of litigation. The fact that the Cliffs Contract had its genesis in an Ontario CCAA process and required the approval of the CCAA court in Ontario appears to me to be at least as much a factor in holding that the contract is an Ontario contract as the factor of who sent or received confirmation of the terms of the contract. Often, and in this case, contract terms or amendments are discussed and agreed orally over the phone or in meetings and then papered afterwards.

51 I conclude and find that Essar Algoma has established a presumptive connecting factor to Ontario for its claim under the Cliffs Contract to Ontario on the basis that the contract was made in Ontario.

52 Essar Algoma also says that Cliffs has operated its business in Ontario and on that basis Ontario has jurisdiction to hear the Essar Algoma request for relief against Cliffs. As stated in para. 79 of *Van Breda*, a defendant's presence in the jurisdiction is a traditional basis for a court having jurisdiction. LeBel J. also stated that carrying on business in a jurisdiction could be an appropriate connecting factor. He stated:

> **87** Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction. But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction. With these reservations, "carrying on business" within the meaning of rule 17.02(p) may be an appropriate connecting factor. (Underlining added)

53 Rule 17.02(p) provides:

> 17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,
>
> (p) against a person ordinarily resident or carrying on business in Ontario;

54 The three Cliffs corporations that are a party to the Cliffs Contract are The Cleveland-Cliffs Iron Company, an Ohio corporation with its principal place of business in Cleveland, Cliffs Mining Company, a Delaware corporation with its principal place of business in Cleveland and Northshore Mining Company, a Delaware corporation with its principal palce of business in Silver Bay, Minnesota. They are each wholly-owned subsidiaries of Cliffs Natural Resources Inc. which is an international mining and natural resources company and publicly traded in the United States and until 2014 owned a mining project in the "Ring of Fire" region of Ontario.

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55 Under the Cliffs Contract, Cliffs mined the iron ore in Michigan, refined the ore into iron ore concentrate in Michigan, processed the iron ore concentrate into iron ore pellets in Michigan and delivered the iron ore pellets to Essar in Michigan. Cliffs asserts that it has not carried on any business in Canada and has no presence here. However, the fact that all of the mining and delivery took place in Michigan does not by itself mean that it did not carry on business in Canada.

56 Essar Algoma relies on the fact that during the course of the Cliffs Contract representatives of Cliffs have continuously dealt with Essar Algoma or its predecessor Old Algoma in Sault Ste. Marie in Ontario. Mr. Mee of Cliffs stated that he himself had visited Canada 20 times in connection with the Cliffs Contract. Essar Algoma and its predecessor Old Algoma has been a significant customer of Cliffs. Mr. Marwah of Essar Algoma stated in his affidavit that representatives of Cliffs visit Sault Ste. Marie and representatives of Essar Algoma visit Cleveland in alternating years, during which visits they discuss the status of the Cliffs Contract and ongoing issues relating to their business relationship. Representatives of Cliffs review Essar Algoma's operations and stockpiles of iron ore pellets when they visit Sault Ste. Marie. The most recent visit by Cliffs' personnel was on September 18, 2015 shortly before Cliffs purported to terminate the Cliffs Contract. Prior to that, representatives of Cliffs, including sales, operational, safety and quality personnel visited Essar Algoma in Sault Ste. Marie in October 2014 and August 2013. All of these visits fall within LeBel J.'s statement in *Van Breda* that "regularly visiting the jurisdiction" can constitute carrying on business in the jurisdiction.

57 Cliffs has previously appeared in the Ontario Superior Court of Justice in connection with the Cliffs Contract. In 2010 after Cliffs purported to terminate the Cliffs Contract after a pricing dispute, Essar Algoma applied for and obtained interim injunctive relief. Cliffs appeared on the application and did not oppose the jurisdiction of the Court to hear the relief. Rather it opposed the injunction on the merits. Cliffs complied with the terms of the injunction.

58 I conclude and find that Essar Algoma has established a presumptive connecting factor to Ontario for its claim under the Cliffs Contract to Ontario on the basis that Cliffs has carried on business in Ontario.

59 Cliffs has the burden of rebuttal and must establish facts which demonstrate that the presumptive connecting factors in this case do not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them. I do not think Cliffs has met that burden. The relationship between the Cliffs Contract and Ontario is not weak and the visits and meetings by Cliffs personnel in Sault Ste. Marie were not for trivial purposes. They were regular visits to meet with an important customer.

60 Accordingly I find that this Court has jurisdiction over the claim of Essar Algoma against Cliffs.

Forum non conveniens

61 The party raising *forum non conveniens* has the burden of showing that the alternative forum is clearly more appropriate. The use of the word "clearly" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. See *Van Breda* at paras. 108 and 109.

62 The factors to be considered are numerous and variable. See *Black v. Breeden*, [2012] 1 S.C.R. 666 (S.C.C.) at para. 23. In *Van Breda*, at para. 5 LeBel J. provided a non-exhaustive list of factors that could play a role. Cliffs relies on a number of these factors as supporting Ohio as the more convenient forum.

63 Before going through these factors, there is an issue as to whether Ohio is the alternative jurisdiction. Essar Algoma says the alternative jurisdiction is Delaware in which the chapter 15 proceedings are taking place. I hesitate to get into

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that issue and will assume that the alternative forum is the Ohio District Court. That is certainly the view of the expert witness Allan L. Gropper relied on by Cliffs.

(i) The cost of transferring the case or of declining the stay

64 Cliffs says it will result in substantial additional cost and delay to litigate the issues in Ontario. It says that both parties have teams of lawyers in Ohio who are intimately familiar with the case, the relevant documents, witnesses and issues. Cliffs had spent approximately U.S. $1 million on the Ohio litigation before it was dismissed. Essar Algoma has stated that it has a team of 12 attorneys who have spent more than 5,000 hours reviewing documents in the Ohio litigation and that its attorneys have reviewed more than 43,000 documents that Cliffs has produced.

65 Cliffs is concerned that if the matter is litigated in Ontario, both sides will have to educate Ontario lawyers about all of this. At one time, that would have been a major concern. However it is now possible and becoming commonplace in cross-border litigation for American lawyers to appear in an Ontario court, and *vice versa*. The recent Nortel trial was a perfect example of that in which on many days there were 10 to 20 U.S. lawyers in Toronto attending the trial.

66 Cliffs also says that as the Cliffs Contract is governed by Ohio law, there would be the added expense of proving Ohio law. That appears to me to be a minor expense. Essar Algoma has already provided an affidavit of an expert on Ohio law, which Cliffs accepted at least on one point during argument. An affidavit on Ohio contract law could not be relatively expensive in comparison to what has already been expended. Cliffs has also provided a copy of Ohio jury instructions for a civil breach of contract case. The concepts seem virtually identical to Ontario concepts.

67 This factor is essentially a neutral one.

(ii) The impact of a transfer on the conduct of the litigation or on related parallel proceedings

68 Cliffs says having an Ontario court hear the dispute would deprive it of an Ohio judge who is familiar with the issues. Judge Nugent is certainly far more familiar with the issues than an Ontario judge would be. However an Ontario judge, like any other judge hearing a trial or proceeding, is used to coming in cold and picking it up quickly.

69 Judge Nugent has not ruled on whether the Cliffs Contract can be terminated or on whether there were breaches of the contract by Essar Algoma that could be considered material breaches. He merely found on the summary judgment motion, that he dismissed, that there was no legally enforceable agreement between the parties to reduce the 2014 annual nomination to 3.3 million tons and that Essar Algoma therefore failed to meet its annual requirements by a margin of at least 500,000 tons. He did not deal with other defences that Essar Algoma was asserting and stated that he could not conclude that there was a breach entitling Cliffs to damages. Cliffs did not claim any declaration that it had a right to terminate the Cliffs Contract. Cliffs says that if it can prove that there were material breaches, it would have the right to terminate the Cliffs Contract. These are issues yet to be dealt with.

70 So far as the timing of any trial or other proceeding is concerned, there is no evidence that the Ohio District Court would be in a better position to hear the case sooner than in this Court. Cliffs says it is ready to proceed to trial. Essar Algoma has said it needs more discovery. Both Cliffs and Essar Algoma say they want the matter determined as quickly as possible.

71 Whatever the situation, this Court can accommodate the parties quickly. The situation for Essar Algoma is critical, and the Monitor has stated in its sixth report that in developing and carrying out the SISP, which has tight timelines, Algoma needs certainty concerning the status of the Cliffs Contract and an expedited determination of the rights of the parties is linked to the development of the SISP. Whether those rights can be determined that quickly may be a question mark, but this Court is in at least as good a position as the Ohio court to deal with the issues quickly.

72 I see this factor as neutral or at best perhaps slightly favouring Cliffs.

(iii) The possibility of conflicting judgments

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73 I do not see this as an issue. In argument, Essar Algoma acknowledged that it is bound by the finding made by Judge Nugent, to which I have already referred. It could hardly say otherwise, given the principle of *res judicata*. All other issues remain open.

(iv) Location of evidence

74 Cliffs says it will have to call evidence of witnesses in the U.S. regarding its advance planning and why Essar Algoma's actions were a problem to Cliffs. These witnesses would come from Cleveland.

75 However, Essar Algoma's witnesses are from Sault Ste. Marie. There is no evidence how many from each side will need to be called. It is a shorter trip from Cleveland to Toronto than from Sault Ste. Marie to Toronto, whether by air or car. In this day of international contracts, particularly between parties near the Canadian border, I do not see this factor as compelling. It is a neutral factor.

(v) Applicable law

76 Ohio law governs the Cliffs Contract. Cliffs says there is a risk an Ontario court will apply Ohio law incorrectly. I suppose it can be said that an Ohio judge would also apply it incorrectly. This might be a material factor if the law in question was markedly different from Ontario law with concepts unknown to Ontario law. It is clear from the record however that this is not the case. It was acknowledged in argument that Ohio law is not substantially different from Ontario law regarding material breach.

77 Cliffs cites the standard jury instructions in Ohio which defines material breach as follows:

> "Material breach" by plaintiff means a breach that violates a term essential to the purpose of the contract. Mere nominal, trifling, slight or technical departures from the contract terms are not material breaches so long as they occur in good faith.

78 The jury instructions go on to say that some Ohio courts have utilized the following five factors listed in the Restatement of the Law, (2d) Contracts (1981) in deciding whether a breach is material:

> (i) The extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (ii) The extent to which the injured party can be adequately compensated for the part of the benefit of which he will be deprived;
>
> (iii) The extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (iv) The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (v) The extent to which the behaviour of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.
>
> (vi) The extent to which the behaviour of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

79 Cliffs argues that the determination of whether a party failed to comport with standards of good faith and fair dealing is an inherently local reflection of local commercial mores and that the nature of an Ontario court's determination of standards of good faith and fair dealing would inevitably reflect Ontario values and standards rather than Ohio values and standards. I find this argument a stretch. There is no suggestion in the evidence that the values in Cleveland on such an issue would be different from the values in Sault Ste. Marie. In any event, there is nothing in the Ohio law that says

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that in a case involving parties undertaking a contract in Cleveland and Sault Ste. Marie, it is the Cleveland values rather than the Sault Ste. Marie values that are to be considered.

80 Ontario courts can and do often apply foreign law. In this case I do not consider the fact that the law to be applied is Ohio law much of a factor, if any.

(vi) Recognition and enforcement of an Ontario judgment

81 Cliffs takes the position that there is no jurisdiction in this Court to deal with the Essar Algoma claim against Cliffs because an injunction should not be ordered against a U.S. resident such as Cliffs that could not be enforced.

82 This argument assumes that Cliffs would ignore a decision of an Ontario court. Whether that is so is a question. Cliffs complied with an injunction ordered in Ontario in 2010 after it purported to terminate the Cliffs Contract. Cliffs has requested alternative relief if this Court assumes jurisdiction requiring a statement of claim to be delivered by Essar Algoma, which is some indication that it intends to appear and deal with the issue if it is to be dealt with in Ontario. If it does there could be no issue of Ontario having jurisdiction that would not be recognized by a U.S. Court as Cliffs would have attorned to the jurisdiction.

83 Cliffs relies on a passage from Sharpe, *Injunctions and Specific Performance*, (loose-leaf ed. November 2015 Toronto: Canada Law Book), ¶1.1220 that refers to a reluctance of courts to make an order that cannot be enforced, as follows:

> Claims for injunctions against foreign parties present jurisdictional constraints which are not encountered in the case of claims for money judgments. In the case of a money claim, the courts need not limit assumed jurisdiction to cases where enforceability is ensured. Equity, however, acts *in personam* and the effectiveness of an equitable decree depends upon the control which may be exercised over the person of the defendant. If the defendant is physically present, it will be possible to require him or her to do, or permit, acts outside the jurisdiction. The courts have, however, conscientiously avoided making orders which cannot be enforced. The result is that the courts are reluctant to grant injunctions against parties not within the jurisdiction and the practical import of rules permitting service *ex juris* in respect of injunction claims is necessarily limited. Rules of court are typically limited to cases where it is sought to restrain the defendant from doing anything within the jurisdiction. As a practical matter the defendant "who is doing anything within the jurisdiction" will usually be physically present within the jurisdiction to allow ordinary service.

84 I have not been provided with any case however involving cross-border insolvencies in which orders in proceedings under the CCAA cannot be enforced in the United States in chapter 15 proceedings under the U.S. Bankruptcy Code or that deal with evidence as in this case regarding the enforceability of a non-monetary judgment in the United States.

85 Cliffs relies on an opinion of Allan L. Gropper, a highly regarded federal bankruptcy judge for the Southern District of New York from 2000 to 2015. In that opinion, Mr. Gropper stated that United States courts have the greatest respect for the orders and judgments of courts of other nations, particularly those of Canada and judgments for money are ordinarily enforced. He stated that while non-monetary judgments are less regularly enforced, in appropriate circumstances they may be enforced under the common law principle of comity. However, in order for a foreign order or judgment to be enforced, the foreign court must have personal jurisdiction over the defendant. [5]

86 I could hardly quarrel with an opinion on these matters by someone as eminent as Mr. Gropper. However, Mr. Gropper was instructed to assume that Cliffs does not carry on business in Canada, and that assumption is critical to his analysis. That assumption cannot stand in light of the findings that I have made regarding Cliffs carrying on business in Ontario. While Mr. Gropper opines that a U.S. court must scrutinize the basis on which a foreign court asserts jurisdiction over a defendant, and in light of international concepts of jurisdiction to adjudicate, there is no discussion of this issue if the foreign court such as this Court has found that the defendant has carried on business in Ontario under a contract made in Ontario.

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87 Essar Algoma relies on an opinion of Ronald A. Brand, a professor of law at the University of Pittsburgh and highly qualified in the area of the recognition of foreign judgments. Professor Brand's opinion is that the fact that a Canadian judgment provides relief in the form of (a) a declaratory order concerning the rights and obligations of parties under and the status of a contract, and/or (b) specific performance of contractual obligations, would not prevent the recognition and enforcement of that judgment in a court in the United States. Recognition is based on the principle of comity and derives from a U.S. case of *Hilton v. Guyot*, 159 U.S. 113 (U.S. N.Y. Sup. 1895). Professor Brand says that the principles of comity discussed in that case have made the U.S. one of the most liberal countries in the world in recognizing foreign judgments.

88 Cliffs relies on an opinion of Richard B. McQuade Jr., as U.S. District Court judge from 1986 to 1989 and before that an Ohio Common Pleas Court judge from 1978. Since 1998 he has served as a judge by assignment in both federal and Ohio states courts. His opinion is that an Ohio, Minnesota or Michigan court would not enforce an order of an Ontario court in the nature of specific performance. I must say that I prefer the opinion of Professor Brand for the reasons given by Professor Brand and his impressive credentials on the subject, credentials that I believe to be superior to those of Mr. McQuade.

89 Mr. McQuade states in his opinion that recognition of foreign judgments is based upon general principles of comity. He then goes on to state that the Uniform Foreign-Money Judgments Recognition Act that has been adopted in many states, including Ohio, Michigan and Minnesota, restricts the enforcement of foreign judgments to the recovery of money only. This, however, is not the whole picture. As Professor Brand points out, those state statutes are limited in scope to the recognition of foreign money judgments, but they all include a "savings clause" which specifically acknowledges that judgments other than money judgments may be recognized by applying traditional concepts of comity.

90 Mr. McQuade in his opinion stated that courts that adopted the Uniform Act have consistently denied enforcement to non-monetary judgments, and he cited one case *Sea Search Armada v. Republic of Colombia*, 821 F.Supp.2d 268 (U.S. Dist. Ct. 2011) as authority for that proposition. However, as explained by Professor Brand, that decision dealt with a version of the Uniform Foreign Money-Judgments Recognition Act that was in effect in Washington D.C. in 2011 that did not contain the savings clause that other states including Ohio, Michigan and Minnesota had adopted. A Washington D.C. statute was later passed in 2011 after the decision to expressly preserve the D.C. courts' discretion to recognize foreign non-money judgments under principles of comity or otherwise. Curiously, Mr. McQuade in a footnote to his opinion stated that a U.S. court may provide injunctive relief to enforce a foreign judgment it has recognized and that a U.S. court in doing so may take into account a number of factors typically taken into account in ordering injunctive relief. That footnote was contrary to his opinion stated in the body of his affidavit. [6]

91 There is also the issue as to what a U.S. court would consider in recognizing an injunctive order from this Court. In a recent article in 2014 by Judge Martin Glenn of the United States Bankruptcy Court for the Southern District of New York, Judge Glenn commented on the practice of comity between the U.S. and Canada. He stated:

> In *Hilton v. Guyot*, the Supreme Court held that if the foreign forum provides "a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting," the judgment should be enforced and not "tried afresh." *Hilton*, 159 U.S. at 202-03. "[W]hen the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the procedural safeguards employed in those foreign proceedings." *In re Bd. of Dirs. of Hopewell Int'l. Ins. Ltd., Inc.*, 238 B.R. 25, 66 (Bankr. S.D.N.Y. 1999), *aff'd*, 238 B.R. 699 (S.D.N.Y. 2002) (internal quotation marks and citations omitted). For example, the U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process. U.S. federal courts have repeatedly granted comity to Canadian proceedings.

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92 Judge Glenn also referred to a reluctance to second guess a decision of a foreign court in taking jurisdiction if the defendant appeared in the foreign court to challenge its jurisdiction and failed to prevail. He stated:

> In deciding whether to enforce a foreign judgment, a court in the United States may scrutinize the basis for the assertion of jurisdiction by the foreign court. *See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 482 cmt. c. ("*Lack of jurisdiction over defendant.* The most common ground for refusal to recognize or enforce a foreign judgment is lack of jurisdiction to adjudicate in respect of the judgment debtor. If the rendering court did not have jurisdiction over the defendant under the laws of its own state, the judgment is void and will not be recognized or enforced in any other state. Even if the rendering court had jurisdiction under the laws of its own state, a court in the United States asked to recognize a foreign judgment should scrutinize the basis for asserting jurisdiction in the light of international concepts of jurisdiction to adjudicate."). Whether jurisdiction was challenged in the foreign court is relevant but not necessarily decisive in deciding whether to enforce a foreign judgment, although a renewed challenge to jurisdiction is generally precluded. *Id.* ("If the defendant appeared in the foreign court to challenge the jurisdiction of the court and failed to prevail, it is not clear whether such determination will be considered *res judicata* by a court in the United States asked to recognize the resulting judgment."); *Id.* at § 482 rn.3 ("[i]f the defendant challenged the jurisdiction of the rendering court in the first action and the challenge was unsuccessful or was not carried to conclusion ... a renewed challenge to jurisdiction of the rendering court is generally precluded").

93 I recognize the reluctance expressed by Justice Sharpe in his text that our courts avoid making orders that cannot be enforced. However on the basis of the evidence before me, Cliffs has not established that an order made in this Court requiring Cliffs to perform the Cliffs Contract would not be enforced in those states where Cliffs has assets. I accept that there may be some risk as opinions are only opinions, but the risk on the basis of the evidence before me does not rise to the level that would render Ontario a *forum non conveniens* in this case.

(vii) Conclusion on forum non conveniens

94 Cliffs has not met its burden of showing that the alternative forum, in this case Ohio, is clearly more appropriate.

Is the relief inappropriate for a summary proceeding?

95 Cliffs takes the position that the relief Essar Algoma seeks is inappropriate for a summary proceeding and that there is no basis for Essar Algoma claiming urgency. This is not raised as a *forum non conveniens* point. It requests an order that Essar Algoma must deliver a statement of claim.

96 So far as the urgency is concerned, the Monitor has made clear that the issue needs to be quickly decided. I cannot find that Essar Algoma has purposely delayed the issue. In any event, Cliffs in argument took the position that it wanted the issue decided quickly.

97 Regarding the kind of hearing required to deal with the dispute, there is nothing in the record before me to say that Essar Algoma is demanding some summary procedure that would impair Cliffs' procedural rights in any material way. In argument, counsel for Essar Algoma said that what procedure will be adopted is for this Court on another day and that the parties will have to work together to come up with an appropriate procedure. It could be a full trial or less.

98 I would not at this stage order that Essar Algoma deliver a statement of claim. What the form of the process will take is yet to be decided. I agree with Cliffs that the procedural rights of the parties should be protected as much as possible as the circumstances will permit. Those circumstances, of course, include the fact that Essar Algoma filed under the CCAA shortly after Cliffs purported to terminate the Cliffs Contract and that the issue needs to be dealt with quickly for the sake of both parties. As well, the principles laid out in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) and the need to be mindful of the most proportionate procedure for a case will need to be considered.

Conclusion

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99 The motion of Cliffs is dismissed.

Motion dismissed.

Footnotes

1 The power in section 11 is "subject to the restrictions set out in this Act." Cliffs argued that an inference should be drawn that because Essar Algoma withdrew its critical supplier motion, an inference should be drawn that it did so because it could not comply with the critical supplier tests in section 11(4). Thus the failure to be able to comply with section 11(4) should be read as a restriction in the Act preventing the use of section 11 by the applicants. I decline to make such an inference and in any event do not think a failure to fall into the language of section 11(4) which provides that a court *may* make an order can be read to be a restriction under section 11. It is commonplace in CCAA proceedings to make orders requiring supply without invoking section 11(4).

2 At the request of Cliffs, the claims procedure order signed on January 14, 2016 in this CCAA proceeding by agreement did not cover Cliffs' claims and the procedure to govern those claims is to await the determination of this motion.

3 It would be up to the Delaware Bankruptcy Court to determine if the claim should proceed in that Court or in the Ohio District Court.

4 Although Justice Dumas referred to a trustee and the Bankruptcy Court, the case was a CCAA case and the MME was not a bankrupt.

5 Mr. Gropper went on in his opinion to give his view ("it is submitted...") that a U.S. Court would not find that Cliffs has submitted to the jurisdiction of the Canadian courts. I have serious doubts as to whether an expert in foreign law should go beyond stating what the foreign law is and give an opinion on what the foreign court would do in a particular case. See my comments in *Nortel Networks Corp., Re* (2014), 20 C.B.R. (6th) 171 (Ont. S.C.J. [Commercial List]) at paras. 103-104. In any event, his opinion was based on the assumption that Cliffs did not carry on business in Canada.

6 Mr. Gropper also referred, in a footnote to his statement that in appropriate circumstances a non-monetary may be enforced under the common law principle of comity, to the *Sea Search* case as authority that where the Uniform Act has been adopted, courts have consistently denied enforcement to non-monetary judgments. However Professor Brand's analysis is a complete answer to that case. I would note that while Mr. Gropper has extremely impressive credentials as a bankruptcy expert, his *curriculum vitae* does not list experience in dealing with state courts or the enforcement of foreign judgments under state legislation.

End of Document

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TAB 4

Court File No. CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	FRIDAY, THE 26th DAY OF
	)	
JUSTICE CAMPBELL	)	AUGUST, 2011

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP

Applicants

-and-

THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security

Respondents

ORDER

THIS MOTION, made by Grant Forest Products Inc. ("**GFPI**"), Grant Alberta Inc., and Grant Forest Products Sales Inc. (the "**Remaining Applicants**"), for *inter alia* an order in the form attached as Schedule "A" to the notice of motion of the Remaining Applicants dated April 15, 2011 (the "**Notice of Motion**") *inter alia*: (i) abridging and validating the timing and method of service of this Motion Record so that the Motion is properly returnable; (ii) authorizing GFPI to take steps required in accordance with the *Pension Benefits Act* (Ontario) (the "**PBA**") to initiate a wind-up of the two registered defined benefit pension plans of which GFPI is plan administrator namely: #0992537 - Pension Plan for Executive Employees of GFPI and #1053008 Pension Plan for the Salaried Employees of GFPI – Timmins Plant (the "**Timmins**

Salaried Plan") (collectively the "**DB Plans**") and authorizing GFPI to work with the Superintendent of Financial Services and the Financial Services Commission of Ontario to appoint a replacement plan administrator of the DB Plans; (iii) authorizing and directing Ernst & Young Inc. in its capacity as court-appointed Monitor of the Remaining Applicants (the "**Monitor**"), until further court order, to hold back from any distribution to creditors of GFPI an amount which is estimated to be the amount necessary to satisfy the wind-up deficits of the DB Plans; (iv) extending, until November 30, 2011, the Stay Period, as defined by the Order of the Honourable Mr. Justice Newbould made in these proceedings on June 25, 2009 (the "**Initial Order**") and as previously extended until August 31, 2011; and (v) approving the twenty-first report to Court (the "**Twenty-First Report**") of the Monitor, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Twenty-first Report, the affidavit of Hap Stephen sworn August 10, 2011, the affidavit of Hap Stephen sworn August 24, 2011 and on hearing submissions of counsel for GFPI, the Monitor, Financial Services Commission of Ontario, Peter Grant Sr. and the Second Lien Lenders, and no one appearing for any other person on the service list, although properly served as appears from the affidavits of Laura Bowles-Dove sworn August 10 and 17, 2011 and the affidavit of Jane Dietrich sworn August 24, 2011, filed:

1. **THIS COURT ORDERS** that the timing and method of service and filing of the notice of motion and GFPI's motion record are hereby abridged so that this motion is properly returnable today.

2. **THIS COURT ORDERS** that GFPI is hereby authorized to take steps required in accordance with the PBA to initiate a wind-up of the Timmins Salaried Plan and GFPI is authorized to work with the Superintendent of Financial Services and the Financial Services Commission of Ontario to facilitate the appointment of a replacement plan administrator of the Timmins Salaried Plan. For greater certainty, nothing in this Order shall fetter a replacement administrator's discretion, subject to the requirements of the PBA, whether to wind-up the Timmins Salaried Plan.

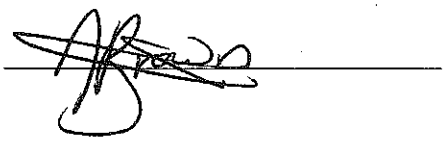
3. **THIS COURT ORDERS** that the Monitor is hereby authorized and directed, until further Court Order, to hold back from any distribution to creditors of GFPI an

amount of $191,245.00 which is estimated to be the amount necessary to satisfy the wind-up deficit of the Timmins Salaried Plan. For greater certainty nothing in this order affects or determines the priority or security of the claims against these funds.

4. **THIS COURT ORDERS** that with respect to the Remaining Applicants, the Stay Period as defined by the Initial Order, be and is hereby extended to November 30, 2011.

5. **THIS COURT ORDERS** that the Twenty-First Report and the activities of the Monitor as set out therein be and are hereby approved.

6. **THIS COURT ORDERS** that the preamble to paragraph 10 of the Initial Order be and is hereby, as of the date of this Order, deleted and replaced with the following, "*10. **THIS COURT ORDERS** that, the Remaining Applicants are hereby prohibited, without the prior written approval of Bank of New York Mellon as agent for the Second Lien Lenders and the Monitor, or further order of this Court from:*" and subparagraphs 10(a) to (o) of the Initial Order remain unchanged.



ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

AUG 26 2011

PER/PAR:

Court File No: CV-09-8247-00CL

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP (the "Applicants")

-and-

THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security (the "Respondents")

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO
(Commercial List)

ORDER
(August 26, 2011)

FRASER MILNER CASGRAIN LLP
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto, Ontario M5K 0A1

Lawyer: Jane O. Dietrich
LSUC: 49302U
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Telephone: 416 863-4467

Facsimile: 416-863-4592

Lawyers for Grant Forest Products Inc., Grant Forest Products Sales Inc., and Grant Alberta Inc.

TAB 5

Most Negative Treatment: Distinguished
Most Recent Distinguished: Dustbane Enterprises Ltd. v. Ontario (Superintendent of Financial Services) | 2001 CarswellOnt 673, 2001 CarswellOnt 9782, 27 C.C.P.B. 1 | (F.S. Trib., Feb 15, 2001)

1998 CarswellOnt 5776
Financial Services Tribunal

C.U.P.E., Locals 1144 & 1590 v. Ontario (Superintendent of Pensions)

1998 CarswellOnt 5776, 20 C.C.P.B. 312

In the Matter of the Pension Benefits Act, R.S.O. 1990, c. P.8 (the "Act")

In the Matter of the decision of the Superintendent of Pensions for Ontario (the "Superintendent") dated January 13, 1997, with respect to the transfer of assets from the Pension Plan for Hospital Employees of the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada Registration Number 302851 (the "Pension Plan") to the St. Joseph's Health Centre Pension Plan, the Providence Centre Pension Plan, and the Morrow Park Plan (the "New Plans")

In the Matter of a Hearing in accordance with subsection 89(8) of the Act

The Canadian Union of Public Employees, Locals No. 1144 and 1590 ("CUPE"), Applicant and Superintendent of Pensions, The Sisters of St. Joseph for the Diocese of Toronto in Upper Canada (the "Sisters"), St. Michael's Hospital, St. Joseph's Health Centre and Providence Centre (the "Hospitals"), Respondent

Moore, Chair; Grenville, Wires, Members

Heard: October 26 and 27 and November 17, 1998
Judgment: December 18, 1998
Docket: XDEC-42

Counsel: *Mr. M. Zigler* and *Mr. R. Tomassini*, for C.U.P.E.
Ms. D. McPhail and *Ms. L. McDonald*, for Superintendent of Pensions.
Ms. F. Kristjanson and *Mr. A. Fanaki*, for Sisters & Hospitals.

Subject: Corporate and Commercial

Headnote

Pensions --- Administration of pension plans — General

Union brought application for declaration that pension plan for hospital employees was multi-employer pension plan — Application dismissed — Pension plan was established by only one employer — Hospitals were operating as business divisions of single employer — Sisters were only employer required to contribute to plan by reason of agreement, statute or municipal by-law.

The sisters for the Diocese of Toronto established a pension plan for hospital employees. "Hospital" was defined in the plan to include any health facility of the sisters as designated by the sisters from time to time. The sisters subsequently wrote to the Pension Commission of Ontario, advising that the plan would be split to apply to two new corporations and that the assets would be transferred to two new plans. The union wrote to the Superintendent of Pensions for Ontario opposing the splitting of the pension plan and transfer of assets. The union applied to the Superintendent for an order under s. 87(1) of the *Pension Benefits Act* that the pension plan for hospital

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employees of the sisters for the Diocese of Toronto and its successors constituted a multi-employer pension plan. The Superintendent dismissed the application, and consented to transfers of assets to the two new pension plans. The union brought an application before the Commission, asking that the Commission declare the pension plan to be a multi-employer pension plan subject to s. 8(1)(e) of the Act, and asking the Commission to make orders regarding the administration of the plan, the proposed transfer of assets to the hospitals' new plans, and status of the new plans. The Commission determined that it had jurisdiction to determine whether the plan was a multi-employer plan and declined to take jurisdiction of the other matters prior to determining that issue.

Held: The application was dismissed.

The pension plan did not meet the definition of a multi-employer pension plan and was not subject to the requirements of s. 8(1)(e) of the Act. Prior to incorporation of the hospitals, the pension plan was established and maintained by the sisters, who were the only employer of the hospital employees. The sisters owned and operated the bank accounts, in the business names of the hospitals, and appointed signing officers through banking resolutions passed by the sisters. Although hospital names were shown on pay stubs and T4 forms, it was clear employees' remuneration was paid from bank accounts under the control of the sisters. The sisters also appointed the auditors for hospital financial statements, approved appointments of hospital board members and other senior officers and approved hospital by-laws. The hospitals were operating as business divisions of a single employer.

Pension plan contributions were not made by reason of statute or municipal by-law. The trust agreement, which required the trustee to receive pension contributions on account of hospital employees, made no reference to hospitals contributing to the pension plan. The pension plan defined "employer" as the sisters, and the contribution provision required only the employees and the sisters to make contributions to the plan. The sisters were the only employer required to contribute to the plan by reason of agreement, statute or municipal by-law.

Table of Authorities

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — considered

Pension Benefits Act, R.S.O. 1990, c. P.8
s. 1 "employer" — considered

s. 1 "multi-employer pension plan" — considered

s. 8(1)(e) — considered

s. 80 — referred to

s. 81 — referred to

s. 86 — considered

s. 87 — considered

s. 87(1) — considered

s. 89 — pursuant to

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s. 89(1) — considered

s. 89(2)(e) — considered

s. 89(2)(e) — considered

s. 94(4) — considered

s. 96(a) — considered

s. 113 — referred to

Public Hospitals Act, R.S.O. 1990, c. P.40
Generally — referred to

APPLICATION by union for declaration that pension plan was multi-employer pension plan subject to s. 8(1)(e) of *Pension Benefits Act*.

***The Tribunal*:**

Nature of the Application

1 The Superintendent of Pensions for Ontario (the "Superintendent") refused to grant relief requested by the Canadian Union of Public Employees Locals No. 1144 and 1590 ("CUPE"), including a request by CUPE that the Superintendent issue an order under s. 87(1) of the Act that the Pension Plan for Hospital Employees of the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada Registration Number 302851 (the "Pension Plan") and its successors constitute a multi-employer pension plan (a "MEPP"). CUPE filed a Request for Hearing under s. 89 of the Act with the Pension Commission of Ontario (the "Commission") asking that the Commission declare the Pension Plan to be a MEPP subject to s. 8 (1)(e) of the Act, and requesting the Commission to make orders regarding: (I) the Pension Plan's administration under s. 8 (1) (e); (ii) the proposed transfer of assets to the Hospitals' New Plans; and (iii) the status of the New Plans. Following a hearing on the Commission's jurisdiction in these matters, the Commission determined that it had jurisdiction to determine whether the Pension Plan is a MEPP subject to s. 8 (1)(e) of the Act (the "MEPP issue") and declined to take jurisdiction of the other matters prior to determining the MEPP issue [reported at (1998), 19 C.C.P.B. 44 (Ont. Pension Comm.)].

The Facts

2 The following facts can be found in the Agreed Statement of Facts on Jurisdictional Issues provided to the hearing panel, on consent, at the hearing on jurisdiction.

3 Effective January 1, 1958, the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada (the "Sisters") established a pension plan for certain employees, and amended the plan from time to time.

4 In Article 1.20 of the Pension Plan, amended and restated as at January 1, 1992, "employee" is defined as meaning "any employee who is employed on a full-time or less than full-time basis at an Hospital", but not meaning "any person who is a casual or temporary employee of the Hospital or who is remunerated under contract for special services or on a fee for service basis".

5 "Employer" is defined in Article 1.21 of the Pension Plan as meaning "for the purposes of this Plan only, the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada in its personal capacity as employer with respect to the Hospitals".

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6 "Hospital" is defined in Article 1.23 of the Plan as follows: "Hospital" means with respect to an Hospital, Providence Centre (formerly Providence Villa and Hospital) or the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada with respect to the employees of the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada whose duties relate to the aforementioned hospitals plus any other health facility of the Sisters of St. Joseph as designated by the Sisters of St. Joseph from time to time.

7 The term "administrator" is defined in Article 1.03 of the Plan as meaning "the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada in its capacity as administrator under the Pension Benefits Act and Income Tax Act".

8 In 1994, the Commission received a letter written on behalf of the Sisters, stating that St. Joseph's Health Centre and Providence Centre would be separately incorporated on January 1, 1995, that the Sisters' plan would be split as of that date so that two new plans would apply to the two new corporations, and that St. Michael's Hospital would be incorporated on January 1, 1996, at which time the Sisters' plan would become the St. Michael's Hospital Plan. On December 6, 1994, the Sisters sent letters to Pension Plan participants, informing them of the Sister's intent to incorporate Providence Centre and St. Joseph's Health Centre on December 31, 1994 and to incorporate St. Michael's Hospital a year later.

9 The Sisters amended and restated its plan as at January 1, 1995. The Preamble to the amended and restated plan states in part:

> Effective January 1, 1995, all assets and liabilities with respect to the employees or forme employees of the St. Joseph's Health Centre and the employees or former employees of Providence Centre, who were Members or the Spouses, former Spouses, Beneficiaries, Dependent Children or joint annuitants of former Members entitled to benefits pursuant to the terms of the Plan as of December 31, 1994, subject to regulatory approval, will be transferred to the St. Joseph's Health Centre Pension Plan and the Providence Centre Pension Plan, respectively.

10 During 1996, the Superintendent received submissions written on behalf of CUPE, opposing the Sisters' splitting of the Pension Plan and transfer of assets. The Superintendent also received written submissions made on behalf of the Sisters, responding to the submissions made on behalf of CUPE.

11 On January 13, 1997, the Superintendent wrote to CUPE's legal counsel refusing to grant the relief requested in CUPE's submissions. In particular, the Superintendent refused to issue an order under s. 87(1) that the Pension Plan and any of its successors constitute a MEPP established pursuant to a collective agreement or a trust agreement within the meaning of s. 8(1)(e) of the Act. On the same day, the Superintendent consented to transfers of assets from the Pension Plan to the St. Joseph's Health Centre Plan and to the Providence Centre Plan.

12 On January 27, 1997, on CUPE's behalf, letters were sent to the Superintendent and to counsel for the Sisters stating that CUPE intended to appeal the Superintendent's decisions dated January 13, 1997 and requesting that transfers of assets be held in abeyance pending the outcome of the appeal.

13 On February 11, 1997, a Request for Hearing Under Section 89 of the Act was submitted to the Commission on CUPE's behalf.

Preliminary Matters

14 Following an initial pre-hearing conference and telephone conference call among the parties, a further pre-hearing conference was held at which a preliminary question arose as to whether the Commission had jurisdiction to conduct the hearing. The parties agreed to argue the issue of jurisdiction in advance of the merits. The Commission received written submissions on the matter, heard oral argument and advised the parties, by letter dated March 13, 1998, that it had determined that the Commission had jurisdiction to determine whether the pension plan is a MEPP under the Act. Written reasons were published in a decision released April 24, 1998 and amended May 13, 1998.

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15 At the hearing on jurisdiction, the hearing panel was also asked to determine its jurisdiction in respect of four other issues relating to division of the Pension Plan, transfer of assets, section 80 and section 81 of the Act. In a subsequent letter dated May 29, 1998, the Commission advised the parties that it did not then have jurisdiction to hold a hearing under s. 89 of the Act regarding any of these four issues. Written reasons were published in a decision released May 29, 1998.

16 At a further pre-hearing conference held June 15, 1998, the parties agreed that disclosure of certain documents requested by CUPE was contested. A hearing into the disclosure was held on July 27, 1998 before the full panel. The Commission received written submissions, heard oral argument, and advised the parties by letter that all documents sought by CUPE and relevant to the issues to be determined in the hearing on the MEPP issue were to be disclosed by the Sisters as requested by CUPE, on a confidential basis. Written reasons were published in a decision released September 9, 1998.

The Issue

17 Was the Pension Plan a multi-employer pension plan (a "MEPP") within the meaning of the Act, and therefore required to be administered in accordance with s. 8 (1)(e) of the Act?

The Relevant Legislation

18 In the Act, Section 1 includes the following definitions:

> **1.** — "employer", in relation to a member or a former member of a pension plan, means the person or persons from whom or the organization from which the member or former member receives or received remuneration to which the pension plan is related,
>
> **1.** — "multi-employer pension plan" means a pension plan established and maintained for employees of two or more employers who contribute or on whose behalf contributions are made to a pension fund by reason of agreement, statute or municipal by-law to provide a pension benefit that is determined by service with one or more of the employers, but does not include a pension plan where all the employers are affiliates within the meaning of the *Business Corporations Act*.

19 Other relevant excerpts from the Act follow:

> **8.** — (1) A pension plan is not eligible for registration unless it is administered by an administrator who is,...
>
> (e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employe pension plan, and a majority of such 1 representatives of the members shall be Canadian citizens or landed immigrants;
>
> **87.** — (1) The Superintendent, in the circumstances mentioned in subsection (2) and subject to section 89 (hearing and appeal), by a written order may require an administrator or any other person to take or to refrain from taking any action in respect of a pension plan or a pension fund.
>
> (2) The Superintendent may make an order under this section if the Superintendent is of the opinion, upon reasonable and probable grounds,
>
> (a) that the pension plan or pension fund is not being administered in accordance with this Act, the regulations or the pension plan;
>
> (b) that the pension plan does not comply with this Act and the regulations; or

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(c) that the administrator of the pension plan, the employer or the other person is contravening a requirement of this Act or the regulations.

89. — (1) Where the Superintendent proposes to refuse to register a pension plan or an amendment to a pension plan or to revoke a registration, the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant or administrator of the plan.

(2) Where the Superintendent proposes to make an order under,...

(e) section 87 (administration of pension plan in contravention of Act or regulation),

the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the administrator and on any other person to whom the Superintendent proposes to direct the order.

. . . . .

(6) A notice under subsection (1), (2), (3), (4) or (5) shall state that the person on whom the notice is served is entitled to a hearing by the Commission if the person delivers to the Commission, within thirty days after service of the notice under that subsection, notice in writing requiring a hearing, and the person may so require such a hearing.

94. (4) The Superintendent shall exercise the powers and perform the duties that are vested in or imposed upon the Superintendent by this Act, the regulations and the Commission.

96. It is the duty of the Commission,

(a) to administer this Act and the regulations; ...

The Arguments

20 CUPE argues that the Pension Plan meets the definition of a MEPP under s.1 of the Act and so must be administered in accordance with s. 8 (1)(e) of the Act. Its argument may be summarized as follows:

1. Before incorporation, the Hospitals operated as divisions and unincorporated entities. Each Hospital viewed itself as a separate organization and was viewed as such under other statutes. Each Hospital described itself in organizational terms, and each had a Board supervising and overseeing its business operations. In addition to a Board, each Hospital had all the trappings of a separate corporation, including an audited financial statement, chief executive officer, other signing officers, and a by-law.

2. Pension Plan annual reports identified the Hospitals as contributing employers, and Pension Plan text wording was ambiguous in this regard. Collective agreements were concluded separately by each Hospital and required Hospital employees to participate in the Pension Plan. Employee payroll stubs and income tax forms showed the Hospitals, not the Sisters, as employers. Since 1959, the Sisters made little or no financial contribution to cover Hospitals' costs, which are largely government funded.

3. CUPE argues that each Hospital, on a broad and purposive interpretation of the Act, falls within the definition of "employer", which includes reference to "... the person or persons from whom or the organization from which the member or former member receives or received remuneration to which the pension plan is related...". CUPE also argues that the Pension Plan is not a "... plan where all the employers are affiliates within the meaning of the *Business Corporations Act*", and therefore is not excluded from the Act's definition of "multi-employer pension plan".

21 The Respondent Sisters and Hospitals argue that the Pension Plan does not meet the definition of a MEPP under s.1 of the Act, and that in any event it should not be administered in accordance with s. 8 (1)(e) of the Act. Their arguments are summarized below:

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1. The Sisters owned and operated all bank accounts from which the Hospitals' payroll and benefit costs were met, in the business names of the Hospitals, and government funding was deposited into the Sisters' bank accounts. Although the Sisters nominated signing officers at each Hospital, no Hospital had authority to borrow or to operate those bank accounts. The requirement of the Public Hospitals Act that a hospital be governed and managed by a board did not confer separate legal existence on the Hospitals, nor did it disregard the Sisters as owner.

2. Prior to the Hospitals' incorporation, the Hospitals were business divisions of the Sisters. The only employer, the only source of remuneration to Hospital employees, was the Sisters. In addition, there was no agreement, statute or municipal by-law requiring any person or organization other than the Sisters to contribute to the Pension Plan.

3. Where a "person" is the employer (as was the Sisters), then the full meaning of "person" in the Act's definition of employer should be accorded and the enquiry should be at an end. Use of the term "organization" in this definition is not intended to confer separate legal status to divisions of persons

4. If, in the alternative, the Commission were to find that the Sisters was not the sole employer, then on a purposive interpretation of the Act, the Hospitals would be affiliates, as each Hospital is controlled by the same person, the Sisters.

5. Finally, if the Commission were to find the Pension Plan to be a MEPP within the meaning of s.1 of the Act, the Respondent Sisters and Hospitals argue that it was not originally established "pursuant to a collective agreement or a trust agreement" and therefore would not be subject to s. 8 (1)(e).

22 For many of the same reasons put forward by the other Respondents, the Superintendent also argued that the Sisters was the only source of Pension Plan members' remuneration and the only employer required to contribute to the Pension Plan, with the result that the Pension Plan was not a MEPP. The Superintendent added that, in the alternative, the Sisters owned and controlled the Hospitals, which meant that the Hospitals were affiliates of the Sisters, and the Pension Plan was not a MEPP.

Laches and Delay

23 The Respondent Sisters and Hospitals also argued that CUPE's delay in requesting this hearing, and the resulting prejudice to the Sisters, should cause the Commission to give effect to the equitable doctrine of laches, and refuse to grant any relief requested by CUPE in this matter.

24 CUPE argued that efforts had been made during the past ten years to deal with the MEPP issue; for example, when discussions were held with the Sisters regarding amalgamation of the Pension Plan with the Hospitals of Ontario Pension Plan ("HOOPP"). Reference to those discussions was noted in the minutes of the Sisters' General Council meeting of November 19, 1992.

25 Given the significance of the MEPP issue, the lack of specific authority in the Act to consider a delay of this nature, and the time required for CUPE to deal fully with the HOOPP discussions, the hearing panel did not find that the delay warranted a refusal to consider the MEPP issue. In the panel's view laches is not covered by s.113 of the Act.

Reasoning and Result

26 In deciding the MEPP issue, the hearing panel must first determine whether the Pension Plan meets the Act's definition of a MEPP. In doing so, the panel must address the following three questions:

(1) Was the Pension Plan established and maintained for two or more employers?

(2) Were contributions made to a pension fund, by those employers or on their behalf, by reason of agreement, statute or municipal by-law?

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(3) Were the employers affiliates within the meaning of the *Business Corporations Act*?

27 If the panel were to conclude that the answers to questions (1) and (2) are "yes" and the answer to question (3) is "no", the plan would be a MEPP. The panel must then determine whether the MEPP i subject to s. 8(1)(e) of the Act, which requires the MEPP to be "established pursuant to a collective agreement or a trust agreement".

(1) Was the Pension Plan established and maintained for two or more employers?

28 In its argument that the Hospitals are separate employers, CUPE stresses the perception given to employees that the Hospitals are separate organizations responsible for pension plan management and other employment-related activities. For example, the panel heard evidence from CUPE representatives that collective bargaining matters were addressed directly by Hospital personnel. Reference was also made to Pension Plan Annual Reports and Hospital planning documents referring to the Hospitals as Pension Plan contributors and separate organizations. CUPE also noted that pay stubs and T4 income tax forms showed the Hospitals, not the Sisters, as employers, and that day-to-day banking transactions were carried out by the Hospitals.

29 On the other hand, these same CUPE representatives gave evidence that they had little or no knowledge of the Sisters' role in Hospital employment matters, nor did any of those witnesses deal directly with the Sisters on these matters. With these two facts in mind, it is not surprising that these witnesses viewed the Hospitals as employers.

30 When the panel heard from witnesses who were familiar with the Sisters' relationship to the Hospitals, or who were directly involved in the Sisters' operations, a quite different picture began to emerge. For example, the Sisters owned and operated the bank accounts, in the business names of the Hospitals, and appointed signing officers through banking resolutions passed by the Sisters. All Ministry of Health funding pursuant to the *Public Hospitals Act* was deposited to these bank accounts, and all payroll and benefit costs were paid from them.

31 While Hospital names were shown on pay stubs and T4 forms, there is no question in the minds of the hearing panel that employees' remuneration, to which pension benefits were related, was paid from bank accounts under the control of the Sisters. The Sisters also appointed the auditors for Hospital financial statements, approved appointments of Hospital Board members and other senior officers, and approved Hospital by-laws. Not only did the Sisters own the property used in the operation of the Hospitals, but evidence was also given that assets of one Hospital were available to the Sisters to satisfy the debt of another Hospital.

32 In the panel's view, none of the three Hospitals controlled bank accounts from which employees remuneration was paid, with the result that none of the Hospitals could be considered employers as defined in the Act. Instead, the Hospitals were functioning as business divisions of a single employer, the Sisters, which had retained the powers to own and operate each of the Hospitals.

33 As a result, the panel concludes that prior to incorporation of the Hospitals, the Pension Plan was established and maintained for employees of only one employer, the Sisters.

(2) Were Pension Plan contributions required to be made to the pension fund by more than one employer by reason of agreement, statute or municipal by-law?

34 Having determined that, prior to the Hospitals' incorporation, only one employer, the Sisters, existed for purposes of the Pension Plan, the panel then directed its attention to the question of whether contributions were required from more than one employer by reason of any agreement, statute or municipal by-law. The hearing panel was presented with no evidence that Pension Plan contribution were made by reason of statute or municipal by-law.

35 Was there an agreement under which contributions to the Pension Plan were required from more than one employer? The Sisters first established the Pension Plan effective January 1, 1958 through group annuity contract with the Canada Life Assurance Company, which identified only the Sisters as the employer contributing to the Pension Plan. The group

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annuity makes no reference to Hospitals contributing to the Pension Plan. A trust agreement made March 31, 1975 between National Trust Company and the Sisters provided for "pension contributions on account of its said hospital employees" to be received by the trustee. This trust agreement makes no reference to Hospitals contributing to the Pension Plan.

36 The collective agreements for CUPE members require participation in the Pension Plan, but no reference is made to the amount of any contributions, how those contributions are made, or who makes them.

37 The Pension Plan text contains the following definitions:

> 1.20 "Employee" means any employee who is employed on a full-time or less than full-time basis at an Hospital. .....
>
> 1.21 "Employer" means for purposes of this Plan only, the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada in its personal capacity as employer with respect to the Hospitals.

38 The "Contributions" section of the Pension Plan, in addition to requiring Employees to contribute, states that:

> 3.02 "The Employer shall pay into the Pension Fund ..... in such amounts and at such times as the Sisters of St. Joseph shall determine." .....

39 While the Pension Plan text contains some ambiguous wording, the Employer is clearly defined as the Sisters and it is only the Sisters and the Employees that are required to contribute to the Pension Plan.

40 As a result, the panel concluded that the Sisters was the only employer required to contribute to the Pension Plan by reason of agreement, statute or municipal by-law.

(3) Were the employers affiliates within the meaning of the Business Corporation Act?

41 Given the panel's finding that the Sisters was the only employer contributing to the Pension Plan, and the only employer required to contribute to the Pension Plan, there is no need to address this third aspect of the MEPP definition.

Conclusion

42 For these reasons, the hearing panel finds that the Pension Plan did not meet the definition of a MEPP under the Act, and therefore is not subject to the requirements of s. 8 (1)(e) of the Act.

Application dismissed.

End of Document

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TAB 6

Most Negative Treatment: Distinguished
Most Recent Distinguished: Lacroix v. Canada Mortgage and Housing Corp. | 2012 ONCA 243, 2012 CarswellOnt 4342, 349 D.L.R. (4th) 1, 15 C.P.C. (7th) 1, 96 C.C.P.B. 222, 75 E.T.R. (3d) 42, 214 A.C.W.S. (3d) 619, 110 O.R. (3d) 81, 2012 C.E.B. & P.G.R. 8482 (headnote only), 290 O.A.C. 99 | (Ont. C.A., Apr 18, 2012)

2004 SCC 54, 2004 CSC 54
Supreme Court of Canada

Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)

2004 CarswellOnt 3172, 2004 CarswellOnt 3173, 2004 SCC 54, 2004 C.E.B. & P.G.R. 8112 (headnote only), 2004 CSC 54, [2004] 3 S.C.R. 152, [2004] S.C.J. No. 51, 132 A.C.W.S. (3d) 579, 17 Admin. L.R. (4th) 1, 189 O.A.C. 201, 242 D.L.R. (4th) 193, 324 N.R. 259, 41 C.C.P.B. 106, 45 B.L.R. (3d) 161, 75 O.R. (3d) 479 (note), 75 O.R. (3d) 479, J.E. 2004-1546, REJB 2004-68722

Monsanto Canada Inc., Appellant v. Superintendent of Financial Services, Respondent

The Association of Canadian Pension Management, Appellant v. Superintendent of Financial Services, Respondent and Attorney General of Canada, National Trust Company, Nicole Lacroix, R. M. Smallhorn, D. G. Halsall, S. J. Galbraith, S. W. (Bud) Wesley, Canadian Labour Congress and Ontario Federation of Labour, Interveners

McLachlin C.J.C., Iacobucci, Major, Bastarache, Binnie, Deschamps, Fish JJ.

Heard: February 16, 2004
Judgment: July 29, 2004
Docket: 29586

Proceedings: affirming *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* (2002), 2002 CarswellOnt 3953, 32 C.C.P.B. 248, 21 C.C.E.L. (3d) 11, 29 B.L.R. (3d) 18, C.E.B. & P.G.R. 8478 (note), 220 D.L.R. (4th) 385, 62 O.R. (3d) 305, 166 O.A.C. 131 (Ont. C.A.); affirming *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* (2001), 2001 CarswellOnt 831, 198 D.L.R. (4th) 109, 144 O.A.C. 204, 27 C.C.P.B. 82, 10 C.C.E.L. (3d) 257, C.E.B. & P.G.R. 8379 (note) (Ont. Div. Ct.); reversing *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* (2000), 2000 CarswellOnt 1400, 23 C.C.P.B. 148, 50 C.C.E.L. (2d) 303, 3 B.L.R. (3d) 99 (F.S. Trib.)

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J. Brett Leger, Lindsay P. Hill for Intervener National Trust Company
William J. Sammon for Intervener Nicole Lacroix
Howard Goldblatt, Dona Campbell, Ethan Poskanzer for Interveners Canadian Labour Congress, Ontario Federation of Labour
Mark Zigler, Ari N. Kaplan for Interveners R.M. Smallhorn, D.G. Halsall, S.J. Gailbraith, S.W. (Bud) Wesley

Subject: Employment; Corporate and Commercial; Estates and Trusts; Civil Practice and Procedure

Headnote

Pensions --- Surplus funds — Termination of plan

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Superintendent of Financial Services refused to approve partial wind up report — Financial Services Tribunal ordered Superintendent to approve report — Superintendent successfully appealed — Appeal by M Inc. dismissed — M Inc. and pension management association appealed — Appeal dismissed — Section 70(6) of Pension Benefits Act required distribution of actuarial surplus related to part of Plan being wound up on effective date of partial wind up — Tribunal incorrectly interpreted provision at first instance.

Pensions --- Administration of pension plans — Winding-up of plan — Distributions on winding-up

Superintendent of Financial Services refused to approve partial wind up report — Financial Services Tribunal ordered Superintendent to approve report — Superintendent successfully appealed — Appeal by M Inc. dismissed — M Inc. and pension management association appealed — Appeal dismissed — Section 70(6) of Pension Benefits Act required distribution of actuarial surplus related to part of Plan being wound up on effective date of partial wind up — Tribunal incorrectly interpreted provision at first instance.

Pensions --- Administration of pension plans — Winding-up of plan — Partial wind-ups

Superintendent of Financial Services refused to approve partial wind up report — Financial Services Tribunal ordered Superintendent to approve report — Superintendent successfully appealed — Appeal by M Inc. dismissed — M Inc. and pension management association appealed — Appeal dismissed — Section 70(6) of Pension Benefits Act required distribution of actuarial surplus related to part of Plan being wound up on effective date of partial wind up — Tribunal incorrectly interpreted provision at first instance.

Pensions --- Practice in pension actions — Appeals

Superintendent of Financial Services refused to approve partial wind up report — Financial Services Tribunal ordered Superintendent to approve report — Superintendent successfully appealed — Appeal by M Inc. dismissed — M Inc. and pension management association appealed — Appeal dismissed — Standard of review of correctness should be adopted — Issue on appeal was pure question of law related to the interpretation of section of Pension Benefits Act that had no specialized technical meaning — Issues raised in s. 70(6) of Pension Benefits Act were legal in nature — There were no persuasive grounds for court to grant Tribunal any deference on pure question of law.

Régimes de retraite --- Excédent d'actifs — Terminaison du régime

Surintendante des services financiers a refusé d'approuver un rapport de liquidation partielle — Tribunal des services financiers a ordonné à la Surintendante d'approuver le rapport — Surintendante a interjeté appel avec succès — Pourvoi de M inc. a été rejeté — M inc. et l'association des administrateurs de régimes de retraite ont interjeté appel — Pourvoi rejeté — Article 70(6) de la Loi sur les régimes de retraite commandait que la répartition de l'excédent actuariel se rapportant au groupe touché par la liquidation partielle soit effectuée à la date de la prise d'effet de cette liquidation. — Tribunal a mal interprété la disposition.

Régimes de retraite --- Administration des régimes de retraite — Liquidation du régime — Distribution dans le cadre d'une liquidation

Surintendante des services financiers a refusé d'approuver un rapport de liquidation partielle — Tribunal des services financiers a ordonné à la Surintendante d'approuver le rapport — Surintendante a interjeté appel avec succès — Pourvoi de M inc. a été rejeté — M inc. et l'association des administrateurs de régimes de retraite ont interjeté appel — Pourvoi rejeté — Article 70(6) de la Loi sur les régimes de retraite commandait que la répartition de l'excédent actuariel se rapportant au groupe touché par la liquidation partielle soit effectuée à la date de la prise d'effet de cette liquidation. — Tribunal a mal interprété la disposition.

Régimes de retraite --- Administration des régimes de retraite — Liquidation du régime — Liquidation partielle

Surintendante des services financiers a refusé d'approuver un rapport de liquidation partielle — Tribunal des services financiers a ordonné à la Surintendante d'approuver le rapport — Surintendante a interjeté appel avec succès —

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Pourvoi de M inc. a été rejeté — M inc. et l'association des administrateurs de régimes de retraite ont interjeté appel — Pourvoi rejeté — Article 70(6) de la Loi sur les régimes de retraite commandait que la répartition de l'excédent actuariel se rapportant au groupe touché par la liquidation partielle soit effectuée à la date de la prise d'effet de cette liquidation. — Tribunal a mal interprété la disposition.

Régimes de retraite --- Procédure dans le cadre d'actions concernant des régimes de retraite — Appels

Surintendante des services financiers a refusé d'approuver un rapport de liquidation partielle — Tribunal des services financiers a ordonné à la Surintendante d'approuver le rapport — Surintendante a interjeté appel avec succès — Pourvoi de M inc. a été rejeté — M inc. et l'association des administrateurs de régimes de retraite ont interjeté appel — Pourvoi rejeté — Norme de contrôle à adopter était celle de la décision correcte — Question en appel était une question de droit pure liée à l'interprétation d'une disposition de la Loi sur les régimes de retraite n'ayant aucun sens technique ou spécialisé — Questions soulevées par l'art. 70(6) de la Loi sur les régimes de retraite étaient de nature juridique — Aucun motif convainquant ne justifiait la Cour de faire preuve de retenue à l'égard de la décision du Tribunal sur la question de droit pure.

M Inc. consolidated three separate pension plans in 1996 to form the Pension Plan for Employees. As a result of a subsequent reorganization, 146 active members of the Plan received notices of termination. M Inc.'s report to the Superintendent of Financial Services provided that the partial wind up was to be effective May 31, 1997. As of that date, information supplied showed that there was an actuarial surplus of $19.1 million. The pro rata share of the surplus related to the part of the Plan being wound up was approximately $3.1 million. The Superintendent refused to approve the partial wind up report for failing to provide for the distribution of surplus assets relating the part of the Plan being wound up. A majority of the Financial Services Tribunal ordered the Superintendent to approve the report, deciding that s. 70(6) of the Pension Benefits Act provided no more than a right to participate in surplus distribution when, if ever, the Plan fully wound up. The Superintendent successfully appealed. An appeal by M Inc. was dismissed. M Inc. and a pension management association appealed.

Held: The appeal was dismissed.

A standard of review of correctness should be adopted. No privative clause had been enacted to insulate the Tribunal's jurisdiction. The issue on appeal was a pure question of law related to the interpretation of a section of the Pension Benefits Act that had no specialized technical meaning. The Tribunal would not have any greater expertise than the courts in construing s. 70(6). The issues raised in s. 70(6) were legal in nature. There were no persuasive grounds for the court to grant the Tribunal any deference of the pure question of law in the case.

An interpretation of s. 70(6) as requiring surplus distribution on partial wind up accorded better with the ordinary and grammatical meaning of the section. Section 70(6) mandates that the affected members "shall have", on the effective date of the partial wind up, the rights and benefits they "would have" on a full wind up. This wording transposed the timing of the rights and benefits exigible on full wind up, up to the effective date of partial wind up and did not connote any delay until the future date of full wind up before the exercise of the acquired rights. The actual wording of "shall have rights and benefits . . . on the effective date" indicated a more immediate realization of rights and benefits. The presence of the phrase "on the effective date of the partial wind up" confirmed that rights and benefits are not only measured but also realized on the effective date of partial wind up. Section 70(6) indicates that the assessment of rights and benefits is to be conducted as if the Plan was winding up in full on the effective date of the partial wind up. The realization of rights and benefits, including the distribution of surplus assets, then occurs for the part of the Plan being wound up.

Under the statutory scheme, a partial wind up is treated the same as a full wind up in evaluating rights and procedural requirements. A partial wind up requires a full wind up to notionally occur for the purposes of evaluating the pro rata share of the assets and liabilities related to the partial wind up, followed by the continuation of the remainder

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of the Plan. The role of s. 70(6) in the statutory scheme appears to be as a residual deeming provision reflecting the legislature's intent of assuring that rights on partial wind up are not less than those available on full wind up, whether granted under the Act or under the terms of the Plan. The scheme of the Act and of the regulations support the ordinary and grammatical meaning of s. 70(6) as requiring distribution at the time of partial wind up.

A construction of s. 70(6) that is in accordance with the terms of the statute was unlikely to disrupt the balance between employer and employee interests. Requiring that the pro rata share of the actuarial surplus be distributed at the time of the partial wind up was unlikely to compromise the continuing integrity of the pension fund. The most equitable solution was to distribute the fortunes of favourable markets at the time the affected members were terminated. In that way, the windfall of the surplus was related to their actual time and participation in the plan. It is at the time of termination that the right of affected members to any surplus was most needed. Section 70(6) requires the distribution of actuarial surplus related to the part of the Plan being wound up, on the effective date of the partial wind up.

En 1996, M inc. a fusionné trois régimes de retraite afin de former le Régime de retraite des employés. En raison de la restruction qui s'en suivi, 146 participants actifs au régime ont reçu des avis de licenciement. Le rapport présenté par M inc. à la Surintendante des services financiers prévoyait que la liquidation partielle prendrait effet le 31 mai 1997. Les renseignements fournis montraient, à cette date-là, l'existence d'un excédent actuariel de 19,1 millions de dollars. La part de l'excédent correspondant à la partie du Régime en voie de liquidation était d'environ 3,1 millions de dollars. La Surintendante a refusé d'approuver le rapport de liquidation partielle au motif qu'il ne prévoyait pas la distribution de l'excédent d'actif correspondant à la partie du Régime en voie de liquidation. La majorité du Tribunal des services financiers a ordonné à la Surintendante d'approuver le rapport, après avoir conclu que l'art. 70(6) de la Loi sur les régimes de retraite ne prévoyait le droit de participer à la distribution de l'excédent qu'en cas de liquidation totale du régime. La Surintendante a interjeté appel avec succès. Le pourvoi de M inc. a été rejeté. M inc. et l'association des administrateurs de régimes de retraite ont interjeté appel.

Arrêt: Le pourvoi a été rejeté.

La norme de contrôle à adopter était celle de la décision correcte. Aucune clause privative n'a été édictée afin de soustraire les décisions du Tribunal à l'examen en appel. La question en appel était une pure question droit liée à l'interprétation d'un article de la Loi sur les régimes de retraite n'ayant aucun sens technique ou spécialisé. Le Tribunal ne possédait pas une plus grande expertise que les tribunaux judiciaires pour interpréter l'art. 70(6). Les questions soulevées par l'art. 70(6) étaient de nature juridique. Aucun motif convainquant ne justifiait la Cour de faire preuve de retenue à l'égard de la décision du Tribunal sur la question de droit pure.

Le sens grammatical et ordinaire de l'article était mieux respecté par une interprétation de l'art. 70(6) comme exigeant la distribution de l'excédent à la liquidation partielle. L'article 70(6) énonce que les participants touchés « ont », à la date de la prise d'effet de la liquidation partielle, les droits et prestations « qu'ils auraient » à la liquidation totale. Ce libellé transposait à la date de prise d'effet de la liquidation partielle le moment où les droits et prestations exigibles à la liquidation totale étaient réalisés. Il ne laissait pas entendre qu'il fallait attendre jusqu'à la date de la liquidation totale pour exercer les droits acquis. Le libellé « ont des droits et prestations [...] à la date de prise d'effet » comportait l'idée d'une réalisation immédiate des droits et prestations. La présence de la mention « à la date de prise d'effet de la liquidation partielle » confirmait que les droits et prestations étaient non seulement déterminés mais aussi réalisés à la date de prise d'effet de la liquidation partielle. L'article 70(6) prévoit que la détermination des droits et prestations doit être effectuée comme si le Régime était liquidé totalement à la date de prise d'effet de la liquidation partielle. La réalisation des droits et prestations, incluant la distribution de l'excédent d'actif, se produit alors pour la partie du Régime qui est effectivement en liquidation.

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Selon le régime législatif, l'évaluation des droits et la procédure de liquidation sont les mêmes, que la liquidation soit partielle ou totale. Pour l'évaluation de la part de l'actif et du passif qui correspond à la partie du régime en cours de liquidation, il faut présupposer la mise en oeuvre d'une liquidation totale fictive. Le reste du régime continue d'exister par la suite. L'article 70(6) apparaît comme une disposition résiduelle qui crée une présomption, reflétant ainsi l'intention du législateur de veiller à ce que les droits à la liquidation partielle ne soient pas inférieurs à ceux dévolus lors de la liquidation totale, que ces derniers soient issus de la Loi ou du régime. L'économie de la Loi et de ses règlements mettent en évidence que le sens ordinaire et grammatical de l'art. 70(6) commande une répartition de l'excédent lors d'une liquidation partielle.

Une interprétation de l'art. 70(6) correspondant au libellé de la Loi ne perturberait vraisemblablement pas l'équilibre entre les intérêts des employeurs et des employés. Exiger que la part proportionnelle de l'excédent actuariel soit répartie à la liquidation partielle ne compromettrait vraisemblablement pas l'intégrité de la caisse de retraite. La solution la plus équitable consistait à distribuer les bénéfices d'une conjoncture favorable au moment où les participants touchés ont perdu leur emploi. De cette manière, ce cadeau du ciel était relié à leur participation réelle au Régime. C'était au moment de la cessation de leur emploi que leur droit à l'excédent était le plus utile. L'article 70(6) commande que la répartition de l'excédent actuariel qui se rapporte au groupe touché par la liquidation partielle soit effectuée à la date de la prise d'effet de cette liquidation.

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Q. v. College of Physicians & Surgeons (British Columbia) (2003), (sub nom. *Dr. Q. v. College of Physicians & Surgeons of British Columbia)* [2003] 1 S.C.R. 226, 2003 SCC 19, 2003 CarswellBC 713, 2003 CarswellBC 743, 11 B.C.L.R. (4th) 1, [2003] 5 W.W.R. 1, 223 D.L.R. (4th) 599, 48 Admin. L.R. (3d) 1, (sub nom. *Dr. Q., Re)* 302 N.R. 34, (sub nom. *Dr. Q., Re)* 179 B.C.A.C. 170, (sub nom. *Dr. Q., Re)* 295 W.A.C. 170 (S.C.C.) — referred to

R. v. Shirose (1999), 1999 CarswellOnt 948, 1999 CarswellOnt 949, (sub nom. *R. v. Campbell)* 237 N.R. 86, 133 C.C.C. (3d) 257, (sub nom. *R. v. Campbell)* 42 O.R. (3d) 800 (note), 171 D.L.R. (4th) 193, (sub nom. *R. v. Campbell)* 119 O.A.C. 201, (sub nom. *R. v. Campbell)* 43 O.R. (3d) 256 (note), 24 C.R. (5th) 365, (sub nom. *R. v. Campbell)* [1999] 1 S.C.R. 565 (S.C.C.) — referred to

Ryan v. Law Society (New Brunswick) (2003), (sub nom. *Law Society of New Brunswick v. Ryan)* [2003] 1 S.C.R. 247, 2003 SCC 20, 2003 CarswellNB 145, 2003 CarswellNB 146, 223 D.L.R. (4th) 577, 48 Admin. L.R. (3d) 33, 302 N.R. 1, 257 N.B.R. (2d) 207, 674 A.P.R. 207, 31 C.P.C. (5th) 1 (S.C.C.) — referred to

Schmidt v. Air Products of Canada Ltd. (1994), 3 C.C.P.B. 1, 20 Alta. L.R. (3d) 225, (sub nom. *Stearns Catalytic Pension Plans, Re)* 168 N.R. 81, [1994] 8 W.W.R. 305, 3 E.T.R. (2d) 1, 4 C.C.E.L. (2d) 1, [1994] 2 S.C.R. 611, 115 D.L.R. (4th) 631, (sub nom. *Stearns Catalytic Pension Plans, Re)* 155 A.R. 81, (sub nom. *Stearns Catalytic Pension Plans, Re)* 73 W.A.C. 81, C.E.B. & P.G.R. 8173, 1994 CarswellAlta 138, 1994 CarswellAlta 746, [1995] O.P.L.R. 283 (S.C.C.) — followed

Voice Construction Ltd. v. Construction & General Workers' Union, Local 92 (2004), 2004 SCC 23, 2004 CarswellAlta 422, 2004 CarswellAlta 423, (sub nom. *Construction & General Workers' Union, Local 92 v. Voice Construction Ltd.)* 2004 C.L.L.C. 220-026 (S.C.C.) — referred to

Statutes considered:

Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28

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s. 1 "regulated sector" — referred to

s. 6(1) — referred to

s. 6(3) — referred to

s. 6(4) — referred to

s. 7 — referred to

s. 7(2) — referred to

s. 20 — referred to

s. 21(4) — referred to

s. 22 — referred to

Pension Benefits Act, 1987, S.O. 1987, c. 35
s. 70(6) — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8
Generally — referred to

s. 1 "partial wind up" — considered

s. 1 "surplus" — considered

s. 1 "wind up" — considered

s. 68 — referred to

ss. 68-70 — referred to

s. 69 — referred to

s. 70 — referred to

s. 70(1)(c) — referred to

s. 70(6) — referred to

s. 73 — considered

s. 73(1)(b) — referred to

s. 73(2) — considered

s. 74(1) — referred to

s. 77 — referred to

s. 78(1) — referred to

s. 79(1) — referred to

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s. 79(3) — referred to

s. 79(4) — referred to

s. 84(1) — referred to

s. 91(1) — referred to

Regulations considered:

Pension Benefits Act, R.S.O. 1980, c. 373
General, R.R.O. 1980, Reg. 746

Generally

Pension Benefits Act, S.O. 1987, c. 35
General, O. Reg. 708/87

Generally

Pension Benefits Act, R.S.O. 1990, c. P.8
General, R.R.O. 1990, Reg. 909

s. 1(2) "going concern valuation"

s. 4(1)

s. 8

s. 8(1)

s. 8(3)

s. 9

s. 10

s. 10.1 [en. O. Reg. 286/97]

s. 13(1)

s. 13(1.1) [en. O. Reg. 712/92]

s. 16

s. 25(1)

s. 25(2)

s. 25(4)

s. 25(5)

s. 26

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s. 28(5)

s. 28(6)

s. 28.1 [en. O. Reg. 144/00]

s. 28.1(2) [en. O. Reg. 144/00]

APPEAL from judgment reported at *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* (2002), 2002 CarswellOnt 3953, 32 C.C.P.B. 248, 21 C.C.E.L. (3d) 11, 29 B.L.R. (3d) 18, C.E.B. & P.G.R. 8478 (note), 220 D.L.R. (4th) 385, 62 O.R. (3d) 305, 166 O.A.C. 131 (Ont. C.A.) dismissing appeal from judgment allowing appeal from tribunal decision.

POURVOI à l'encontre de l'arrêt publié à *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* (2002), 2002 CarswellOnt 3953, 32 C.C.P.B. 248, 21 C.C.E.L. (3d) 11, 29 B.L.R. (3d) 18, C.E.B. & P.G.R. 8478 (note), 220 D.L.R. (4th) 385, 62 O.R. (3d) 305, 166 O.A.C. 131 (C.A. Ont.), qui a rejeté le pourvoi à l'encontre du jugement qui avait accueilli le pourvoi à l'encontre de la décision du tribunal administratif.

***Deschamps J.*:**

1 Pension law is a field which is gaining in importance as more and more people retire and look to their pensions to sustain them during their "golden years". The complex exercise of actuarial accounting that determines how pensions should be funded is rivalled only by the complexity of the law determining the pension rights and obligations of employees and employers, which often meets at the intersection of contracts, trust law, and statute law. This appeal is an attempt to bring some clarity to a relatively confined area of pension law, which has been the subject of much debate: when there is a partial wind up of an Ontario defined benefit pension plan, must the actuarial surplus be distributed at that time?

2 In particular, does s. 70(6) of the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P. 8 ("Act"), require the distribution of a proportional share of actuarial surplus when a defined benefit pension plan is partially wound up? The Superintendent of Financial Services answered this question in the affirmative. She refused to approve the partial wind up report of the appellant, Monsanto Canada Inc. ("Monsanto"), for failing to provide for the distribution of surplus assets related to the part of the Pension Plan being wound up. A majority of the Financial Services Tribunal ("Tribunal") disagreed with the Superintendent and ordered her to approve the report: (2000) 3 B.L.R (3d) 99. The majority held that s. 70(6) provides no more than a right to participate in surplus distribution when, if ever, the Plan fully winds up. The Ontario Divisional Court overturned the Tribunal on appeal ((2001), 198 D.L.R. (4th) 109 (Ont. Div. Ct.)) and the Court of Appeal agreed ((2002), 62 O.R. (3d) 305 (Ont. C.A.)). Monsanto and The Association of Canadian Pension Management now appeal to this Court. The appeal, for the reasons that follow, should be dismissed.

I. Facts

3 The factual foundation of the legal question raised in the present appeal can be briefly stated. Monsanto originally maintained three separate pension plans in respect of various operations. Effective January 1, 1996, these plans were consolidated to form the Pension Plan for Employees of Monsanto Canada Inc. ("Plan"). As a result of a subsequent reorganization of Monsanto, involving a staff reduction program and a plant closure, 146 active members of the Plan ("Affected Members") received notice that their employment with Monsanto would terminate between December 31, 1996 and December 31, 1998. Monsanto's report to the Superintendent provided that the partial wind up was to be effective May 31, 1997. As of that date, the information supplied to the regulator by the actuaries for the Plan showed that there was an actuarial surplus of some $19.1 million, representing the amount by which the estimated asset value exceeded the estimated liabilities. According to the evidence, the pro rata share of the surplus related to the part of the Plan being wound up is approximately $3.1 million.

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4 One of the bases for the Superintendent's refusal to approve Monsanto's report was the failure to provide for the distribution of this surplus on partial wind up, in accordance with s. 70(6) of the Act. This is the only ground still in issue before this Court as the other bases for refusal were not pursued on this appeal. Also noteworthy is the fact that this matter is preliminary to the question of surplus entitlement, which is not affected by this decision and will need to be determined at a later date.

II. Issue

5 The only issue in this appeal is whether the Tribunal properly interpreted s. 70(6) of the Act as not requiring distribution of the actuarial surplus on a partial plan wind up. Thus, the analysis must proceed in two stages. First, the appropriate standard of review of the Tribunal's decision must be determined. Second, the Tribunal's interpretation of s. 70(6) must be measured against this standard. All of the relevant legislative provisions are annexed at the end of these reasons.

III. Standard of Review

6 The courts below found, and the appellants and respondent agreed, that the appropriate standard of review of the Tribunal's decision was reasonableness. However, the standard of review is a question of law, and agreement between the parties cannot be determinative of the matter. An evaluation of the four factors comprising the pragmatic and functional approach is required to decide the appropriate level of deference this Court should grant in reviewing the decision.

A. Privative Clause

7 The legislature did not enact a privative clause to insulate the Tribunal's jurisdiction. To the contrary, s. 91(1) of the Act provides for a statutory right of appeal to the Divisional Court. While not determinative, this factor suggests that the legislature intended less deference to be afforded to the Tribunal on judicial review (*Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476 (S.C.C.), at para. 11; *Deputy Minister of National Revenue v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100 (S.C.C.), at para. 27).

B. Nature of the Problem

8 The issue on appeal is a pure question of law, related to the interpretation of a section that has no specialized technical meaning. Statutory interpretation is an exercise in which the courts are well equipped to engage. The question here concerns the establishment of statutory rights by construing the legislature's intention from the text of s. 70(6), the legislative purpose, and the statutory context in which it is situated. Generally speaking, such legal questions will attract a more searching standard of review as being clearly within the expertise of the judiciary, unless the legal question is "at the core" of the Tribunal's expertise (*Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23 (S.C.C.), at para. 29; see also, *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), at para. 34).

C. Relative Expertise

9 The expertise of the Tribunal relative to that of the courts must be evaluated in reference to the particular provision being invoked and interpreted and the nature of the Tribunal's expertise (*Barrie, supra*, at paras. 12-13; *Pushpanathan*, *supra*, at para. 28). In other words, relative expertise must be evaluated in context and in relation to the specific question under review (*Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247 (S.C.C.), at para. 30).

10 On the one hand, we have to look at courts' expertise and the subject matter which is, as discussed in the previous sections, the statutory interpretation of s. 70(6). On its face, the provision sets out the rule of parity between situations of partial wind up and full wind up. Except perhaps in demonstrating the practical implications of proposed interpretations, the issue is neither factually laden nor highly technical. In this case, as it is generally, statutory interpretation is "a purely

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legal question... 'ultimately within the province of judiciary'" (*Barrie, supra*, at para. 16; see also *Attis v. New Brunswick District No. 15 Board of Education*, [1996] 1 S.C.R. 825 (S.C.C.), at para. 28).

11 On the other hand, the Tribunal does not have specific expertise in this area. The Tribunal is a general body that was created under the *Financial Services Commission of Ontario Act*, 1997, S.O. 1997, c. 28, s. 20 ("*FSCOA*"), to replace the specialized Pension Services Commission. It is responsible for adjudication in a variety of "regulated sectors" (*FSCOA*, s. 1), including co-operatives, credit unions, insurance, mortgage brokers, loans and trusts, and pensions (*FSCOA*, s. 1). In addition, the nature of the Tribunal's expertise is primarily adjudicative. Unlike the former Pension Services Commission or the current Financial Services Commission, the Tribunal has no policy functions as part of its pensions mandate (see *FSCOA*, s. 22). As noted in *Mattel Canada, supra*, and in *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324 (S.C.C.), involvement in policy development will be an important consideration in evaluating a tribunal's expertise. Lastly, in appointing members to the Tribunal and assigning panels for hearings, the statute advises that, to the extent practicable, expertise and experience in the regulated sectors should be taken into account (*FSCOA*, ss. 6(4), 7(2)). However, there is no requirement that members necessarily have special expertise in the subject matter of pensions. The Tribunal is a small entity of six to 12 members which further reduces the likelihood that any particular panel would have expertise in the matter being adjudicated (*FSCOA*, s. 6(3)).

12 Overall, there is little to indicate that the legislature intended to create a body with particular expertise over the statutory interpretation of the Act. The Tribunal would not have any greater expertise than the courts in construing s. 70(6). Thus, this factor also suggests a lower amount of deference is required to be given to the Tribunal's decisions on the issue of statutory interpretation.

D. Purposes of the Legislation and the Provision

13 The purpose of the Act was well stated in *GenCorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at p. 503:

> [T]he *Pension Benefits Act* is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and "evinces a special solicitude for employees affected by plant closures"...

14 On the one hand, the protection of the rights of vulnerable groups is a central and long-standing function of the courts. The protectionist aim of the legislation is especially evident in s. 70(6), which seeks to preserve the equal treatment and benefits between situations of partial wind up and full wind up. On the other hand, pension standards legislation is a complex administrative scheme, which seeks to strike a delicate balance between the interests of employers and employees, while advancing the public interest in a thriving private pension system. In this task, the regulatory body usually has a certain advantage in being closer to the dispute and the industry. In part, this factor led the Ontario Court of Appeal in *GenCorp* to conclude that the decisions of the Pension Services Commission should be reviewed on a standard of reasonableness.

15 Here, however, the Tribunal assumes a different role and function in relation to the statutory purpose of the particular provision at issue. The determination of the meaning of s. 70(6) is not "polycentric" in nature. In other words, s. 70(6) does not grant the Tribunal broad discretionary powers nor a range of policy-laden remedial choices that involve the balancing of multiple sets of interests of competing constituencies (see *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at para. 56; *Pushpanathan*, *supra*, at para. 36; *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), at paras. 30-31). Moreover, the issues raised in s. 70(6) are legal in nature, rather than economic, broad, specialized, technical or scientific in such a way as to substantially deviate from the normal role of the courts (*Q.*, *supra*, at para. 31; *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at paras. 48-49). Therefore, this factor also seems to indicate less deference be accorded to the Tribunal's interpretation.

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E. Conclusion on the Standard of Review

16 As all four factors point to a lower degree of deference, a standard of review of correctness should be adopted in this case. There are no persuasive grounds for the Court to grant the Tribunal any deference on the pure question of law before us in this case (See also *Barrie, supra*, at para. 18, citing *Pushpanathan*, *supra*, at para. 37).

IV. Statutory Interpretation of Section 70(6)

17 I now turn to the essence of this appeal: the question of the interpretation of s. 70(6). The provision reads:

> 70. (6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

18 The appellants argue that the effect of the provision is to afford Affected Members a vested right, as of the effective date of partial wind up, to participate in surplus distribution when, if ever, the Plan fully winds up, assuming they are so entitled under the Plan agreement. In contrast, the respondent contends that s. 70(6) requires that the distribution of the surplus actually occurs on the effective date of the partial wind up. The main area of contention between the parties is the import of the last phrase: "on the effective date of the partial wind up".

19 The established approach to statutory interpretation was recently reiterated by Iacobucci J. in *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 (S.C.C.), at para. 26, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:

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

I will examine each of these factors in turn, beginning first with the background context.

A. Historical Context

20 Pension plans have a long history in Canada, first appearing in the late 19th century. However, it was not until after the Second World War that the development of pension plans flourished in tandem with the economic growth and prosperity of the era (see *Report of the Royal Commission on the Status of Pensions in Ontario* (1980), vol. I, at p. 35; R.L. Deaton, *The Political Economy of Pensions* (1989), at p. 79). In the early days, pensions were commonly regarded as gratuitous rewards for long and faithful service, subject to the discretion and financial health of the employer (see *Report of the Royal Commission on the Status of Pensions in Ontario*, vol. I, at p. 2; *Mercer Pension Manual* (loose-leaf ed.), at p. 1-9. However, particularly as pensions became a more familiar sight at the collective bargaining table, a competing conception as an enforceable employee right developed, (see E.E. Gillese, "Pension Plans and The Law of Trusts" (1996), 75 *Can. Bar Rev.* 221, at pp. 226-27; Deaton, *supra*, at pp. 122-23). The enactment of minimum standards legislation in Ontario, first in 1963 and again in 1987, "considerably expanded the rights of plan members. It altered, again, the power balance between employers and employees in the matter of pensions" (Gillese, *supra*, at p. 228).

21 The notion of a pension fund actuarial surplus, by contrast, has had a much shorter history. Surpluses, in any noticeable form, generally did not appear before the early 80s when millions of dollars in actuarial surplus were developing in some funds (see e.g. J. Dewetering, *Occupational Pension Plans: Selected Policy Issues* (1991), at p. 17; Deaton, *supra*, at p. 134). Surplus can only arise in defined benefit plans, like the one provided by Monsanto, because, in contrast to defined contribution plans, benefits or plan liabilities are not contingent on the level of nor return on contributions. Members are guaranteed specific benefits at retirement in an amount fixed by a determined formula. Contributions are made each year on the basis of an actuary's estimate of the amount which must be presently invested in order to provide the stipulated benefits at the time the pension is paid out ("current service cost"). These estimates

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are generally conservative in nature and based on a narrow range of assumptions consistent with actuarial standards and practices. This exercise is inherently somewhat speculative, and in the event of changes in market conditions or other unforeseeable future experience, the present value of the assets of the fund may actually be lower or greater than originally estimated.

22 If, in a given year, the assets of the fund, evaluated as a going concern, are found to be insufficient to cover the current service cost, there is said to be an "unfunded liability" and the employer will be called upon to make up the deficit through contributions (see generally, s. 4(1) of *The Pension Benefits Act General Regulations*, R.R.O. 1990, Reg. 909). If the plan is underfunded on wind up, then benefits will be reduced, subject to the application in Ontario of the Pension Benefits Guarantee Fund (ss. 77 and 84(1) of the Act). In contrast, if the value of the assets are greater than originally estimated, the fund is said to have a surplus, being "the excess of the value of the assets of a pension fund related to a pension plan over the value of the liabilities under the pension plan" (s. 1 of the Act). The surplus is considered "actuarial" because it has not yet been concretely realized through the liquidation of assets and the payment of liabilities.

23 Consequently, in the 80s, the surplus issue became a hotly contested one. Employers claimed the surplus as the result of their assumption of risk, while employees maintained that the fund, including the surplus, represented deferred wages belonging to them. It was in this context that the legislature re-enacted s. 70(6) as part of the *Pension Benefits Act, 1987*, S.O. 1987, c. 35, virtually unchanged from the previous version introduced in 1969 (O. Reg. 103/66, s. 11, as am. by O. Reg. 91/69, s. 3; see *Hansard, Official Report of Debates* First, Second and Third Sessions, 33rd Parliament, January 13, 1986 to June 25, 1987). Also at this time, definitions of "partial wind up" and "surplus" were included in the scheme. Concurrently, a moratorium was placed on surplus withdrawals from ongoing plans in 1986 (R.R.O. 1980, Reg. 746/80 as am. by Reg. 31/87), which was extended to plans on wind up in 1988 (O. Reg. 708/87 as am. by Reg. 100/88). The surplus sharing regulation was enacted to replace the moratorium (O. Reg. 708/87 as am. by Reg. 412/90), requiring that no payments be made from the surplus of a pension plan that is being wound up in whole or in part unless it is (a) made to or for the benefit of members, former members or persons other than the employer who are entitled to payments; or (b) made to the employer with the written agreement of a prescribed number of members (R.R.O. 1990, Reg. 909, s. 8(1)). This regulation, designed to encourage agreement and sharing between employers and employees, ceases to have effect after December 31, 2004 (Reg. 909, s. 8(3)).

24 This historical context, though not determinative, may provide some insight into the legislature's intention regarding the effect of s. 70(6). Through its statutory interventions, the legislature has sought to clarify some aspects of the relationship between employers and employees in pension matters. Steps have been taken to improve many employee rights but the importance of maintaining a fair and delicate balance between employer and employee interests, in a way which promotes private pensions, has also been a consistent theme. It is in light of this background that the legal meaning of the provision must be interpreted in accordance with the accepted approach to statutory interpretation.

B. Grammatical and Ordinary Sense

25 As noted by the Court of Appeal, s. 70(6) specifies the timing, group and rights to which the section applies. First, the timing is the partial wind up of a pension plan. Second, the specified group of "members, former members and other persons entitled to benefits under the pension plan" is generally meant to refer to the members affected by a partial wind up (para. 41). Lastly, the rights accorded are those rights and benefits that are not less than the group would have if there were a full wind up on the date of partial wind up (para. 42). The parties agree with these propositions.

26 Where the disagreement lies is with regard to the timing of distribution following a partial wind up of a plan in which there is an actuarial surplus. The respondent reasons that, since (i) s. 70(6) requires the rights and benefits on a partial wind up to not be less than those available on full wind up, and (ii) all parties agree that surplus distribution would occur on a full wind up (C.A. judgment, at para. 43; see also s. 79(4)), then (iii) s. 70(6) must require surplus distribution on a partial wind up. In contrast, the appellants argue that, at most, s. 70(6) requires the vesting of the right to participate in surplus distribution in a potential future full wind up because it is only on final wind up that an actual,

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rather than actuarial, surplus can exist. In my opinion, the former interpretation accords better with the ordinary and grammatical meaning of the section.

27 First, the section mandates that the Affected Members "shall have", on the effective date of the partial wind up, the rights and benefits they "would have" on a full wind up. This wording transposes the timing of the rights and benefits exigible on full wind up *up to* the effective date of partial wind up. It does not connote any delay *until* the future date of full wind up before the exercise of acquired rights.

28 Second, the phrase "*on* the effective date" (emphasis added) suggests more immediacy than other possible alternatives, such as "as of". If the provision was worded "shall have rights and benefits ... *as of* the effective date", this would be more indicative of a situation where rights were being vested presently but paid out in the future. The actual wording of "shall have rights and benefits ... *on* the effective date" (emphasis added) indicates a more immediate realization of rights and benefits.

29 Third, the appellants' proposed interpretation, as adopted by the majority of the Tribunal, in effect reads out this last phrase of the provision. In my opinion, without the phrase "on the effective date of the partial wind up", it may have been open to read s. 70(6) as only vesting rights to be exercised on full wind up. However, the presence of this phrase confirms that rights and benefits are not only measured but also realized on the effective date of partial wind up.

30 Lastly, s. 70(6) acts as a residual deeming provision rather than being an independent delineation of substantive rights. As a matter of logic, if it equalizes the position of the full and partial wind up groups, and it is clear that there is surplus distribution on full wind up, then there should also be surplus distribution on partial wind up.

31 In sum, the provision indicates that the assessment of rights and benefits is to be conducted *as if* the Plan was winding up in full on the effective date of partial wind up. The realization of rights and benefits, including the distribution of surplus assets, then occurs for the part of the Plan actually being wound up. Therefore, the Affected Members, if entitled, may receive their pro rata share of the surplus existing in the fund on a partial wind up, as if the Plan was being fully wound up on that day.

C. Scheme of the Act

32 The statutory scheme further supports this conclusion. First, the definitions of "wind up" and "partial wind up" in s. 1 of the Act closely parallel one another, both requiring a distribution of assets:

> "partial wind up" means the termination of part of a pension plan and the distribution of the assets of the pension fund related to that part of the pension plan;
>
> "wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;
>
> It then follows that s.70(1)(c) requires the administrator to file as part of its full or partial wind-up report, "the methods of allocating and distributing the assets of the pension plan". Similarly, s. 28.1(2) of Reg. 909 requires that the administrator of the Plan give to each person entitled to a pension a statement setting out, among other things: "[t]he method of distributing the surplus assets", "[t]he formula for allocating the surplus among the plan beneficiaries" and "[a]n estimate of the amount allocated to the person". Thus, delaying the distribution would not be consonant with these provisions that make distribution of surplus assets an intended part of the wind-up process, whether the wind up is in whole or in part.

33 Second, the statutory scheme makes an important distinction between continuing plans and winding up plans. The partial wind up falls, for all purposes, in the latter group, even though there is a remaining part of the Plan that continues to exist. Under the scheme, in evaluating rights and procedural requirements, partial wind up is treated the same as a full wind up, which coincides with the purpose and effect of s. 70(6). For instance, in s. 78(1) the general rule is established that "[n]o money may be paid out of a pension fund to the employer without the prior consent of the Superintendent".

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Sections 79(1) and 79(3) then provide for exceptions to this rule depending on whether the application for payment is being made with regard to a plan that is continuing or one that is winding up. As with the additional conditions set out in the regulations (Reg. 909, ss. 8-10 and 25-28.1), it is much more difficult to justify surplus withdrawal from a continuing plan than from a plan winding up in whole or in part. The interpretation of s. 70(6) herein proposed is consistent with the logic of this aspect of the statutory scheme and the legislature's choice to treat partial wind ups in the same manner as full wind ups. As a result, a partial wind up requires a full wind up to notionally occur for the purposes of evaluating the pro rata share of the assets and liabilities related to the partial wind up, followed by the continuation of the remainder of the Plan.

34 Lastly, in this statutory scheme, the role of s. 70(6) appears to be as a residual deeming provision reflecting the legislature's intent of assuring that rights on partial wind up are not less than those available on full wind up, whether granted under the Act or under the terms of the Pension Plan. In almost every section where wind up is mentioned, the legislature has already clarified that it is referring to wind up "in whole or in part". This is the case when referring to grow-in rights (s. 74(1)) and immediate vesting rights (s. 73(1)(b)). These are special rights that members affected by a wind up acquire but that ordinary retirees or individuals leaving employment do not. Provisions regarding the procedural requirements on wind up similarly specify application on wind up both "in whole or in part" (see, e.g. ss. 68-70). One of the rare instances in the Act where both are not expressly included is with regard to transfer rights on wind up, which only mentions "wind up" (s. 73(2)). The appellants seem to agree, correctly in my opinion, that those rights would still have effect on partial wind up even though it is not explicitly mentioned. Presumably, this must result from the application of s. 70(6), and controverts any sort of *expressio unius est exclusio alterius* logic for s. 73(2).

35 As a last point, it is worth commenting on the approach of the majority judgment of the Tribunal in disregarding the regulations in construing the meaning of s. 70(6). While it is true that a statute sits higher in the hierarchy of statutory instruments, it is well recognized that regulations can assist in ascertaining the legislature's intention with regard to a particular matter, especially where the statute and regulations are "closely meshed" (see *R. v. Shirose*, [1999] 1 S.C.R. 565 (S.C.C.), at para. 26; *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 282). In this case, the statute and the regulations form an integrated scheme on the subject of surplus treatment and the thrust of s. 70(6) can be gleaned in light of this broader context.

36 In summary, the scheme of the Act and of the regulations supports the ordinary and grammatical meaning of s. 70(6) as requiring distribution of surplus at the time of partial wind up.

D. Object of the Act

37 A purposive interpretation of s. 70(6) should be mindful of the legislative objective in the context of the statutory scheme surrounding surplus and partial wind up.

38 The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans (see *GenCorp, supra; Firestone Canada Inc. v. Ontario (Pension Commission)* (1990), 1 O.R. (3d) 122 (Ont. C.A.), at p. 127). This is especially important when, as recognized by this Court in *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.), at p. 646, it is remembered that pensions are now generally given for consideration rather than being merely gratuitous rewards. At the same time, the voluntary nature of the private pension system requires the interventions in this area to be carefully calibrated. This is necessary to avoid discouraging employers from making plan decisions advantageous to their employees. The Act thus seeks, in some measure, to ensure a balance between employee and employer interests that will be beneficial for both groups and for the greater public interest in established pension standards.

39 Employers often argue that the risk and responsibility of a defined benefit plan are borne by the employer and, thus, it should be allowed the control and flexibility to manage the plan as it sees fit. It is contended that requiring distribution

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of surplus weighs the balance too heavily in favour of the employees and will result in funds being contributed to according to less cautious actuarial estimates, fewer defined benefit plans, and fewer private pension plans overall. While important considerations, these arguments are unpersuasive. First, the requirement of distribution is value-neutral to the question of entitlement, which must be determined separately under the provisions of the Plan and the Act. Second, the statutory scheme protects against underfunding by requiring employers and administrators to follow accepted actuarial practice in their valuations (Reg. 909, s. 16). Lastly, the provision of pensions serves a number of labour market functions which benefit the corporate sector, including attracting a labour supply, reducing turnover, improving morale, increasing productivity and efficiency, promoting loyalty to the corporation, and so on (Deaton, supra, at p. 119). In short, there are many reasons for employers to maintain pension plans and a construction of s. 70(6) that is in accordance with the terms of the statute is unlikely to disrupt the balance between employer and employee interests.

40 As between employees, it is difficult to see how this interpretation of s. 70(6) results in any unfairness to the ongoing members, as was argued before us in this appeal. Requiring that the pro rata share of the actuarial surplus be distributed at the time of partial wind up is unlikely to compromise the continuing integrity of the pension fund. By definition, the fund will still be in surplus after the distribution, except that the amount of surplus will be reduced in proportion to the size and level of entitlement, if any, of the partial wind up group and subject to the statutory restrictions on withdrawal of surplus by the employer. In this case, approximately $16 million in actuarial surplus would have remained in the fund even if the entire surplus related to the partial wind up was distributed.

41 By contrast, if Affected Members are required to await a full wind up at some indeterminate future date to share in the distribution of surplus, it would place them in a worse position than continuing employees. Affected Members are placed in a significantly different position from continuing employees because they have just lost their jobs, their level of pensionable earnings are reduced, and they will rarely be able to replicate the same level of benefits elsewhere. Since pension plans are theoretically intended to be indeterminate in nature, Affected Members may no longer be reachable if a full wind up occurs. It makes sense for the Affected Members to be subject to the risks of the Plan while they are a part of it, but not after they have been terminated from it. This same rationale would equally apply to future Affected Members if another partial wind up occurs and to all members at the time of a full wind up, so that each group would bear the consequences of market forces at the time of their termination from the Plan. This seems to be the fairest distribution of risk and in accordance with the object of the Act.

42 There are also policy and practical reasons supporting an interpretation requiring distribution upon partial wind up. A surplus is, in effect, a windfall because it was not within the expectations of either the employer or the employees when the regime was implemented. The employer contributes to the fund as much as is necessary to match the funding target of the Plan on a going concern basis, taking into consideration actuarial estimates and assumptions. The basic expectation of the employees when joining the Plan is to receive periodic pension benefits on retirement. The fluctuation in the value of the assets is essentially the result of unforeseen market performance or plan experience. As discussed earlier, the most equitable solution is to distribute the fortunes of favourable markets at the time Affected Members are terminated. In this way, the windfall is related to their actual time and participation in the plan rather than being subject to the experience of a plan of which they are no longer a part.

43 Moreover, the increasingly mobile nature of labour should be recognized. When a group of employees is terminated and that part of the Plan is wound up, those accounts should generally be settled concurrently. The Affected Members should be able to know their status at the time of their termination so as to arrange their affairs accordingly and not be indefinitely tied to an employer that laid them off. On the flip side, if Affected Members only have a right to surplus distribution on full wind up, assuming they are so entitled to receive it, they may no longer be alive to realize their right when, if ever, a full wind up occurs. Even if they are, they may be difficult to locate or contact. As a practical matter, it is at the time of termination that their right to surplus, if any, is most needed, considering they have just lost their jobs and their source of regular income.

44 Furthermore, the argument that actuarial surplus is notional and thus too unreliable to justify the liquidation of any Plan assets is unconvincing. Although the assessment of an actuarial surplus is of necessity an estimate, it does

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not follow that the distribution of surplus would be unsound. Actuarial estimates of pension values are used for many purposes, including the sale of corporations or divisions of corporations, the division of matrimonial property, and the taking of contribution holidays by employers. Further, while the actuarial assumptions at play can vary, some uniformity can be found by requiring particular methods of valuation for certain purposes. For instance, the regulations prescribe that a "going concern valuation" (defined in Reg. 909, s. 1(2)) be used for valuing *continuing* pension plans (see, e.g. Reg. 909, ss. 13(1) or 26). In contrast, a "solvency valuation" or "wind-up valuation" can be used when plans are actually or notionally wound up. This is in line with the different purposes underlying the regulation of continuing as opposed to winding up plans. In the former, the main concern is capital regulation to ensure adequate contribution levels based on estimates of current service costs to maintain fund integrity. In the latter, for wind ups in whole or in part, the main concern is severing the terminated part of the Plan and ensuring Affected Members receive their legal entitlements, if any, as beneficiaries through the distribution of assets related to the part of the Plan being wound up.

45 Lastly, distribution upon partial wind up is consistent with the trust principles outlined in *Schmidt*, *supra*, regarding surplus entitlement and contribution holidays. Although that case dealt with a situation of entitlement to surplus on a full wind up, which is not in issue here, the appellants placed much weight on the distinction made by Cory J. between actual and actuarial surplus. Cory J. held at pp. 654-655 that:

> Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan. Therefore, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits.
>
> . . . . .
>
> When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. [Emphasis added.]

46 Section 70(6) provides for distribution of surplus only at the time of plan termination, be it partial or full. The definition of "partial wind up" in s. 1 of the Act explicitly refers to the "termination" of "that part of the pension plan". Also, surplus is ascertainable at that time according to current valuation methods. Neither s. 70(6) nor this appeal affects the ability of an employer to take contribution holidays while the Plan is ongoing and the Plan allows for it. Therefore, requiring distribution on partial wind up is fully compatible with this Court's decision in *Schmidt* and the principles discussed therein. Upon partial wind up, the pro rata share of the surplus ceases to be notional. It is then actual.

47 Section 70(6) was enacted to ensure that Affected Members on partial wind up are not in a worse position than a future full wind up group. This requirement of equity provided by s. 70(6) is in relation to other rights provided for under the Act. As far as the distribution of surplus is concerned, the object of the Act and s. 70(6) strongly promote an interpretation that requires this distribution to occur at the time of the partial wind up rather than later.

V. Conclusion

48 In light of all of the above, I conclude that s. 70(6) requires the distribution of actuarial surplus related to the part of the Plan being wound up, on the effective date of the partial wind up. As a consequence, I agree with the Court of Appeal's interpretation and find that the Tribunal incorrectly interpreted the provision at first instance.

49 This result is also consistent with the historical context of pension law. Statutory interventions in pension law have sought to clarify and regulate the relationship between employers and employees in order to promote the pension system while adjusting imbalances of power. With regard to surplus and its distribution on wind up, the legislature has implemented some measures in this regard, be it to improve the position of employees if the Plan fails to provide for distribution (s. 79(4) of the Act) or to require consent of members for the withdrawal of surplus by employers (Reg. 909, s. 8). However, these steps have also been tailored in such a way as to avoid placing too heavy a burden on employers in exercising their rights under the Plan or discouraging them from maintaining pension funds for their workforce. Distribution of surplus on partial wind up reflects this balance because it does not reduce or remove any entitlements of

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the employers. In contrast, failure to require distribution could negatively impact the potential entitlements of affected employees of the partial wind-up group. Considering the text, scheme and purpose of the Act against this background discloses an intent of the legislature to require surplus distribution on partial wind up of a plan.

50 The vital importance of pension schemes in the modern labour market is evident. Pension funds are a significant asset for employers and an invaluable nest egg for an aging workforce. Legislative schemes that establish minimum standards and ensure the protection of employee benefits are an element of sound financial and social policy. The facilitation and encouragement of pension plan participation advance the interests of employees, employers, and the public. As part of the legislature's statutory structure that aims to accommodate the interests of ongoing and terminated employees, it enacted s. 70(6) to require actual distribution of the pro rata share of actuarial surplus on plan wind up, be it full or partial.

51 The appeal is dismissed with costs.

Appeal dismissed.

Pourvoi rejeté.

APPENDIX — of Statutory Provisions

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

1. In this Act,

. . . . .

"partial wind up" means the termination of part of a pension plan and the distribution of the assets of the pension fund related to that part of the pension plan; ("liquidation partielle")

"surplus" means the excess of the value of the assets of a pension fund related to a pension plan over the value of the liabilities under the pension plan, both calculated in the prescribed manner; ("excédent")

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund; ("liquidation")

68. (1) The employer or, in the case of a multi-employer pension plan, the administrator may wind up the pension plan in whole or in part.

(2) The administrator shall give written notice of proposal to wind up the pension plan to,

(a) the Superintendent;

(b) each member of the pension plan;

(c) each former member of the pension plan;

(d) each trade union that represents members of the pension plan;

(e) the advisory committee of the pension plan; and

(f) any other person entitled to a payment from the pension fund.

(3) In the case of a proposal to wind up only part of a pension plan, the administrator is not required to give written notice of the proposal to members, former members or other persons entitled to payment from the pension fund if they will not be affected by the proposed partial wind up.

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(4) The notice of proposal to wind up shall contain the information prescribed by the regulations.

(5) The effective date of the wind up shall not be earlier than the date member contributions, if any, cease to be deducted, in the case of contributory pension benefits, or, in any other case, on the date notice is given to members.

(6) The Superintendent by order may change the effective date of the wind up if the Superintendent is of the opinion that there are reasonable grounds for the change.

69. (1) The Superintendent by order may require the wind up of a pension plan in whole or in part if,

(a) there is a cessation or suspension of employer contributions to the pension fund;

(b) the employer fails to make contributions to the pension fund as required by this Act or the regulations;

(c) the employer is bankrupt within the meaning of the *Bankruptcy and Insolvency Act* (Canada);

(d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;

(e) all or a significant portion of the business carried on by the employer at a specific location is discontinued;

(f) all or part of the employer's business or all or part of the assets of the employer's business are sold, assigned or otherwise disposed of and the person who acquires the business or assets does not provide a pension plan for the members of the employer's pension plan who become employees of the person;

(g) the liability of the Guarantee Fund is likely to be substantially increased unless the pension plan is wound up in whole or in part;

(h) in the case of a multi-employer pension plan,

(i) there is a significant reduction in the number of members, or

(ii) there is a cessation of contributions under the pension plan or a significant reduction in such contributions; or

(i) any other prescribed event or prescribed circumstance occurs.

(2) In an order under subsection (1), the Superintendent shall specify the effective date of the wind up, the persons or class or classes of persons to whom the administrator shall give notice of the order and the information that shall be given in the notice.

70. (1) The administrator of a pension plan that is to be wound up in whole or in part shall file a wind up report that sets out,

(a) the assets and liabilities of the pension plan;

(b) the benefits to be provided under the pension plan to members, former members and other persons;

(c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and

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(d) such other information as is prescribed.

(2) No payment shall be made out of the pension fund in respect of which notice of proposal to wind up has been given until the Superintendent has approved the wind up report.

(3) Subsection (2) does not apply to prevent continuation of payment of a pension or any other benefit the payment of which commenced before the giving of the notice of proposal to wind up the pension plan or to prevent any other payment that is prescribed or that is approved by the Superintendent.

(4) An administrator shall not make payment out of the pension fund except in accordance with the wind up report approved by the Superintendent.

(5) The Superintendent may refuse to approve a wind up report that does not meet the requirements of this Act and the regulations or that does not protect the interests of the members and former members of the pension plan.

(6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

73. (1) For the purpose of determining the amounts of pension benefits and any other benefits and entitlements on the winding up of a pension plan, in whole or in part,

(a) the employment of each member of the pension plan affected by the winding up shall be deemed to have been terminated on the effective date of the wind up;

(b) each member's pension benefits as of the effective date of the wind up shall be determined as if the member had satisfied all eligibility conditions for a deferred pension; and

(c) provision shall be made for the rights under section 74.

(2) A person entitled to a pension benefit on the wind up of a pension plan, other than a person who is receiving a pension, is entitled to the rights under subsection 42 (1) (transfer) of a member who terminates employment and, for the purpose, subsection 42 (3) does not apply.

74. (1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

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77. Subject to the application of the Guarantee Fund, where the money in a pension fund is not sufficient to pay all the pension benefits and other benefits on the wind up of the pension plan in whole or in part, the pension benefits and other benefits shall be reduced in the prescribed manner.

78. (1) No money may be paid out of a pension fund to the employer without the prior consent of the Superintendent.

. . . . .

79. (1) Subject to section 89 (hearing and appeal), the Superintendent shall not consent to payment of money that is surplus to the employer out of a continuing pension plan unless,

(a) the Superintendent is satisfied, based on reports provided with the application, that the pension plan has a surplus;

(b) the pension plan provides for the withdrawal of surplus by the employer while the pension plan continues in existence, or the applicant satisfies the Superintendent that the applicant is otherwise entitled to withdraw the surplus;

(c) where all pension benefits under the pension plan are guaranteed by an insurance company, an amount equal to at least two years of the employer's current service costs is retained in the pension fund as surplus;

(d) where the members are not required to make contributions under the pension plan, the greater of,

(i) an amount equal to two years of the employer's current service costs, or

(ii) an amount equal to 25 per cent of the liabilities of the pension plan calculated as prescribed,

is retained in the pension fund as surplus;

(e) where members are required to make contributions under the pension plan, all surplus attributable to contributions paid by members and the greater of,

(i) an amount equal to two years of the employer's current service costs, or

(ii) an amount equal to 25 per cent of the liabilities of the pension plan calculated as prescribed,

are retained in the pension fund as surplus; and

(f) the applicant and the pension plan comply with all other requirements prescribed under other sections of this Act in respect of the payment of surplus money out of a pension fund.

. . . . .

(3) Subject to section 89 (hearing and appeal), the Superintendent shall not consent to an application by an employer in respect of surplus in a pension plan that is being wound up in whole or in part unless,

(a) the Superintendent is satisfied, based on reports provided with the application, that the pension plan has a surplus;

(b) the pension plan provides for payment of surplus to the employer on the wind up of the pension plan;

(c) provision has been made for the payment of all liabilities of the pension plan as calculated for purposes of termination of the pension plan; and

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(d) the applicant and the pension plan comply with all other requirements prescribed under other sections of this Act in respect of the payment of surplus money out of a pension fund.

(4) A pension plan that does not provide for payment of surplus money on the wind up of the pension plan shall be construed to require that surplus money accrued after the 31st day of December, 1986 shall be distributed proportionately on the wind up of the pension plan among members, former members and any other persons entitled to payments under the pension plan on the date of the wind up.

84. (1) If the Superintendent by order declares that the Guarantee Fund applies to a pension plan, the following are guaranteed by the Guarantee Fund, subject to the limitations and qualifications as are set out in this Act or are prescribed:

1 Any pension in respect of employment in Ontario.

2 Any deferred pension in respect of employment in Ontario to which a former member is entitled, if the former member's employment or membership was terminated before the 1st day of January, 1988 and the former member was at least forty-five years of age and had at least ten years of continuous employment with the employer, or was a member of the pension plan for a continuous period of at least ten years, at the date of termination of employment.

3 A percentage of any defined pension benefits in respect of employment in Ontario to which a member or former member is entitled under section 36 or 37 (deferred pension), or both, if the member's or former member's employment or membership was terminated on or after the 1st day of January, 1988, equal to 20 per cent if the combination of the member's or former member's age plus years of employment or membership in the pension plan equals fifty, plus an additional $^{2}/_{3}$ of 1 per cent for each additional one-twelfth credit of age and employment or membership to a maximum of 100 per cent.

4 All additional voluntary contributions, and the interest thereon, made by members or former members while employed in Ontario.

5 The minimum value of all required contributions made to the pension plan by a member or former member in respect of employment in Ontario plus interest.

6 That part of a deferred pension guaranteed under this subsection to which a former spouse or same-sex partner of a member or of a former member is entitled under a domestic contract or an order under the *Family Law Act*.

7 Any pension to which a survivor of a former member is entitled under subsection 48 (1) (death before commencement of payment).

. . . . .

91. (1) A party to a proceeding before the Tribunal under section 89 may appeal to the Divisional Court from the decision or order of the Tribunal.

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Pension Benefits Act General Regulations, R.R.O. 1990, Reg. 909 as am.

. . . . .

1. (2) In this Part,

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"going concern valuation" means a valuation of the assets and liabilities of a pension plan using methods and actuarial assumptions that are consistent with accepted actuarial practice for the valuation of a continuing pension plan; ("évaluation à long terme")

4. (1) Every pension plan shall set out the obligation of the employer or any person required to make contributions on behalf of an employer, to contribute both in respect of the normal cost and any going concern unfunded actuarial liabilities and solvency deficiencies under the plan.

8. (1) No payment may be made from surplus out of a pension plan that is being wound up in whole or in part unless,

(a) the payment is to be made to or for the benefit of members, former members and other persons, other than an employer, who are entitled to payments under the pension plan on the date of wind up; or

(b) the payment is to be made to an employer with the written agreement of,

(i) the employer,

(ii) the collective bargaining agent of the members of the plan or, if there is no collective bargaining agent, at least two-thirds of the members of the plan, and

(iii) such number of former members and other persons who are entitled to payments under the pension plan on the date of the wind up as the Superintendent considers appropriate in the circumstances.

(2) Despite subsection (1), a payment may be made from surplus out of a pension plan that is being wound up in whole or in part if,

(a) the payment would have been permitted by this section as it read immediately before the 18th day of December, 1991; and

(b) notice of proposal to wind up the pension plan was given to the Superintendent of Pensions before December 18, 1991.

(3) Subsections (1) and (2) do not apply after December 31, 2004.

9. If an amendment to a pension plan with defined benefits converts the defined benefits to defined contribution benefits, the employer may offset the employer's contributions for normal costs against the amount of surplus, if any, in the pension fund after the conversion.

10. (1) The criteria described in this section must be met before the Superintendent may consent to the payment of money that is surplus out of a continuing pension plan to the employer.

(2) All persons who are entitled to receive benefits under the pension plan and all members must consent to the terms upon which the surplus is to be paid out of the plan.

(3) All persons in respect of whom the administrator has purchased a pension, deferred pension or ancillary benefit, other than those persons who requested that the administrator do so, must consent to the terms upon which the surplus is to be paid out of the pension plan.

(4) The pension plan must provide that a former member's contributions to the plan and the interest on the contributions shall not be used to provide more than 50 per cent of the commuted value of a pension or deferred

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pension in respect of contributory benefits to which the member is entitled under the plan on termination of membership or employment.

(5) The pension plan must provide that a former member who is entitled to a pension or deferred pension on termination of employment or membership is entitled to payment from the pension fund of a lump sum payment equal to the amount by which the former member's contributions under the plan and the interest on the contributions exceed one-half of the commuted value of the former member's pension or deferred pension in respect of the contributory benefits.

(8) If surplus is allocated to a person to increase the person's benefits, the person must be offered the choice of receiving the surplus in the form of inflation adjustments to the existing benefits.

(9) The inflation adjustments that are provided must be made,

(a) by indexing the benefits in accordance with a formula based upon increases in the annual Consumer Price Index;

(b) by providing an annual percentage increase in the amount of the benefits or an annual increase of a specified dollar amount; or

(c) by a combination of the methods described in clauses (a) and (b).

(10) For the purpose of subsection (9), the employer may select the method for providing the inflation adjustments.

(11) The pension plan must state who is entitled, or must provide a mechanism for determining who is entitled, to any surplus in the plan after the payment of surplus to which the Superintendent is being asked to consent.

(12) Subsection (11) applies with respect to applications under section 78 of the Act made after the 31st day of October, 1990.

10.1 (1) This section applies with respect to a payment from surplus out of a pension plan to the employer,

(a) if a court has appointed an individual to represent persons described in subclause 8(1)(b)(iii), persons described in subsection 10(2) (but not members) or persons described in subsection 10 (3); and

(b) if the Superintendent is satisfied, on the basis of such information and evidence as he or she may require from the employer or administrator, that,

(i) in the case of a proposed payment to the employer from surplus out of a pension plan that is being wound up in whole or in part, the employer has obtained the written agreement referred to in clause 8(1)(b) of 90 per cent of the former members who are in receipt of a pension payable from the pension fund on the date of the wind up, or

(ii) in the case of a proposed payment of money that is surplus out of a continuing pension plan to the employer, the employer has obtained the consent of 90 per cent of the former members who are in receipt of a pension payable from the pension fund, whose consent is required by subsection 10 (2).

(2) The court-appointed representative is authorized to give the written agreement referred to in clause 8(1)(b) on behalf of the former members in receipt of a pension payable from the pension fund, who he or she represents. However, the representative is not authorized to give written agreement on behalf of former members who have agreed or have objected to the payment from surplus.

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(3) The court-appointed representative is authorized to give the consent required by subsection 10(2) on behalf of the former members in receipt of a pension payable from the pension fund, who he or she represents. However, the representative is not authorized to consent on behalf of former members who have consented or have objected to the terms upon which the surplus is to be paid out of the plan.

13. (1) Within sixty days after the date of establishment of a plan, the administrator shall submit a report on the basis of a going concern valuation that sets out,

(a) the normal cost, in the first year during which the plan is registered and the rule for computing the normal cost in subsequent years up to the date of the next report;

(b) an estimate of the normal cost, in the subsequent years up to the date of the next report;

(c) where applicable, the estimated aggregate employee contributions to the pension plan during each year up to the date of the succeeding report;

(d) the past service unfunded actuarial liability, if any, under the pension plan as at the date on which the plan qualified for registration;

(e) the special payments required to liquidate the past service unfunded actuarial liability in accordance with section 5;

(f) any other going concern unfunded liability;

(g) the special payments required to liquidate any going concern unfunded liability referred to in clause (f);

(j) where the plan provides for an escalated adjustment, whether and to what extent,

(i) liability for the future cost of the adjustment has been included in the determination of any going concern unfunded actuarial liability, or

(ii) the cost for the escalated adjustment is included in the normal cost.

(1.1) The report shall also set out, on the basis of a solvency valuation,

(a) whether there is a solvency deficiency;

(b) if there is a solvency deficiency, the amount of the solvency deficiency and the special payments required to liquidate it in accordance with section 5;

(c) whether the transfer ratio is less than one; and

(d) if the transfer ratio is less than one, the transfer ratio.

16. (1) An actuary preparing a report under section 70 of the Act or under section 3, 5.3, 13 or 14 shall use methods and actuarial assumptions that are consistent with accepted actuarial practice and with the requirements of the Act and this Regulation.

(2) An actuary preparing a report under section 4 shall use his or her best effort to meet the standards set out in subsection (1).

(3) The person preparing a report referred to in subsection (1) or (2) shall certify that it meets the requirements of subsection (1) or (2), as the case may be.

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(4) The person preparing a report referred to in subsection (2) shall disclose in the report any respect in which the report does not meet the standards set out in subsection (1).

25. (1) The following information is prescribed for the purposes of a notice respecting an application under subsection 78(2) of the Act:

1 The name of the pension plan and its provincial registration number.

2 The valuation date of the report provided with the application and the amount of surplus in the pension plan.

3 The surplus attributable to employee and employer contributions.

4 The amount of surplus withdrawal requested.

5 A statement that submissions in respect of the application may be made in writing to the Superintendent within thirty days after receipt of the notice.

6 The contractual authority for surplus withdrawals.

7 Notice that copies of the report and certificates filed with the Superintendent in support of the surplus request are available for review at the offices of the employer and information on how copies of the report may be obtained.

(2) The employer shall file a copy of the notice required by subsection 78(2) of the Act before transmitting it to the persons required by that subsection.

. . . . .

(4) An application by an employer for the consent of the Superintendent to a payment from a continuing pension plan under subsection 78(1) of the Act shall be accompanied by a certified copy of the notice referred to in subsection (1), a statement that subsection 78(2) of the Act has been complied with, details as to the classes of persons who received notice and the date the last notice was distributed.

(5) An application referred to in subsection (1) shall be accompanied by a current report prepared on the basis of a going concern valuation demonstrating that a surplus as determined in accordance with section 26 exists and that there are no special payments required to be made to the pension fund.

26. (1) For purposes of determining surplus in a continuing pension plan,

(a) the value of the assets of the pension plan shall be calculated on the basis of the market value of the investments held by the pension fund plus any cash balances and accrued or receivable items; and

(b) the value of the liabilities of the pension plan shall be the greater of the calculation of,

(i) the going concern liabilities, or

(ii) the solvency liabilities.

(2) For purposes of subclauses 79(1)(d)(ii) and 79(1)(e)(ii) of the Act, the liabilities of the pension plan shall be calculated as the solvency liabilities.

28.(5) A notice required under subsection 78(2) of the Act for a plan that is being wound up shall contain,

(a) the name of the pension plan and its provincial registration number;

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(b) the valuation date of the report provided with the application and amount of surplus in the pension plan;

(c) the surplus attributable to employee and employer contributions;

(d) the amount of surplus withdrawal requested;

(e) a statement that submissions may be made in writing to the Superintendent within thirty days of receipt of the notice;

(f) the contractual authority for surplus reversion; and

(g) notice that copies of the wind up report filed with the Superintendent in support of the surplus request are available for review at the offices of the employer and information on how copies of the report may be obtained.

(6) An application by an employer for the consent of the Superintendent to a payment from a pension plan that is being wound up shall be accompanied by a certified copy of the notice referred to in subsection (5), a statement that subsection 78(2) of the Act has been complied with, the date the last notice was distributed and details as to the classes of persons who received notice.

28.1 (1) This section applies if there is a surplus on the wind up of a pension plan in whole or in part.

(2) The administrator of the pension plan shall give to each person entitled to a pension, deferred pension or other benefit or to a refund in respect of the pension plan a statement setting out the following information:

1 The name of the pension plan and its provincial registration number.

2 The member's name and date of birth.

3 The method of distributing the surplus assets.

4 The formula for allocating the surplus among the plan beneficiaries.

5 An estimate of the amount allocated to the person.

6 The options available to the person concerning the method for distributing the amount allocated to the person and the period within which any election respecting the options must be made.

7 The method of distribution that will be used, if an election is not made within the specified period.

8 The name and details of the person to be contacted with respect to any questions arising out of the statement.

9 Notice that the allocation of surplus and the options available for distributing it are subject to the approval of the Superintendent and of the Canada Customs and Revenue Agency, and may be adjusted accordingly.

. . . . .

Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28.

1. In this Act,

. . . . .

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"regulated sector" means a sector that consists of,

(a) all co-operative corporations to which the *Co-operative Corporations Act* applies;

(b) all credit unions, caisses populaires and leagues to which the *Credit Unions and Caisses Populaires Act, 1994* applies;

(c) all persons engaged in the business of insurance and governed by the *Insurance Act*;

(d) all corporations registered or incorporated under the *Loan and Trust Corporations Act*;

(e) all mortgage brokers registered under the *Mortgage Brokers Act*; or

(f) all persons who establish or administer a pension plan within the meaning of the *Pension Benefits Act* and all employers or other persons on their behalf who are required to contribute to any such pension plan; ("secteur réglementé")

6. (1) There is hereby established a tribunal to be known in English as the Financial Services Tribunal and in French as Tribunal des services financiers.

. . . . .

(3) In addition to the chair and the two vice-chairs, the Lieutenant Governor in Council shall appoint at least six persons, and not more than 12, as members of the Tribunal for the length of time not exceeding three years that the Lieutenant Governor in Council specifies and may reappoint any member to the Tribunal.

(4) In appointing members to the Tribunal, the Lieutenant Governor in Council shall, to the extent practicable, appoint members who have experience and expertise in the regulated sectors.

. . . . .

7. (1) A matter referred to the Tribunal may be heard and determined by a panel consisting of one or more members of the Tribunal, as assigned by the chair of the Tribunal.

(2) In assigning members of the Tribunal to a panel, the chair shall take into consideration the requirements, if any, for experience and expertise to enable the panel to decide the issues raised in any matter before the Tribunal.

20. The Tribunal has exclusive jurisdiction to,

(a) exercise the powers conferred on it under this Act and every other Act that confers powers on or assigns duties to it; and

(b) determine all questions of fact or law that arise in any proceeding before it under any Act mentioned in clause (a).

21. (4) An order of the Tribunal is final and conclusive for all purposes unless the Act under which the Tribunal made it provides for an appeal.

22. For a proceeding before the Tribunal, the Tribunal may,

(a) make rules for the practice and procedure to be observed;

(b) determine what constitutes adequate public notice;

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(c) before or during the proceeding, conduct any inquiry or inspection that the Tribunal considers necessary; or

(d) in determining any matter, consider any relevant information obtained by the Tribunal in addition to evidence given at the proceeding, if the Tribunal first informs the parties to the proceeding of the additional information and gives them an opportunity to explain or refute it.

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TAB 7

2010 ONSC 1708
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2010 CarswellOnt 1754, 2010 ONSC 1708, 192 A.C.W.S. (3d) 368, 63 C.B.R. (5th) 44, 81 C.C.P.B. 56

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

Morawetz J.

Heard: March 3-5, 2010
Judgment: March 26, 2010
Docket: 09-CL-7950

Counsel: Derrick Tay, Jennifer Stam, Suzanne Wood for Applicants
Lyndon Barnes, Adam Hirsh for Nortel Directors
Benjamin Zarnett, Gale Rubenstein, C. Armstrong, Melaney Wagner for Monitor, Ernst & Young Inc.
Arthur O. Jacques for Nortel Canada Current Employees
Deborah McPhail for Superintendent of Financial Services (non-PBGF)
Mark Zigler, Susan Philpott for Former and Long-Term Disability Employees
Ken Rosenberg, M. Starnino for Superintendent of Financial Services in its capacity as Administrator of the Pension Benefit Guarantee Fund
S. Richard Orzy, Richard B. Swan for Informal Nortel Noteholder Group
Alex MacFarlane, Mark Dunsmuir for Unsecured Creditors' Committee of Nortel Networks Inc.
Leanne Williams for Flextronics Inc.
Barry Wadsworth for CAW-Canada
Pamela Huff for Northern Trust Company, Canada
Joel P. Rochon, Sakie Tambakos for Opposing Former and Long-Term Disability Employees
Robin B. Schwill for Nortel Networks UK Limited (In Administration)
Sorin Gabriel Radulescu for himself
Guy Martin for himself, Marie Josee Perrault
Peter Burns for himself
Stan and Barbara Arnelien for themselves

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

N Corp. was insolvent major telecommunications company which continued to provide pension and other benefits to former employees, retired employees (retirees) and employees on long-term disability (LTD employees) on discretionary basis — N Corp. was granted stay of proceedings under Companies' Creditors Arrangement Act (CCCA), but cessation of payments was inevitable — To reduce or eliminate uncertainty, risk of litigation and

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disruption in transition of benefits and to provide for early payments to terminated employees and maintain quantum and validity of pension and health and welfare trust (HWT) claims as ordinary, unsecured claims, N Corp. negotiated settlement agreement (SA) with Monitor appointed under CCAA, representatives of former employees, LTD employees and settlement counsel, and union — SA provided, among other things, for funding and payment of pensions and benefits under HWT until specified dates, for ranking of allowable pension claims pari passu with claims of unsecured creditors, and for express exclusion of HWT benefits from preferential or priority claim or trust — SA contained Bankruptcy and Insolvency Act (BIA) clause providing that subsequent amendments to BIA changing current, relative priorities of claims against N Corp. did not preclude party to SA from arguing applicability of amendment to claims ceded in SA — While most parties supported SA, committee of N Corp.'s unsecured creditors (Committee) and informal N Corp. noteholder group (Noteholders) opposed SA on basis of BIA clause — Applicants brought motion for court approval of SA — Motion dismissed — SA was consistent with spirit and purpose of CCAA but could not be approved in current form as BIA clause in SA was not fair and reasonable in circumstances and resulted in agreement that provided neither certainty nor finality of fundamental priority issue — BIA clause created uncertainty and potential for fundamental alteration of SA — Practical effect of BIA clause was that issue was not fully resolved and clause was somewhat inequitable to other unsecured creditors who were entitled to know, with certainty and finality, effect of SA — Comprehensive settlement of claims in magnitude and complexity contemplated by SA should not provide opportunity to re-trade deal after fact — BIA clause failed to recognize interests of other creditors whose claims ranked equally with claims of former employees and LTD employees — Effect of SA was to give former and LTD employees preferred treatment for certain claims, notwithstanding that priority was not provided for in statute and was not recognized in case law.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Creditor approval

N Corp. was insolvent major telecommunications company which continued to provide pension and other benefits to former employees, retired employees (retirees) and employees on long-term disability (LTD employees) on discretionary basis — N Corp. was granted stay of proceedings under Companies' Creditors Arrangement Act (CCCA), but cessation of payments was inevitable — To reduce or eliminate uncertainty, risk of litigation and disruption in transition of benefits and to provide for early payments to terminated employees and maintain quantum and validity of pension and health and welfare trust (HWT) claims as ordinary, unsecured claims, N Corp. negotiated settlement agreement (SA) with Monitor appointed under CCAA, representatives of former employees, LTD employees and settlement counsel, and union — SA provided, among other things, for funding and payment of pensions and benefits under HWT until specified dates, for ranking of allowable pension claims pari passu with claims of unsecured creditors, and for express exclusion of HWT benefits from preferential or priority claim or trust — SA contained Bankruptcy and Insolvency Act (BIA) clause providing that subsequent amendments to BIA changing current, relative priorities of claims against N Corp. did not preclude party to SA from arguing applicability of amendment to claims ceded in SA — While most parties supported SA, committee of N Corp.'s unsecured creditors (Committee) and informal N Corp. noteholder group (Noteholders) opposed SA on basis of BIA clause — Applicants brought motion for court approval of SA — Motion dismissed — SA was consistent with spirit and purpose of CCAA but could not be approved in current form as BIA clause in SA was not fair and reasonable in circumstances and resulted in agreement that provided neither certainty nor finality of fundamental priority issue — BIA clause created uncertainty and potential for fundamental alteration of SA — Practical effect of BIA clause was that issue was not fully resolved and clause was somewhat inequitable to other unsecured creditors who were entitled to know, with certainty and finality, effect of SA — Comprehensive settlement of claims in magnitude and complexity contemplated by SA should not provide opportunity to re-trade deal after fact — BIA clause failed to recognize interests of other creditors whose claims ranked equally with claims of former employees and LTD employees — Effect of SA was to give former and LTD employees preferred treatment for certain claims, notwithstanding that priority was not provided for in statute and was not recognized in case law.

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — Miscellaneous

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N Corp. was insolvent major telecommunications company which continued to provide pension and other benefits to former employees, retired employees (retirees) and employees on long-term disability (LTD employees) on discretionary basis — N Corp. was granted stay of proceedings under Companies' Creditors Arrangement Act (CCCA), but cessation of payments was inevitable — To reduce or eliminate uncertainty, risk of litigation and disruption in transition of benefits and to provide for early payments to terminated employees and maintain quantum and validity of pension and health and welfare trust (HWT) claims as ordinary, unsecured claims, N Corp. negotiated settlement agreement (SA) with Monitor appointed under CCAA, representatives of former employees, LTD employees and settlement counsel, and union — SA provided, among other things, for funding and payment of pensions and benefits under HWT until specified dates, for ranking of allowable pension claims pari passu with claims of unsecured creditors, and for express exclusion of HWT benefits from preferential or priority claim or trust — SA contained Bankruptcy and Insolvency Act (BIA) clause providing that subsequent amendments to BIA changing current, relative priorities of claims against N Corp. did not preclude party to SA from arguing applicability of amendment to claims ceded in SA — While most parties supported SA, committee of N Corp.'s unsecured creditors (Committee) and informal N Corp. noteholder group (Noteholders) opposed SA on basis of BIA clause — Applicants brought motion for court approval of SA — Motion dismissed — SA was consistent with spirit and purpose of CCAA but could not be approved in current form as BIA clause in SA was not fair and reasonable in circumstances and resulted in agreement that provided neither certainty nor finality of fundamental priority issue — BIA clause created uncertainty and potential for fundamental alteration of SA — Practical effect of BIA clause was that issue was not fully resolved and clause was somewhat inequitable to other unsecured creditors who were entitled to know, with certainty and finality, effect of SA — Comprehensive settlement of claims in magnitude and complexity contemplated by SA should not provide opportunity to re-trade deal after fact — BIA clause failed to recognize interests of other creditors whose claims ranked equally with claims of former employees and LTD employees — Effect of SA was to give former and LTD employees preferred treatment for certain claims, notwithstanding that priority was not provided for in statute and was not recognized in case law.

Pensions --- Payment of pension — Disability benefits

N Corp. was insolvent major telecommunications company which continued to provide pension and other benefits to former employees, retired employees (retirees) and employees on long-term disability (LTD employees) on discretionary basis — N Corp. was granted stay of proceedings under Companies' Creditors Arrangement Act (CCCA), but cessation of payments was inevitable — To reduce or eliminate uncertainty, risk of litigation and disruption in transition of benefits and to provide for early payments to terminated employees and maintain quantum and validity of pension and health and welfare trust (HWT) claims as ordinary, unsecured claims, N Corp. negotiated settlement agreement (SA) with Monitor appointed under CCAA, representatives of former employees, LTD employees and settlement counsel, and union — SA provided, among other things, for funding and payment of pensions and benefits under HWT until specified dates, for ranking of allowable pension claims pari passu with claims of unsecured creditors, and for express exclusion of HWT benefits from preferential or priority claim or trust — SA contained Bankruptcy and Insolvency Act (BIA) clause providing that subsequent amendments to BIA changing current, relative priorities of claims against N Corp. did not preclude party to SA from arguing applicability of amendment to claims ceded in SA — While most parties supported SA, committee of N Corp.'s unsecured creditors (Committee) and informal N Corp. noteholder group (Noteholders) opposed SA on basis of BIA clause — Applicants brought motion for court approval of SA — Motion dismissed — SA was consistent with spirit and purpose of CCAA but could not be approved in current form as BIA clause in SA was not fair and reasonable in circumstances and resulted in agreement that provided neither certainty nor finality of fundamental priority issue — BIA clause created uncertainty and potential for fundamental alteration of SA — Practical effect of BIA clause was that issue was not fully resolved and clause was somewhat inequitable to other unsecured creditors who were entitled to know, with certainty and finality, effect of SA — Comprehensive settlement of claims in magnitude and complexity contemplated by SA should not provide opportunity to re-trade deal after fact — BIA clause failed to recognize interests of other creditors whose claims ranked equally with claims of former employees

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and LTD employees — Effect of SA was to give former and LTD employees preferred treatment for certain claims, notwithstanding that priority was not provided for in statute and was not recognized in case law.

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Generally — referred to

MOTION by insolvent corporation for court approval of settlement agreement under Companies' Creditors Arrangement Act.

***Morawetz J.*:**

Introduction

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

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

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

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

3 Since the CCAA filing, the Applicants have continued to provide medical, dental and other benefits, through the HWT, to pensioners and employees on long-term disability ("Former and LTD Employees") and active employees ("HWT Payments") and have continued all current service contributions and special payments to the Pension Plans ("Pension Payments").

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

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

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

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

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

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

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

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

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

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

(h) Nortel and, *inter alia*, its successors, advisors, directors and officers, are released from all future claims regarding Pension Plans and the HWT, provided that nothing in the release shall release a director of the Applicants from any matter referred to in subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only;

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

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

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

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

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

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

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

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

The Facts

A. Status of Nortel's Restructuring

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

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

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

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

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

B. The Settlement Agreement

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

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

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

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

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

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

Positions of the Parties on the Settlement Agreement

The Applicants

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

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

(b) eliminates the risk of costly and protracted litigation regarding Pension Claims and HWT Claims, leading to reduced costs, uncertainty and potential disruption to the development of a Plan;

(c) prevents disruption in the transition of benefits for current employees;

(d) provides early payments to terminated employees in respect of their termination and severance claims where such employees would otherwise have had to wait for the completion of a claims process and distribution out of the estates;

(e) assists with the commitment and retention of remaining employees essential to complete the Applicants' restructuring; and

(f) does not eliminate Pension Claims or HWT Claims against the Applicants, but maintains their quantum and validity as ordinary and unsecured claims.

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

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

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

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

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

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

30 Further, counsel to the Applicants submits that the court has the jurisdiction to release third parties under a Settlement Agreement where the releases (1) are connected to a resolution of the debtor's claims, (2) will benefit creditors generally and (3) are not overly broad or offensive to public policy. See *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (Ont. C.A.), [*Metcalfe*] at para. 71, leave to appeal refused, (S.C.C.) and *Grace Canada Inc., Re* (Ont. S.C.J. [Commercial List]) [*Grace 2008*] at para. 40.

31 The Applicants submit that a settlement of the type put forward should be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all the circumstances. Elements of fairness and reasonableness include balancing the interests of parties, including any objecting creditor or creditors, equitably (although not necessarily equally); and ensuring that the agreement is beneficial to the debtor and its stakeholders generally, as per *Air Canada, Re* (Ont. S.C.J. [Commercial List]) [*Air Canada*]. The Applicants assert that this test is met.

The Monitor

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

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

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

Former and LTD Employees

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

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

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

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

39 In response to allegations that third party releases unacceptably compromise employees' rights, Representative Counsel accepts that this was a concession, but submits that it was satisfactory because the claims given up are risky, costly and very uncertain. The releases do not go beyond s. 5.1(2) of the CCAA, which disallows releases relating to misrepresentations and wrongful or oppressive conduct by directors. Releases as to deemed trust claims are also very uncertain and were acceptably given up in exchange for other considerations.

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

CAW

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

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

Board of Directors

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

Opposing LTD Employees

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

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

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

47 Regarding the third party releases, the Opposing LTD Employees assert that Nortel is attempting to avoid the distraction of third party litigation, rather than look out for the best interests of the Former and LTD Employees. The

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Opposing LTD Employees urge the court not to release the only individuals the Former and LTD Employees can hold accountable for any breaches of trust. Counsel submits that Nortel has a common law duty to fund the HWT, which the Former and LTD Employees should be allowed to pursue.

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

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

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

UCC

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

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

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

Noteholders

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

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

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

Superintendent

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

Northern Trust

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

Law and Analysis

A. Representation and Notice Were Proper

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

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

B. Effect of the Settlement Approval Order

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

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

63 I previously indicated that "the overriding objective of appointing representative counsel for employees is to ensure that the employees have representation in the CCAA process": *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]) at para 16. I am satisfied that this objective has been achieved.

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

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

66 I am satisfied that Representative Counsel has represented their constituents' interests in accordance with their mandate, specifically, in connection with the negotiation of the Settlement Agreement and the draft Settlement Approval Order and appearance on this Motion. There have been intense discussions, correspondence and negotiations among Representative Counsel, the Monitor, the Applicants, the Superintendent, counsel to the Board of the Applicants, the

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Noteholder Group and the Committee with a view to developing a comprehensive settlement. NCCE's Representative Counsel have been apprised of the settlement discussions and served with notice of this Motion. Representatives have held Webinar sessions and published press releases to inform their constituents about the Settlement Agreement and this Motion.

C. Jurisdiction to Approve the Settlement Agreement

67 The CCAA is a flexible statute that is skeletal in nature. It has been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]) at paras. 28-29, citing *Metcalfe*, *supra*, at paras. 44 and 61.

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

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the power of the court to make an order "on such terms as it may impose" pursuant to s. 11(4) of the CCAA; and

(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects: see *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]) at para. 30, citing *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (Ont. Gen. Div. [Commercial List]) [*Canadian Red Cross*] at para. 43; *Metcalfe*, *supra* at para. 44.

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

70 In these proceedings, this court has confirmed its jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order and prior to the proposal of any plan of compromise or arrangement: see, for example, *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]); *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]) and *Nortel Networks Corp., Re*, 2010 ONSC 1096 (Ont. S.C.J. [Commercial List]).

71 I am satisfied that this court has jurisdiction to approve transactions, including settlements, in the course of overseeing proceedings during a CCAA stay period and prior to any plan of arrangement being proposed to creditors: see *Calpine Canada Energy Ltd., Re* (Alta. C.A. [In Chambers]) [*Calpine*] at para. 23, affirming (Alta. Q.B.); *Canadian Red Cross*, *supra*; *Air Canada*, *supra*; *Grace 2008*, *supra*, and *Grace Canada Inc., Re* (Ont. S.C.J. [Commercial List]) [*Grace 2010*], leave to appeal to the C.A. refused February 19, 2010; *Nortel Networks Corp., Re*, 2010 ONSC 1096 (Ont. S.C.J. [Commercial List]).

D. Should the Settlement Agreement Be Approved?

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

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

i) Sprit and Purpose

74 The CCAA is a flexible instrument; part of its purpose is to allow debtors to balance the conflicting interests of stakeholders. The Former and LTD Employees are significant creditors and have a unique interest in the settlement of

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their claims. This Settlement Agreement brings these creditors closer to ultimate settlement while accommodating their special circumstances. It is consistent with the spirit and purpose of the CCAA.

ii) Balancing of Parties' Interests

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

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

Third Party Releases

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

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

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

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

81 The releases benefit creditors generally as they reduces the risk of litigation against the Applicants and their directors, protect the Applicants against potential contribution claims and indemnity claims by certain parties, including directors, officers and the HWT Trustee; and reduce the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs.

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

Clause H.2

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

84 The Noteholders and UCC assert that Clause H.2 causes the Settlement Agreement to not be a "settlement" in the true and proper sense of that term due to a lack of certainty and finality. They emphasize that Clause H.2 has the effect

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of undercutting the essential compromises of the Settlement Agreement in imposing an unfair risk on the non-employee creditors of NNL, including NNI, after substantial consideration has been paid to the employees.

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

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

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

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

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

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

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

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

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

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

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

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

(i) ongoing exposure to potential liability for pension claims if a bankruptcy order is made before October 1, 2010;

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(ii) provisions allowing payments made to employees to be credited against employees' claims made, rather than from future distributions or not to be credited at all; and

(iii) lack of clarity as to whether the proposed order is binding on the Superintendent in all of his capacities under the *Pension Benefits Act* and other applicable law, and not merely in his capacity as Administrator on behalf of the Pension Benefits Guarantee Fund.

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

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

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

Disposition

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

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

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

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

104 Accordingly, the motion is dismissed.

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

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

Motion dismissed.

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Footnotes

1 On March 25, 2010, the Supreme Court of Canada released the following: *Donald Sproule et al. v. Nortel Networks Corporation et al.* (Ont.) (Civil) (By Leave) (33491) (The motions for directions and to expedite the application for leave to appeal are dismissed. The application for leave to appeal is dismissed with no order as to costs./La requête en vue d'obtenir des directives et la requête visant à accélérer la procédure de demande d'autorisation d'appel sont rejetées. La demande d'autorisation d'appel est rejetée; aucune ordonnance n'est rendue concernant les dépens.): <http://scc.lexum.umontreal.ca/en/news_release/2010/10-03-25.3a/10-03-25.3a.html>

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TAB 8

2015 ONCA 681
Ontario Court of Appeal

Nortel Networks Corp., Re

2015 CarswellOnt 15461, 2015 ONCA 681, 127 O.R. (3d) 641, 259 A.C.W.S. (3d) 15, 32 C.B.R. (6th) 21, 340 O.A.C. 234, 391 D.L.R. (4th) 283

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Janet Simmons, E.E. Gillese, Paul Rouleau JJ.A.

Heard: April 29, 2015
Judgment: October 13, 2015
Docket: CA C59703

Proceedings: affirming *Nortel Networks Corp., Re* (2014), 121 O.R. (3d) 228, 2014 ONSC 4777, 2014 CarswellOnt 17193 (Ont. S.C.J. [Commercial List])

Counsel: Richard B. Swan, S. Richard Orzy, Gavin H. Finlayson, for Appellant, Ad Hoc Group of Bondholders
Andrew Kent, Brett Harrison, for Respondent, Bank of New York Mellon
Edmond Lamek, for Respondent, Law Debenture Trust Company of New York
Benjamin Zarnett, Graham D. Smith, for Monitor and Respondent, Canadian Debtors
Kenneth D. Kraft, John J. Salmas, for Respondent, Wilmington Trust, National Association
Kenneth T. Rosenberg, Ari N. Kaplan, for Respondent, Canadian Creditors' Committee
Tracy Wynne, for Joint Administrators (EMEA)
Scott A. Bomhof, Adam M. Slavens, for Nortel Networks Inc./U.S. Debtors

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Groups of companies were subject to proceedings under Companies' Creditors Arrangement Act (CCAA) — Appellants were ad hoc group of bondholders holding crossover bonds that were issued or guaranteed by Canadian entities of companies and they provided for continuing accrual of interest until payment — Holders of crossover bonds filed claims for principal and pre-filing interest in amount of US$4.092 billion and they also claimed they were entitled to post-filing interest under terms of crossover bonds — In context of joint allocation trial, CCAA judge found that the common law "interest stops rule" applied in context of CCAA and holders of crossover bond claims were not legally entitled to claim or receive any amounts under relevant indentures above and beyond outstanding principal debt and pre-petition interest — Bondholders' appealed — Appeal dismissed — Main purposes of interest stops rule were fairness to creditors and achieving orderly administration of insolvent debtor's estate — Interest stops rule had been consistently applied in bankruptcy and winding-up proceedings — While there were differences between CCAA and other insolvency schemes, same principles supporting conclusion that interest stops rule was necessary in bankruptcy and insolvency proceedings, namely, fair treatment of creditors and orderly administration of insolvent debtor's estate, applied with equal force to CCAA proceedings — As interest stops rule applied upon

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bankruptcy under Bankruptcy and Insolvency Act, it should also apply in CCAA proceedings unless rule was ousted by CCAA, which it was not — If interest stops rule did not apply in CCAA proceedings then creditors who did not have contractual right to post-filing interest would have skewed incentives against reorganization under CCAA — CCAA created conditions for preserving status quo and if post filing interest was available to only one set of creditors then status quo was not preserved — If interest stops rule did not apply to CCAA proceedings then key objective of CCAA, to facilitate restructuring of corporations through flexibility and creativity, might be undermined due to uneven entitlement to interest that might be created — Principle of fairness supported application of interest stops rule — Interest stops rule was not contrary to established CCAA practice and it did not prevent CCAA plan from providing for post-filing interest — There were rational reasons for adopting interest stops rule in CCAA context.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Appeals

Groups of companies were subject to proceedings under Companies' Creditors Arrangement Act (CCAA) — Appellants were ad hoc group of bondholders holding crossover bonds that were issued or guaranteed by Canadian entities of companies and they provided for continuing accrual of interest until payment — Holders of crossover bonds filed claims for principal and pre-filing interest in amount of US$4.092 billion and they also claimed they were entitled to post-filing interest under terms of crossover bonds — In context of joint allocation trial, CCAA judge found that the common law "interest stops rule" applied in context of CCAA and holders of crossover bond claims were not legally entitled to claim or receive any amounts under relevant indentures above and beyond outstanding principal debt and pre-petition interest — Bondholders' appealed — Appeal dismissed — Main purposes of interest stops rule were fairness to creditors and achieving orderly administration of insolvent debtor's estate — Interest stops rule had been consistently applied in bankruptcy and winding-up proceedings — While there were differences between CCAA and other insolvency schemes, same principles supporting conclusion that interest stops rule was necessary in bankruptcy and insolvency proceedings, namely, fair treatment of creditors and orderly administration of insolvent debtor's estate, applied with equal force to CCAA proceedings — As interest stops rule applied upon bankruptcy under Bankruptcy and Insolvency Act, it should also apply in CCAA proceedings unless rule was ousted by CCAA, which it was not — If interest stops rule did not apply in CCAA proceedings then creditors who did not have contractual right to post-filing interest would have skewed incentives against reorganization under CCAA — CCAA created conditions for preserving status quo and if post filing interest was available to only one set of creditors then status quo was not preserved — If interest stops rule did not apply to CCAA proceedings then key objective of CCAA, to facilitate restructuring of corporations through flexibility and creativity, might be undermined due to uneven entitlement to interest that might be created — Principle of fairness supported application of interest stops rule — Interest stops rule was not contrary to established CCAA practice and it did not prevent CCAA plan from providing for post-filing interest — There were rational reasons for adopting interest stops rule in CCAA context.

The group of companies were subject to proceedings under the Companies' Creditors Arrangement Act (CCAA). The appellants were an ad hoc group of bondholders holding crossover bonds, which were unsecured bonds that were issued or guaranteed by the Canadian entities of the companies. The indentures provided for the continuing accrual of interest until payment, at contractually specified interest rates, as well as other post-filing payment obligations. Other claimants, including pensioners and former employees, did not have a provision for interest on amounts owing. The holders of the crossover bonds filed claims for principal and pre-filing interest in the amount of US$4.092 billion. They also claimed they were entitled to post-filing interest and related claims under the terms of the crossover bonds of approximately US$1.6 billion.

In the context of a joint allocation trial, the CCAA judge found that the common law "interest stops rule" applied in the context of the CCAA. The CCAA judge found that the holders of the crossover bond claims were not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest, namely, above and beyond US$4.092 billion. The crossover bondholders appealed.

Held: The appeal was dismissed.

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Per Rouleau J.A. (Simmons and Gillese JJ.A. concurring): The pari passu principle provided that the assets of an insolvent debtor were to be distributed amongst classes of creditors rateably and equally as those assets were found at the date of insolvency. The pari passu principle was the foremost principle in insolvency law. The pari passu principle was grounded in the need to treat all creditors fairly and to ensure an orderly distribution of assets. A necessary corollary of the pari passu principle was the interest stops rule. The interest stops rule was a fundamental tenant of insolvency law. Absent the interest stops rule, the fair and orderly distribution sought by the pari passu principle could not be achieved. The main purposes behind the interest stops rule were fairness to creditors and to achieve the orderly administration of an insolvent debtor's estate. The interest stops rule had been consistently applied in bankruptcy and winding-up proceedings.

There were differences between the CCAA and other insolvency schemes. However, the same principles supporting the conclusion that the interest stops rule was necessary in bankruptcy and insolvency proceedings, namely, the fair treatment of creditors and the orderly administration of an insolvent debtor's estate, applied with equal force to CCAA proceedings. The CCAA was an integrated insolvency regime, which included the Bankruptcy and Insolvency Act (Act). In keeping with the idea of harmonization, as the interest stops rule applied upon bankruptcy under the Act, it should also apply in CCAA proceedings unless the rule was ousted by the CCAA, which it was not. If the interest stops rule did not apply in CCAA proceedings then the creditors who did not have a contractual right to post-filing interest would have skewed incentives against reorganization under the CCAA. Such creditors would have an incentive to proceed under the Act or the Winding-up and Restructuring Act where the interest stops rule applied to prevent creditors who had a contractual right to interest from improving their proportionate claim against the debtor at the expense of other creditors. The CCAA created conditions for preserving the status quo and if post filing interest was available to only one set of creditors then the status quo was not preserved.

If the interest stops rule did not to apply CCAA proceedings then the key objective of the CCAA, to facilitate the restructuring of corporations through flexibility and creativity, might be undermined due to the uneven entitlement to interest that might be created. Creditors who had an entitlement to post-filing interest might be less motivated to compromise. The ability to find a compromise acceptable to all creditors would be more challenging if the amount of a creditor's legal entitlement was constantly shifting as post-interest accrued. The principle of fairness supported the application of the interest stops rule. The interest stops rule was not contrary to established CCAA practice and it did not prevent a CCAA plan from providing for post-filing interest. There were rational reasons for adopting the interest stops rule in the CCAA context.

The interest stops rule did not preclude the payment of post-filing interest under a plan of compromise or arrangement. Nothing in the CCAA judge's reasons prevented the bondholders from seeking and obtaining post-filing interest through a negotiated plan.

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s. 9 — considered

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s. 122 — considered

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s. 56 — considered

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Generally — referred to

APPEAL by bondholders from judgment reported at *Nortel Networks Corp., Re* (2014), 2014 ONSC 4777, 2014 CarswellOnt 17193, 121 O.R. (3d) 228 (Ont. S.C.J. [Commercial List]), finding interest stops rule applied in *Companies' Creditors Arrangement Act* proceedings and that bondholders were not legally entitled to claim or receive any amounts beyond outstanding principal debt and pre-petition interest.

***Paul Rouleau J.A.*:**

A. Overview

1 This appeal represents another chapter in the Nortel proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), which has been on-going since January 2009. A parallel proceeding under Chapter 11 of the United States *Bankruptcy Code* has also been on-going in Delaware since that time.

2 The *Ad Hoc* Group of Bondholders (the "appellant") brings this appeal with leave. The group represents substantial holders of "crossover bonds", which are unsecured bonds either issued or guaranteed by certain of the Canadian Nortel entities. The relevant indentures provide for the continuing accrual of interest until payment, at contractually specified interest rates, as well as other post-filing payment obligations, such a make-whole provisions and trustee fees.

3 In contrast, the claims of other claimants, such as Nortel pensioners and former employees, do not have a provision for interest on amounts owing to them.

4 Holders of the crossover bonds have filed claims for principal and pre-filing interest in the amount of US$4.092 billion against each of the Canadian and U.S. Nortel estates. They also claim they are entitled to post-filing interest and related claims under the terms of the crossover bonds. As of December 31, 2013, the amount of this claim was

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approximately US$1.6 billion. The total of these two amounts represents a significant portion of the proceeds generated from the worldwide sale of Nortel's business lines and other Nortel assets, totalling approximately $7.3 billion. This latter amount is apparently not growing at any appreciable rate because of the conservative nature of the investments made with it pending the outcome of the insolvency proceedings.

5 In the context of a joint allocation trial, the *CCAA* judge directed that two issues be argued:

> 1. whether the holders of the crossover bond claims are legally entitled ... to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion); and
>
> 2. if it is determined that the crossover bondholders are so entitled, what additional amounts are such holders entitled to so claim and receive.

6 The *CCAA* judge answered the first question in the negative and so he did not need to answer the second question. In reaching that conclusion, he accepted that the common law "interest stops rule", which has been held to be a fundamental tenet of insolvency law, applies in the *CCAA* context. He disagreed with the appellant's submission that the Supreme Court of Canada's decision in *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24, [2006] 1 S.C.R. 865 (S.C.C.) [hereinafter *Canada 3000*], and this court's subsequent decision in *Stelco Inc., Re*, 2007 ONCA 483, 35 C.B.R. (5th) 174 (Ont. C.A.), are binding authority that the interest stops rule does not apply in the *CCAA* context.

7 On appeal, the appellant raises two related issues — whether the *CCAA* judge erred in concluding that an interest stops rule applies in *CCAA* proceedings and, if not, whether he erred in concluding that the holders of Crossover Bond Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest.

8 I would dismiss the appeal. As I will explain, there are sound legal and policy reasons for applying the interest stops rule in the *CCAA* context, and as I read *Stelco Inc., Re* and *Canada 3000*, they do not preclude such a result. Nor do I see a basis for varying the order that he made.

B. Background

9 In the *CCAA* court's initial order of January 14, 2009, the Canadian Debtors [1] were directed, subject to certain exceptions, to make no payments of principal or interest on account of amounts owing by the Canadian Debtors to any of their creditors as of the filing date, unless approved by the Monitor. Further, all proceedings and enforcement processes, and all rights and remedies of any person against the Canadian Debtors were stayed absent consent of the Canadian Debtors and the Monitor, or leave of the court.

10 In accordance with a claims procedure order dated July 30, 2009, claims against the Canadian Debtors were required to be filed by a claims bar date. Under a subsequent claims resolution order dated September 16, 2010, a disputed claim could be brought before the *CCAA* court for final determination.

11 As previously noted, holders of the crossover bonds filed proofs of claim that included not only the principal amount of the debt and interest accrued to the date of insolvency but also contractual claims for interest and other amounts post-filing.

12 In May 2014, a joint allocation trial, conducted by way of video-link by the *CCAA* judge in Ontario and Judge Gross in Delaware, commenced on the issue of the allocation of the sale proceeds among the debtor estates, including the Canadian and U.S. estates. In his 2015 decision, the *CCAA* judge, citing the "fundamental tenet of insolvency law that all debts shall be paid *pari passu*" and that "all unsecured creditors receive equal treatment" held that the $7.3 billion in funds generated from the Nortel liquidation should be allocated on a *pro rata* basis as among the estates: 2015 ONSC 2987, 23 C.B.R. (6th) 249 (Ont. S.C.J. [Commercial List]), at para. 209. He ordered, at para. 258, that the funds be allocated

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among the debtor estates in accordance with a number of principles, including the principle that each debtor estate "is to be allocated that percentage of the [liquidation proceeds] that the total allowed claims against that Estate bear to the total allowed claims against all Debtor Estates." A number of parties have sought leave to appeal that decision.

13 It was on June 24, 2014, while the joint allocation trial was proceeding, that the *CCAA* judge directed that the two issues set out above be decided.

C. Decision Below

14 The *CCAA* judge began his analysis with a review of cases applying the interest stops rule in the bankruptcy and winding-up context. He noted the relationship between the interest stops rule and the *pari passu* principle, which he described as "a fundamental tenet of insolvency law" that requires equal treatment of unsecured creditors. He found there was "no reason to not apply the [common law] interest stops rule to a CCAA proceeding because the CCAA does not expressly provide for its application." The issue was "whether the rule should apply to this CCAA proceeding."

15 He went on to conclude that "[t]here is no controlling authority in Canada in a case such as this in which there is a contested claim being made by bondholders for post-filing interest against an insolvent estate under the CCAA, let alone under a liquidating CCAA process, or in which the other creditors are mainly pensioners with no contractual right to post-filing interest." In reaching this conclusion, he distinguished *Stelco* and *Canada 3000* and found that the application of the interest stops rule was supported by the more recent decisions in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter *Century Services*], and *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.).

16 The *CCAA* judge thus ordered that "holders of Crossover Bond Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion)."

D. Issues on Appeal

17 The appellant raises two related issues:

1. Did the *CCAA* judge err in concluding that an interest stops rule applies in *CCAA* proceedings?

2. If the *CCAA* judge did not err in concluding that an interest stops rule applies in *CCAA* proceedings, did he err in holding that holders of Crossover Bonds Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest?

E. Analysis

(1) Did the CCAA judge err in concluding that an interest stops rule applies in CCAA proceedings?

18 The appellant, supported by the Bank of New York Mellon and the Law Debenture Trust Company of New York as indenture trustees, submits that the *CCAA* judge erred in concluding that the interest stops rule applies.

19 First, the appellant submits he applied inapplicable case law and misinterpreted case law in concluding that the rule did and should apply. Among other things, the appellant criticizes the *CCAA* judge's application of the Supreme Court of Canada's decisions in *Century Services* and *Indalex*, which deal with the inter-play between the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*").

20 The appellant also submits that the application of the interest stops rule in the *CCAA* context is inconsistent with the *CCAA* and would have negative practical consequences.

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21 Finally, the appellant submits that *Canada 3000* and *Stelco* are binding authority that preclude the application of the interest stops rule in the *CCAA* context and that the *CCAA* judge violated the principle of *stare decisis* in refusing to follow them.

22 I will deal with these submissions in turn, beginning with a discussion of the interest stops rule and the related *pari passu* principle.

(a) Should the interest stops rule apply in CCAA proceedings?

(i) Origin and scope of the interest stops rule

23 It is well settled that the *pari passu* principle applies in insolvency proceedings. This principle, to the effect that "the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of insolvency" is said to be one of the "governing principles of insolvency law" in Canada: *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.T.C. 486 (Ont. S.C.J. [Commercial List]), at para. 20, *per* Blair J. [2] In fact, the *pari passu* principle has been said to be the foremost principle in the law of insolvency not just in Canada but around the world: Rizwaan J. Mokal "Priority as Pathology: The *Pari Passu* Myth" (2001) 60:3 Cambridge L.J. 581, at p. 581. According to an article in the Cambridge Law Journal, "[c]ommentators claim to have found [the *pari passu*] principle entrenched in jurisdictions far removed ... in geography and time": Mokal, at pp. 581-582.

24 The *pari passu* principle is rooted in the need to treat all creditors fairly and to ensure an orderly distribution of assets.

25 As explained in *Humber Ironworks & Shipbuilding Co., Re* (1869), 4 Ch. App. 643 (Eng. Ch. Div.), nearly 150 years ago, a necessary corollary of the *pari passu* principle is the interest stops rule. Absent the interest stops rule, the fairness and orderly distribution sought by the *pari passu* principle could not be achieved. Selwyn L.J. explained the rationale for the interest stops rule, at pp. 645-646:

> In the present case we have to consider what are the positions of the creditors of the company, when, as here, there are some creditors who have a right to receive interest, and others having debts not bearing interest.
>
> . . . . .
>
> It is very difficult to conceive a case in which the assets of a company could be ... immediately realized and divided; but suppose they had a simple account at a bank, which could be paid the next day, that would be the course of proceeding. Justice, I think, requires that that course of proceeding should be followed, and that no person should be prejudiced by the accidental delay which, in consequence of the necessary forms and proceedings of the Court, actually takes place in realizing the assets; but that, in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding-up. I, therefore, think that nothing should be allowed for interest after that date.

26 Giffard L.J. similarly stated, at p. 647-648:

> That rule ... works with equality and fairness between the parties; and if we are to consider convenience, it is quite clear that, where an estate is insolvent, convenience is in favour of stopping all the computations at the date of the winding-up.
>
> . . . . .
>
> I may add another reason, that I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

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27 Thus, the primary purpose behind the common law interest stops rule is fairness to creditors. Another purpose is to achieve the orderly administration of an insolvent debtor's estate.

28 The common law interest stops rule has been consistently applied in proceedings under bankruptcy and winding-up legislation. In fact, as explained by Blair J. in *Confederation Life Insurance Co.* at paras. 22-23, the rule has been applied even when the legislation might be read to the contrary:

> This common law principle has been applied consistently in Canadian bankruptcy and winding-up proceedings. This is so notwithstanding the language of subsection 71(1) of the *Winding-Up Act* and section 121 of the *BIA*, which might be read to the contrary, in my view.
>
> . . . . .
>
> Yet, the "interest stops" principle has always applied to the payment of post-insolvency interest, and the provisions of subsection 71(1) have never been interpreted to trump the common law insolvency "interest stops rule".

29 I will now turn to the question of whether the interest stops rule should be applied in the *CCAA* context.

(ii) Should the interest stops rule apply in CCAA proceedings?

30 The respondents[3] maintain that one would expect the interest stops rule to apply in *CCAA* proceedings given that *CCAA* proceedings are insolvency proceedings to which the common law *pari passu* principle applies. Consistent with the *pari passu* principle and the related interest stops rule, creditors in *CCAA* proceedings must surely expect to be treated fairly and not see creditors with interest entitlements have their claims grow, post-insolvency, disproportionately to those with no, or lesser, interest entitlements. In the respondents' submission, the same reasoning used by courts to conclude that the interest stops rule applies in winding-up and bankruptcy proceedings leads to the conclusion that the interest stops rule applies in *CCAA* proceedings.

31 The appellant, on the other hand, submits that *CCAA* proceedings are different from other insolvency proceedings in that they do not immediately or permanently alter the rights of creditors. The filing is intended to give the debtor breathing space so that a plan of compromise or arrangement can be negotiated with creditors and the business can continue. The objective of a *CCAA* proceeding is a consensual, statutory compromise in the form of a *CCAA* plan. Such a *CCAA* plan can provide for any kind of distribution, provided it is approved by the requisite majority of creditors and the court.

32 In the appellant's submission, until a plan is negotiated or the proceeding is converted to bankruptcy or winding-up, the rights of creditors are not altered; rather, their rights to execute on them are simply stayed. In the appellant's view, therefore, unless and until this sought-after compromise of rights is negotiated, only the exercise of the rights is stayed. The *CCAA* filing does not affect the right to accrue interest; it only stays the collection of that interest.

33 The appellant further argues that the *CCAA* judge's decision is contrary to the established *CCAA* practice and the reasonable expectations of the parties in this proceeding. In particular, the appellant notes that a *CCAA* plan may, and often does, provide for the recovery of post-filing interest. The appellant also submits that the application of the interest stops rule would allow debtors to obtain a permanent interest holiday simply by filing for *CCAA* protection, even if the filing were later withdrawn, causing a permanent prejudice to the creditors not contemplated by the *CCAA*. And, the appellant submits that an interest stops rule would create a disincentive for creditors to participate in *CCAA* proceedings since they would not be compensated for delays under the *CCAA* even if there were ultimately assets available to do so

34 I do not accept the appellant's submissions on this point. Admittedly, there are differences between the *CCAA* and other insolvency schemes, including that the *CCAA* does not provide for a fixed scheme of distribution. Further, assuming a plan of compromise or arrangement under the *CCAA* is negotiated it may or may not result in a distribution to creditors. Nevertheless, in my view, the same principles that underpin the conclusion that the interest stops rule

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is necessary in bankruptcy and winding-up proceedings — namely, the fair treatment of creditors and the orderly administration of an insolvent debtor's estate - apply with equal force to *CCAA* proceedings. I say so for several reasons.

35 First, the *CCAA* is part of an integrated insolvency regime, which also includes the *BIA*. The Supreme Court of Canada in *Century Services* considered the *CCAA* regime and opined, at para. 24, that "[w]ith parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation". The court went on to explain, at para. 78, that the *CCAA* and *BIA* are related and "no 'gap' exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy".

36 Consistent with the notion of harmonization, because the common law interest stops rule applies upon bankruptcy under the *BIA*, it should follow that the common law rule also applies in a *CCAA* proceeding unless, of course, the rule is ousted by the *CCAA*. The *CCAA* does not address entitlement to claim post-filing interest let alone oust the common law rule with clear wording.

37 Second, if the interest stops rule were not to apply in *CCAA* proceedings, the creditors who do not have a contractual right to post-filing interest would, as the Supreme Court explained in *Century Services* at para. 47, have "skewed incentives against reorganizing under the *CCAA*" and this would "only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert." This concern over skewed incentives was confirmed in *Indalex* where the Supreme Court held, at para. 51, that "[i]n order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those they would receive under the *BIA*.

38 Without an interest stops rule under the *CCAA*, the creditors with no claim to post-filing interest would have an incentive to proceed under the *BIA* or the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, where the interest stops rule operates to prevent creditors, such as the appellant, who have a contractual right to interest from improving their proportionate claim against the debtor at the expense of other creditors.

39 Third, as recognized by the Supreme Court in *Century Services* at para. 77, the "*CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all". This is achieved through grouping all claims within a single proceeding and staying all actions against the debtor, thus putting creditors on an equal footing: *Century Services*, para. 22.

40 As submitted by the Canadian Creditors' Committee, if post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights to sue the debtor and obtaining a judgment that bears interest, the *status quo* has not been preserved.

41 Fourth, if the interest stops rule were not to apply in *CCAA* proceedings, the key objective of that statute — to facilitate the restructuring of corporations through flexibility and creativity — may be undermined. This is because of the asymmetrical entitlement to interest that would be created. Creditors with an entitlement to post-filing interest may be less motivated to compromise than those creditors without such an entitlement. Using the case under appeal as an example, if post-filing interest is allowed to accrue, the delay and failure to reach a compromise will see the appellant's proportionate claim against the assets of the debtors rise very significantly at the expense of other creditors. One could well understand that if the urgency for reaching a compromise and the incentive to compromise are significantly lower for one group of unsecured creditors than for the balance of the unsecured creditors, restructuring will be more difficult to achieve and the ability to reach creative solutions will be lessened.

42 Furthermore, if the amount of an unsecured creditor's legal entitlement is constantly shifting as post-filing interest accrues, the ability to find a compromise that is acceptable to all creditors at any one point in time will pose a greater challenge than if the entitlements are fixed as of the date of filing.

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43 Fifth, the principle of fairness supports the application of the interest stops rule. Insolvency proceedings are intended to be fair processes for liquidating or restructuring insolvent corporations. How, one may ask, is it fair if the appellant, an unsecured creditor, sees its claim against the assets of the debtor balloon from $4.092 billion to $5.692 billion (as of December 31, 2013) because of contractual provisions when the claims of unsecured creditors, who have no such contractual provisions and who have been prevented for almost seven years by the *CCAA* stay from converting their claims into court judgments that would bear interest, have seen no increase at all? Delays in liquidating the Nortel assets have helped the Monitor achieve the very significant recoveries made ($7.3 billion) and, in fairness, this achievement should be for the benefit of all creditors.

44 Finally, I wish to respond to the appellant's concerns.

45 As to past practice and the reasonable expectations of the parties, I do not view the existence of an interest stops rule as being contrary to established *CCAA* practice or as preventing a *CCAA* plan from providing for post-filing interest. Parties may negotiate for a plan that provides for payments of more or less than a creditor's legal entitlement in lieu of the foregone interest. Thus, I do not accept the appellant's submission that there would be a disincentive to participate in *CCAA* proceedings, which is based on the premise that post-filing interest may not be recovered under a *CCAA* plan.

46 The appellant also raised the concern that a debtor company could obtain a permanent interest holiday, resulting in unfairness. The appellant says that if there are proceeds over and above the amounts needed to satisfy the pre-filing claims of creditors, those proceeds would be for the benefit of the shareholders of the debtor. This follows from the fact that the *CCAA* contains no provision for the payment of a "surplus" to creditors and the interest stops rule would prevent the unsecured creditors from recovering any post-filing interest. The debtor could therefore resort to the *CCAA* to stop interest from accruing and operate his business interest free.

47 This hypothetical raises the same concern about the loss of post-filing interest but in a somewhat different way. The concern is that a debtor may seek *CCAA* protection to avoid the obligation to pay interest.

48 There may well be exceptional situations where, at some point in a *CCAA* proceeding, the common law interest stops rule risks working an unfairness of some sort. I leave for another day what orders, if any, might be made by a *CCAA* judge in cases such as the hypothetical presented by the appellant where a debtor might be considered to benefit unfairly as a result of the common law interest stops rule. I note, however, that in order to achieve the remedial purpose of the *CCAA*, *CCAA* courts have been innovative in their interpretation of their stay power and in the exercise of their authority in the administration of *CCAA* proceedings. This approach has been specifically endorsed by the Supreme Court of Canada in *Century Services* and would no doubt guide the court should the need arise: see, for example, paras. 61 and 70.

49 In conclusion, there are sound reasons for adopting an interest stops rule in the *CCAA* context. I now turn to the argument that *Canada 3000* and *Stelco* preclude the application of the rule.

(b) Are Canada 3000 and Stelco binding authorities to the effect that the interest stops rule does not apply in CCAA proceedings?

50 The appellant vigorously maintains that the *CCAA* judge was bound by *Canada 3000* and *Stelco*, which both confirm that the interest stops rule does not apply in *CCAA* proceedings.

51 I would not give effect to this submission. As I will explain, both of these decisions should be read narrowly and do not constitute a precedent with respect to the issue raised in this appeal — whether the common law interest stops rule applies in *CCAA* proceedings.

(i) Canada 3000

Background and lower court decisions

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52 The decision in *Canada 3000* arose out of the collapse of three airlines — Canada 3000 Airlines Ltd. and Royal Aviation Inc. (collectively "Canada 3000"), and Inter-Canadian (1991) Inc. ("Inter-Canadian"). Canada 3000 filed for protection under the *CCAA* and, three days later, filed for bankruptcy. Inter- Canadian filed a *BIA* proposal but the proposal ultimately failed and so it too was placed into bankruptcy effective as of the date it filed its notice of intention to make a proposal.

53 At the time the airlines collapsed, they owed significant amounts in unpaid airport and navigation charges. As a result, various airport authorities and NAV Canada sought remedies under the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c. 5 ("*Airports Act*") and the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20 ("*CANSCA*"). In particular, they sought orders seizing and detaining aircraft leased by the bankrupt airlines. While the lessors of the planes retained legal title to the aircraft, the bankrupt airlines were the registered owner for the purposes of the *Aeronautics Act*, R.S.C. 1985, c. A- 2.

54 The airport authorities and NAV Canada brought proceedings in Ontario and Quebec.

55 In Ontario, Ground J. dismissed motions for orders permitting the airport authorities and NAV Canada to seize and detain the aircraft leased by Canada 3000: *Canada 3000 Inc., Re* (2002), 33 C.B.R. (4th) 184 (Ont. S.C.J.). On the question of interest, he concluded, at para. 73, that the airport authorities and NAV Canada were entitled to charge interest on the unpaid charges up to the date of payment or the posting of security for payment.

56 On appeal from Ground J.'s decision, this court held that the interest question need not be determined since the airport authorities and NAV Canada did not have the right to detain the aircraft: *Canada 3000 Inc., Re* (2004), 69 O.R. (3d) 1 (Ont. C.A.), at para. 197.

Supreme Court's decision

57 On appeal to the Supreme Court of Canada, the court determined that the airport authorities and NAV Canada had the right to detain the aircraft leased and operated by the bankrupt airlines. The issue of post-filing interest was, therefore, an issue the court had to decide.

58 In deciding that issue, Binnie J. made the following comment at para. 96:

> While a CCAA filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].
>
> [Emphasis added.]

59 The appellant submits that the underlined words are binding *ratio* and must be followed in this case.

60 While I agree that Binnie J.'s comment about the *CCAA* is not *obiter*, I am not convinced that it should be read as broadly as the appellant contends. In *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 (S.C.C.), Binnie J. warned, at para. 57, against reading "each phrase in a judgment ... as if enacted in a statute". Rather, the question to be asked is "what did the case decide?".

61 To answer what *Canada 3000* decided about post-filing interest under the *CCAA*, it is important to consider the context in which Binnie J. made his comment, including the facts of the case, the issues before the court, the structure of his reasons, the wording he used, and what he said as well as what he did not say.

62 At para. 40., Binnie J. defined the "two major questions raised by the appeals" as follows: (1) "are the *legal titleholders* liable for the debt incurred by the registered owners and operators of the failed airlines to the service providers?" and (2) "even if they are not so liable, are *the aircraft* to which they hold title subject on the facts of this case to judicially issued seizure and detention orders to answer for the unpaid user charges incurred by Canada 3000 and

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Inter-Canadian?" (emphasis in original). The answer to those two questions turned on the interpretation of the *Airports Act* and *CANSCA*. As Binnie J. noted at para. 36, the case was "from first to last an exercise in statutory interpretation".

63 After engaging in a lengthy exercise of statutory interpretation, he concluded that: (1) under s. 55 of *CANSCA*, the legal titleholders were not jointly and severally liable for the charges due to NAV Canada; and (2) under s. 56 of *CANSCA* and s. 9 of the *Airports Act*, the airport authorities and NAV Canada were entitled to apply for an order detaining the aircraft operated by the failed airlines.

64 Binnie J. then addressed eight additional arguments made by the parties and just before his last paragraph on disposition, he included a section simply entitled "Interest", starting at para. 93.

65 He began his analysis of the interest issue by outlining the statutory authority for charging interest: s. 9(1) of the *Airports Act* expressly provided for the payment of interest, and while *CANSCA* did not explicitly provide for interest, a regulation under *CANSCA* imposed interest: para. 93.

66 "The question then", said Binnie J. at para. 95, was "how long the interest can run". He addressed that question as follows, at paras. 95-96:

> The airport authorities and NAV Canada have possession of the aircraft until the charge or amount in respect of which the seizure was made is paid. It seems to me that this debt must be understood in real terms and must include the time value of money.
>
> Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. While a CCAA filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].
>
> [Emphasis added.]

67 Significantly, Binnie J. made no mention in his reasons of the common law interest stops rule or the related *pari passu* principle. Nor did he cite any case law dealing with those issues. In fact, even though it is well established that the interest stops rules applies under the *BIA*, he did not rely on the common law rule in support of his finding that interest stopped on bankruptcy. Instead, he relied on ss. 121 and 122 of the *BIA* in concluding that the interest payable under the *Airports Act* and the regulation under *CANSCA* did not accrue post-bankruptcy.

68 Binnie J.'s analysis of the issue is rooted in the factual and statutory context of the case. In discussing the accrual of interest under the *CCAA*, he specified that the interest was on "unpaid charges", namely charges under *CANSCA* and the *Airports Act*. Binnie J. was not answering an abstract legal question but rather deciding how long interest ran in the particular factual and statutory context.

69 In effect, I read Binnie J. as saying that a *CCAA* filing does not stop the accrual of interest under *CANSCA* or the *Airports Act* but the statutory provisions of the *BIA* ss. 121 and 122 do. He was not deciding whether, in the absence of the right to interest under *CANSCA* and the *Airports Act*, interest would have accrued or been stopped by the common law interest stops rule.

70 Let me add that I agree with the *CCAA* judge's comment that Binnie J.'s statement in *Canada 3000* should "now be construed in light of *Century Services* and *Indalex*". In fact, one can well imagine that the court's interpretation of *CANSCA* and the *Airports Act* as allowing the accrual of interest in a *CCAA* proceeding but not in a *BIA* proceeding

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might have been different had it reached the Supreme Court after these two more recent cases. That question, however, is for another day. For now, I turn to this court's decision in *Stelco*.

(ii) Stelco

Background and motion judge's decision

71 The post-filing interest issue in *Stelco* arose in "the final chapter of the financial restructuring of Stelco" under the *CCAA*: *Stelco Inc., Re* (2006), 24 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]), at para. 1. The final chapter involved competing claims to a portion of the amount payable to the holders of subordinated notes (the "Junior Noteholders") pursuant to Stelco's plan of arrangement (the "Plan"). The claim to these funds ("Turnover Proceeds") was made by the "Senior Debentureholders".

72 The dispute over the Turnover Proceeds arose after Stelco's Plan had been sanctioned and Stelco had emerged from restructuring with its debt reorganized. The Senior Debentureholders claimed the Turnover Proceeds on the basis of subordination provisions contained in the Note Indenture under which Stelco had issued convertible unsecured subordinated debentures to the Junior Noteholders.

73 Under the terms of the Note Indenture, the Junior Noteholders expressly agreed that, in the event that the debtor became insolvent, they would subordinate their right of repayment until after repayment in full of "Senior Debt".

[74] The plan of arrangement that had been approved was a "no interest" plan, meaning that distribution from Stelco to the creditors did not include or account for post-filing interest. The Plan, however, provided that the rights as between the Senior Debentureholders and the Junior Noteholders were preserved. The Senior Debentureholders, who had not received payment of post-filing interest from Stelco under the Plan, demanded payment of it from the Junior Noteholders pursuant to the terms of the Note Indenture. The Junior Noteholders argued, among other things, that the subordination provisions did not survive the Plan's implementation and that the Senior Debentureholders were not entitled to claim post-filing interest from them.

75 The motion judge, and on appeal, this court ruled in favour of the Senior Debentureholders. The courts found that the Plan was expressly drafted to preserve the subordination provisions and that the *CCAA* does not purport to affect rights as between creditors to the extent that they do not directly involve the debtor.

How to read Stelco?

76 The appellant and the respondents offer different readings of *Stelco*.

77 The appellant argues that this court's decision is binding authority for the proposition that the interest stops rule does not apply in the *CCAA* context. The passages relied on by the appellant include para. 67:

> [T]here is no persuasive authority that supports an Interest Stops Rule in a *CCAA* proceeding. Indeed, the suggested rule is inconsistent with the comment of Justice Binnie in [*Canada 3000*] at para. 96, where he said:
>
> > While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].

78 The respondents, for their part, read the case more narrowly as a resolution of an inter-creditor dispute. They submit that the *ratio* of the case is that there was no rule that prohibited giving effect to the agreed upon inter- creditor postponement. To the extent that this court discussed the interest stops rule in the abstract, its comments are *obiter*.

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79 I agree with the respondents. In my view, the court in *Stelco* did not need to decide whether the interest stops rule applies in *CCAA* proceedings for it to decide the inter-creditor dispute before the court and so its statements about the rule's application are not binding.

80 This court expressly noted, at para. 44, that it was dealing with an inter-creditor dispute. The Junior Noteholders had accepted the subordination terms in the Note Indenture. They had agreed not to be paid anything, in the event of insolvency, until those who held Senior Debt were paid principal and interest in full. The court affirmed, at para. 44, that the *CCAA* does not change the relationship among creditors where it does not directly involve the debtor.

81 As noted, this was a "no interest" plan, meaning that the Senior Debentureholders received no post-filing interest from Stelco. Rather, they sought and eventually received payment of post-filing interest from the Junior Noteholders' share of the proceeds. The court found that the Stelco Plan contemplated the continued accrual of interest to Senior Debentureholders for the purpose of their rights as against the Junior Noteholders after the *CCAA* filing date: paras. 59 and 70. It noted that *CCAA* plans can and sometimes do provide for payments in excess of claims filed in *CCAA* proceedings. There was no rule precluding the payment of post-filing interest to the Senior Debentureholders in accordance with the Stelco Plan: para. 70.

82 The court's conclusion that the Junior Noteholders could not rely on the interest stops rule is consistent with the traditional interest stops rule. The interest stops rule relates to claims by creditors against the debtor. It does not deal with arrangements as between creditors. In other words, whether or not the interest stops rule applies in *CCAA* proceedings did not need to be decided because the agreement between creditors fell outside the scope of that rule.

83 The appellant makes two further submissions based on its interpretation of s. 6.2(1) of the Note Indenture. That paragraph reads as follows:

> 6.2 Distribution on Insolvency or Winding-up.
>
> . . . . .
>
> (1) the holders of all Senior Debt will first be entitled to receive payment in full of the principal thereof, premium (or any other amount payable under such Senior Debt), if any, and interest due thereon, before the Debentureholders will be entitled to receive any payment or distribution of any kind or character, whether in cash, property or securities, which may be payable or deliverable in any such event in respect of any of the Debentures;
>
> [Emphasis added.]

84 The first argument is that the Senior Debentureholders were only entitled to receive principal, premium and interest "which may be payable or deliverable in any such event", the event being insolvency or bankruptcy proceedings. Therefore, the court must have concluded, at least implicitly, that the Senior Debentureholders would have been entitled to maintain their claim for post-filing interest against Stelco.

85 The second argument is that, by the terms of s. 6.2(1), the Senior Debentureholders were only entitled to interest "due thereon" and so they could not claim post-filing interest from the Junior Noteholders unless they could claim post-filing interest from Stelco.

86 I would not give effect to either submission.

87 In *Stelco*, the court did not address either argument and we do not have a copy of the entire agreement nor do we have the other agreements that form part of the factual matrix. Without that context, this court is not in the position to interpret s. 6.2(1).

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88 In my view, the key question for this court is not how to properly interpret s. 6.2(1) but, rather, how we should read the reasons in *Stelco*. What did the *Stelco* court decide, and specifically, should we read the panel as implicitly deciding that the Senior Debentureholders could not recover post-filing interest from the Junior Noteholders unless they could claim post-filing interest against Stelco?

89 In discussing post-filing interest, the court's only mention of the Senior Debentureholders' claim as against Stelco is found at paras. 57-59, where the panel expressly rejected the argument that "any claim the Senior [Debentureholders] have for interest must be based on a "claim" [as defined in the Plan] they have against Stelco for such interest" and that "[i]f the Senior Debt does not include post-filing interest, there can be no claim against the [Junior] Noteholders for such amounts": see paras. 58-59.

90 Admittedly, the panel made this comment in discussing the effect of the Stelco Plan as opposed to the effect of the interest stops rule. However, as I read the section on post-filing interest as a whole, the court is saying that the Junior Noteholders agreed to be bound by the deal they made. They had agreed to the subordination provisions that guaranteed full payment to the Senior Debentureholders in the event of insolvency, and the Plan affirmed that the Senior Noteholders could claim the full amount that would have been owing had there been no *CCAA* filing. In this court's words at para. 70, there is no interest stops rule "that precludes such a result." In my view, therefore, this court did not make an implicit finding that the Senior Debentureholders had to be able to claim post-filing interest from Stelco in order to claim post-filing interest from the Junior Noteholders.

91 In conclusion, I consider the comment that there is no persuasive authority that supports an interest stops rule in *CCAA* proceedings to be *obiter*. *Stelco* dealt with the effect of an agreement as between creditors as to how, between them, they would share distributions. Whether or not interest stops upon a *CCAA* filing was of no import in answering that question.

(2) If the CCAA judge did not err in concluding that an interest stops rule applies in CCAA proceedings, did he err in holding that holders of Crossover Bonds Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest?

92 The appellant objects to the wording of the *CCAA* judge's order. It provides that "holders of Crossover Bond Claims are not legally entitled to claim *or receive* any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest" (emphasis added). While the appellant asked the *CCAA* judge to amend his order to delete "or receive", he refused. The appellant submits that, to the extent this precludes the bondholders from receiving post-filing interest under a *CCAA* plan, the *CCAA* judge erred. The appellant notes that all the parties in this proceeding agree that a *CCAA* plan may provide for post-filing interest.

93 As I explained above, the interest stops rule does not preclude the payment of post-filing interest under a plan of compromise or arrangement.

94 As I read the *CCAA* judge's reasons and order, he did not decide otherwise. His decision confirms that the common law interest stops rule applies in *CCAA* proceedings. If a plan of compromise or arrangement is concluded, it should not, for example, be read as limiting any right to recover post-filing interest creditors may have as amongst themselves, as existed in *Stelco*, or from non-parties. Nor does it dictate what any creditor may seek in bargaining for a fair plan of compromise or arrangement. In that regard, I do not interpret the *CCAA* judge's use of the words "or receive" as preventing the appellant from seeking and obtaining such a result in a negotiated plan. In particular, I note the *CCAA* judge's comment at para. 35 of his reasons that "the parties would of course be free to include post-filing interest payments in a plan of arrangement, as is sometimes done."

95 The appellant also seeks clarification as to the effect of the words "*any amounts* under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest" (emphasis added). The appellant notes that, without clarification, the wording of the order could potentially preclude the recovery of other contractual entitlements under

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the relevant indentures, such as costs and make-whole provisions, even though no arguments were advanced before the *CCAA* judge with respect to any amounts other than post-filing interest.

96 The issue the *CCAA* judge was directed to answer was "whether the holders of the crossover bond claims ... [were] legally entitled ... to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest". As indicated in the appellant's factum, the only arguments advanced before the *CCAA* judge related to post-filing interest and not any other amounts under the indentures. The appellant does not appear to have made submissions to the *CCAA* judge with respect to the costs and make-whole fees it now raises in its factum. This court is in no position to deal with the new argument raised by the appellant. Further, beyond making the broad submission noted above, the appellant did not expand on that submission and direct the court to the specific claims or indenture provisions it relies on in support of its argument or explain why the claims should not be caught by the order.

97 As I have already indicated, the *CCAA* judge's order confirms that the interest stops rule, and the limits imposed by the rule, apply in *CCAA* proceedings. To the extent that the appellant maintains that there are other contractual entitlements under the relevant indentures not covered by the interest stops rule, it is up to the *CCAA* court to decide if those can now be raised and ruled upon.

F. Final Comments

98 I acknowledge that the Nortel *CCAA* proceedings are exceptional, particularly with respect to the length of the delay. The amount the appellant claims for post-filing interest and related claims under the indentures, and the resulting impact on other unsecured creditors is so great because of the length of that process. The principle, however, is the same whether the *CCAA* process is short or long. After the imposition of a stay in *CCAA* proceedings, allowing one group of unsecured creditors to accumulate post-filing interest, even for a relatively short period of time, would constitute unfair treatment vis-à-vis other unsecured creditors whose right to convert their claim into an interest-bearing judgment is stayed.

99 This decision does not purport to change or limit the powers of *CCAA* judges. Although the decision clearly settles at the outset of a *CCAA* proceeding whether there is a legal entitlement to post-filing interest, it does not dictate how the proceeding will progress thereafter until a plan of compromise or arrangement is approved, or the *CCAA* proceeding is otherwise brought to an end.

100 The determination of legal entitlement is important as it clearly establishes the starting point in a *CCAA* proceeding. It tells creditors, debtors and the court what legal claim a particular creditor has. Its significance is not only for purposes of setting the voting rights of creditors on any proposed plan of compromise or arrangement, it also ensures that, in assessing any such proposed plan, the parties will know what they are or are not compromising and the court will be equipped to consider the fairness of such a plan.

G. Disposition

101 For these reasons, I would dismiss the appeal. Pursuant to the agreement of the parties, I would award the respondent Monitor, as successful party, costs as against the appellant fixed in the amount of $40,000, inclusive of disbursements and applicable taxes. I would make no other order as to costs.

***Janet Simmons J.A.*:**

I agree

***E.E. Gillese J.A.*:**

I agree

Appeal dismissed.

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Footnotes

1 There are five Canadian Debtors: Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation.

2 As explained in Roderick J. Wood's text on bankruptcy and insolvency law, "insolvency law is the wider concept, encompassing bankruptcy law but also including non-bankruptcy insolvency systems.": Roderick J. Wood, *Bankruptcy & Insolvency Law* (Toronto: Irwin Law Inc., 2009), at p. 1.

3 The respondents are the Monitor, the Canadian Debtors, the Canadian Creditors' Committee and the Wilmington Trust, National Association. While technically The Bank of New York Mellon and the Law Debenture Trust Company of New York are also respondents, they support the appellant's position and so my use of the term "respondents" excludes them.

End of Document

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TAB 9

Most Negative Treatment: Distinguished
Most Recent Distinguished: Danielson v. Calgary (City) | 2005 ABQB 55, 2005 CarswellAlta 123, [2005] A.W.L.D. 1023, 29 M.P.L.R. (4th) 103, 364 A.R. 334 | (Alta. Q.B., Jan 27, 2005)

2002 ABQB 682
Alberta Court of Queen's Bench

Sulphur Corp. of Canada Ltd., Re

2002 CarswellAlta 896, 2002 ABQB 682, [2002] 10 W.W.R. 491, [2002] A.W.L.D. 345, [2002] A.J. No. 918, 319 A.R. 152, 35 C.B.R. (4th) 304, 5 Alta. L.R. (4th) 251

IN THE MATTER OF THE COMPANIES CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF THE BUSINESS CORPORATIONS ACT, R.S.A. 2000, c. B-9

AND IN THE MATTER OF SULPHUR CORPORATION OF CANADA LTD.

Lovecchio J.

Heard: June 19, 2002
Judgment: July 16, 2002
Docket: Calgary 0201-06610

Counsel: *Brian P. O'Leary*, *Q.C.*, for Applicants
Karen Horner, for Sulphur Corporation of Canada Ltd.
Howard A. Gorman, for Proprietary Industries Inc.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Company had working capital shortfall of almost $10 million and approximately $9 million of builders' liens had been registered against its assets — Company obtained protection under Companies' Creditors Arrangement Act — Order under Act stayed all actions by creditors and authorized company to borrow $200,000 in debtor in possession financing from major shareholder which would rank in priority to all other creditors — Several builders' lienholders brought application for determination of jurisdiction of court to grant debtor in possession financing charge ranking ahead of registered liens — Company brought application for extension of stay and increase in amount of financing — Court has jurisdiction to grant charge for debtor in possession financing which ranks in priority to liens under Builders Lien Act — Section 11 of Companies' Creditors Arrangement Act provides courts with broad and liberal power to be used to help achieve overall objective of Act, which is to foster restructuring of insolvent companies to preserve and enhance their value for mutual benefit of companies and creditors — No specific limitations were placed on exercise of courts' discretion under s. 11 — Provisions of federal Companies' Creditors Arrangement Act were in conflict with provisions of provincial Builders Lien Act and Companies' Creditors Arrangement Act should prevail — Major shareholder's increased debtor in possession financing proposal was only plan that could result in creation of greater value — Given magnitude of amounts involved, prejudice to lienholders was outweighed by

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potential benefit for all parties — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11 — Builders Lien Act, S.B.C. 1997, c. 45.

Table of Authorities

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Hunters Trailer & Marine Ltd., Re, 2001 CarswellAlta 964, [2001] 9 W.W.R. 299, 27 C.B.R. (4th) 236, 94 Alta. L.R. (3d) 389, 2001 ABQB 546, 295 A.R. 113 (Alta. Q.B.) — followed

Pacific National Lease Holding Corp. v. Sun Life Trust Co., 34 C.B.R. (3d) 4, 10 B.C.L.R. (3d) 62, [1995] 10 W.W.R. 714, *(*sub nom. *Pacific National Lease Holding Corp., Re)* 62 B.C.A.C. 151, *(*sub nom. *Pacific National Lease Holding Corp., Re)* 103 W.A.C. 151, 1995 CarswellBC 369 (B.C. C.A.) — followed

Royal Oak Mines Inc., Re, 1999 CarswellOnt 792, 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) — distinguished

Smoky River Coal Ltd., Re, 1999 CarswellAlta 128, *(*sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 237 A.R. 83, *(*sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) — considered

United Used Auto & Truck Parts Ltd., Re, 1999 CarswellBC 2673, 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) — considered

United Used Auto & Truck Parts Ltd., Re, 2000 BCCA 146, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96 (B.C. C.A.) — considered

Statutes considered:

Builders Lien Act, S.B.C. 1997, c. 45
Generally — referred to

s. 11 — considered

s. 32 — considered

s. 32(1) — considered

s. 32(2) — considered

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

s. 11 — considered

s. 11(3) — considered

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s. 11(4) — considered

Court of Queen's Bench Act, R.S.M. 1970, c. C280
s. 59 — referred to

Legal Profession Act, S.B.C. 1987, c. 25
Generally — referred to

Mechanics' Liens Act, R.S.M. 1970, c. M80
s. 11(1) — referred to

APPLICATION by builders' lienholders for determination of jurisdiction of court under *Companies' Creditors Arrangement Act* to grant debtor in possession financing charge which would rank ahead of registered liens; APPLICATION by insolvent company for extension of stay and increase in debtor in possession financing.

***Lovecchio J.*:**

INTRODUCTION

1 This is an application by several builders' lien claimants of Sulphur Corporation of Canada Ltd. to determine whether this Court has the jurisdiction under the *Companies' Creditors Arrangements Act* [1] to grant a debtor in possession financing charge which would rank in priority to their registered liens. In a concurrent application, Sulphur sought an extension of the stay and an increase in the DIP financing of $450,000.

BACKGROUND

2 The basic facts in the applications are not in dispute. They are briefly summarized below.

3 Sulphur is a company incorporated under the laws of the Province of Alberta and Proprietary Industries Inc. owns 79.59% of Sulphur's issued and outstanding voting shares.

4 Sulphur's only activity has been to develop and construct a sulphur terminal and processing facility in Prince Rupert, British Columbia. The facility has not been completed and it generates no cash flow.

5 On April 19, 2002, Sulphur obtained protection under the *CCAA* in an *ex parte* application. The Order stayed all actions against Sulphur by all of its creditors for a period of 30 days, named Arthur Andersen Inc. (which firm was subsequently taken over by Deloitte & Touche Inc.) as the Monitor and authorized Sulphur to borrow an amount not exceeding $200,000 from Proprietary to finance the continued activities of Sulphur. This DIP financing was to rank in priority to all other creditors of Sulphur, except those claiming under the Administrative Charge (being primarily the Monitor's fees and disbursements).

6 A number of affidavits have been filed in this matter. Based on these affidavits, it appears the financial position of Sulphur is extremely precarious.

7 Sulphur has a working capital shortfall of $9,751,435.00. On December 7, 2001, Sulphur ceased paying its trade creditors for their work and materials provided for the construction and development of the facility. The trades continued to work on the facility and were not advised by Sulphur that funding from Proprietary had ceased until around January 8, 2002.

8 Approximately $9,000,000.00 of builders' liens have been registered against Sulphur's assets. It would appear these liens were registered in early 2002, and the Applicants represent a total of $6,498,252.98 or 59% of that amount.

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9 By the middle of December, 2001, Proprietary had advanced a total of $17,791,338.00 to Sulphur. Of that amount, $1,000,000.00 was advanced as consideration for a share subscription and $1,166,200.00 to exercise Share Purchase Warrants. The balance of the advances, in the amount of $15,625,138.00, was a loan. At the time the loan advances were made only one debenture, securing the first $1,180,000.00 advance under the loan, was issued and despite the requests and the demands of Proprietary, the then existing management of Sulphur failed or refused to execute debentures securing the balance of the advances under the loan, contrary to the commitment of Sulphur to secure all advances.

10 On April 18, 2002, an additional debenture to secure the balance of the indebtedness was issued. Proprietary is the only secured creditor of Sulphur.

11 The only other major creditor of Sulphur is Ridley Terminals Inc. The facility is on leased lands and Sulphur was unable to make its lease payments to Ridley under the Phase-One sublease and the Phase-two sublease for the month of April, 2002. At the time of the initial Order, the total lease arrears owed to Ridley with respect to the lands is $24,966.25. On or about March 20, 2002, Ridley issued a Notice of Default under the subleases to Sulphur.

12 It was also deposed that Proprietary is the only party willing to provide interim financing to Sulphur and that financing would not be provided unless it ranked as a first charge after the Administrative Charge.

13 Pursuant to the Order of Hart. J dated May 16, 2002, the stay of proceedings and all other terms of my initial Order were confirmed and continued until June 19, 2002.

14 On June 19, 2002, the Applicants sought an order to vary the DIP financing provisions of my initial Order, such that the DIP financing be ranked as a secured charge but after their claims.

15 During this hearing, I further extended the May 16 Order until July 19, 2002 and increased the DIP financing, allowing an additional $200,000 to be borrowed from Proprietary. Despite Proprietary's earlier position, Proprietary consented to lend this additional amount, notwithstanding my ruling that the priority of these additional funds and the original funds could be varied depending on the answer given to the jurisdictional question raised by the Applicants.

ISSUE

16 The only real issue still to be determined in this application is the following:

> Does this Court have the jurisdiction to grant a charge under the ***CCAA*** to secure a DIP financing which ranks in priority to a statutory lien under the under the ***Builders Liens Act*** [2] of British Columbia?

DECISION

> This Court has the jurisdiction to grant a charge under the *CCAA* to secure a DIP financing which ranks in priority to a statutory lien under the under the *BLA* of British Columbia.

ANALYSIS

Position of the Applicants

17 The Applicants argues that s. 32(2) of the *BLA* establishes a priority for liens over all other charges, except those listed, and a charge to secure a DIP financing is not listed. As a result, the Applicants argue there is no necessity to resort to the doctrine of paramountcy as the *BLA* and the Court's powers are not in conflict.

18 The Applicants also contend that the *CCAA* contains no specifically enunciated statutory basis for the Court to grant a charge to secure a DIP financing which ranks in priority to the statutory liens of the builders' lien claimants. They do not dispute that the Court has the inherent jurisdiction to grant a security interest in certain circumstances but they

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maintain this contest comes down to the Court's inherent jurisdiction (an equitable power) versus an express provincial statutory provision and as such it falls outside of the limited purview of the paramountcy doctrine.

Position of the Respondent

19 The Respondent argues that s. 32(2) of the *BLA* only establishes a priority for liens over advances by a mortgagee, under a registered mortgage, and a DIP financing is not a registered mortgage. As a result, the Respondent argues there is no necessity to resort to the doctrine of paramountcy as the *BLA* and the Court's powers are not in conflict.

20 If that position is not maintained, then the Respondent disagrees with the Applicants' submission that this is a contest between the Court's equitable power versus an express statutory priority provision. The Respondent submits there is a statutory basis for the initial Order and, as a result, if there is a conflict between the charge and the liens, then the charge created under the *CCAA* being a federal statute, is paramount to liens provided for in the *BLA* being a provincial statute. The Respondent relies on ss. 11(3) and 11(4) of the *CCAA* as the statutory provisions which empower the Court to create the charge.

Discussion

The BLA Statutory Interpretation Argument

21 Section 32 of the *BLA* states the following:

> 32(1) Subject to subsection (2), the amount secured in good faith by a registered mortgage as either a direct or contingent liability of the mortgagor has priority over the amount secured by a claim of lien.
>
> 32(2) Despite subsection (1), an advance by a mortgagee that results in an increase in the direct or contingent liability of a mortgagor, or both, under a registered mortgage occurring after the time a claim of lien is filed ranks in priority after the amount secured by that claim of lien.

22 If the circumstances of this case did not give rise to a paramountcy issue, s. 32 of the *BLA* would govern. Clearly, the DIP financing is not a registered mortgage and the validly registered builders liens would have priority. (See discussion on *Baxter* below).

The Paramountcy Argument and the Jurisdiction of the Courts

23 Sections 11(3) and 11(4) of the *CCAA* read as follows:

> 11(3) A Court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such a period as the Court deems necessary not exceeding 30 days, . . . [staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].
>
> 11(4) A court may on application in respect of a company other than an initial application, make an order on such terms as it may impose, . . . [staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].

24 It is clear that the power of the Court to create a charge to support a DIP financing is not mentioned. Are the words "such terms as it may impose" sufficient to give inherent jurisdiction a statutory cloak?

25 The facts at bar are similar to those that were before Associate Chief Justice Wachowich (as he then was) in *Hunters Trailer & Marine Ltd., Re*.[3] In that case, Wachowich C.J.Q.B. granted Hunters an *ex parte*, 30 day stay of proceedings under the *CCAA* and, further, granted a DIP financing and Administrative Charge with a super-priority ranking over the claims of the other creditors.

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26 In discussing the objective of the *CCAA*, Wachowich C.J.Q.B. stated the following at para. 15:

> The aim of the *CCAA* is to maintain the status quo while an insolvent company attempts to bring its creditors on side in terms of a plan of arrangement which will allow the company to remain in business to the mutual benefit of the company and its creditors . . .

At para 18:

> I agree with the statement made by Mackenzie J.A. in *United Used Auto & Truck Parts Ltd., Re* (2000), 16 C.B.R. (4th) 141 (B.C.C.A.), at 146 that:" . . . the *CCAA*'s effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.

Later, at para.32:

> Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the professional advisors who guide a debtor company through the *CCAA* process. Hunters brought its initial *CCAA* application *ex parte* because it was insolvent and there was a threat of seizure by some of its major floor planners. If super-priority cannot be granted without the consent of secured creditors, the protection of the *CCAA* effectively would be denied a debtor company in many cases.

Finally, at para. 51

> As I have indicated above, I am of the view that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative costs, including those of the monitor and professional advisors of the debtor company. While this jurisdiction is invoked when an initial application is made under the *CCAA*, the Court is not limited to granting a priority only for those costs which arise after the date of the application or initial order. So long as the monies were reasonably advanced to maintain the status quo pending a *CCAA* application or the costs were incurred in preparation for the *CCAA* proceedings, justice dictates and practicality demands that they fall under the super-priority granted by the Court. To deny them priority would be to frustrate the objectives of the *CCAA*.

27 In addressing the Court's jurisdiction to grant an order, the Court of Appeal in *Smoky River Coal Ltd., Re*[4] confirmed the conclusion that s. 11(4) confers broad powers on the Court to exercise a wide discretion to make an order "on such terms as it may impose". At p. 11, para 53 of the decision, Hunt J.A. for the Court wrote:

> These statements about the goals and operations of the *CCAA* support the view that the discretion under s. 11(4) should be interpreted widely.

28 As indicated by Wachowich C.J.Q.B., numerous decisions in Canada have supported the proposition that s.11 provides the courts with broad and liberal power to be used to help achieve the overall objective of the *CCAA*. It is within this context that my initial Order and the June 19 Order were based.

29 Counsel for the Applicants referred to *Royal Oak Mines Inc., Re*[5] as an authority supporting their submission that the Courts cannot use inherent jurisdiction to override a provincial statute. In that case, Farley J., held that s. 11 of the *BLA* eliminated the Court's inherent jurisdiction to grant a super-priority DIP order over validly registered builders' liens. Farley J. did not even consider s. 32 of the *BLA*. His decision was based solely on s. 11 of the *BLA*, which is not at issue in the case at hand.

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30 In *Royal Oak Mines Inc.*, Farley J. also relied on *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* [6], where the Supreme Court of Canada remarked that there is a limit to the inherent jurisdiction of superior courts and, in the circumstances of that particular case, the Court's inherent jurisdiction should not be applied to override an express statutory provision. At p. 480 the Court wrote the following:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or a Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

31 *Baxter* may be distinguished from the case at hand since, in that particular case, the contest came down to the Court's inherent jurisdiction pursuant to s. 59 of the ***Court of Queen's Bench Act*** [7], a provincial statute which, the Supreme Court of Canada noted, was not intended to empower the Court to negate the unambiguous expression of the legislative will found in s. 11(1) of the ***Mechanics' Liens Act*** [8], also a provincial statute.

32 I have the greatest of respect for my colleague from Ontario but, in this case s. 11 of the *BLA* was not invoked by the Applicants and in the final analysis I would see the matter differently. In *Smoky*, Hunt J.A. used the words the exercise of discretion — a discretion she found to have been broad and one provided for in the statute.

33 It is clear that the Court's power to attach conditions was envisioned by Parliament. The intent of Parliament, through the enactment of the *CCAA*, was to help foster restructuring which, in turn, fosters the preservation and enhancement of the insolvent corporation's value.

34 In *United Used Auto & Truck Parts Ltd., Re* [9], Mackenzie J.A., of the Court of Appeal, wrote the following at p. 152, para. 29:

> When, as here, the cash flow from operations is insufficient to assure payment and asset values exceeding secured charges are in doubt, granting a super-priority is the only practical means of securing payment. In such circumstances, if a super-priority cannot be granted without the consent of secured creditors, then those creditors would have an effective veto over *CCAA* relief. I do not think that Parliament intended that the objects of the *Act* could be indirectly frustrated by secured creditors.

35 Parliament's way of ensuring that the *CCAA* would have the necessary force to meet this objective was to entitle the Courts, pursuant to s. 11, to exercise its discretion and no specific limitations were placed on the exercise of that discretion. There is a logic to the lack of specificity as what is required to be done is often dictated at least in part by the particular circumstances of the case. Whether the Court should exercise that discretion is obviously a different matter and that will be discussed below.

36 For the foregoing reasons, I find that in the circumstances of this case, there is a federal statute versus a provincial statute conflict.

Paramountcy

37 Having established that the Court has a statutory basis to use its inherent jurisdiction in the exercise of a discretion granted under the *CCAA*, the next question is whether this jurisdiction can be used to override an express provincial statutory provision, in this case s. 32 of the *BLA*.

38 The case of *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* [10] was raised by Sulphur's Counsel to draw an analogy to the paramountcy issue at bar. While the facts are not identical, the case involved a conflict between the Court's power pursuant to the federal *CCAA* and the *Legal Professions Act* of British Columbia. In that decision, the Court found that it is within the Court's jurisdiction, pursuant to the *CCAA*, to exercise broad "power and flexibility",

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and proceeded to comment on p. 6 that the *CCAA* "will prevail should a conflict arise between this and another federal or provincial statute". I agree with that conclusion and would apply it in this case.

The Exercise of That Discretion

39 Sulphur has a working capital deficiency of over $9,000,000. Proprietary had ceased funding construction. Given the registered liens and the security position of Proprietary, funding from any other third party, other than Proprietary, is an illusion. Sulphur would have no chance to recover or restructure but for the provision of some interim financing to permit an assessment of where it goes, if anywhere at all, other than into bankruptcy.

40 When a Court chooses to grant a stay order under s. 11 of the *CCAA*, a significant portion of the order must address how costs will be covered for ongoing operations, the assessment process and the formation of a meaningful plan of arrangement.

41 A balancing of the interests of all of the stakeholders is involved. The Court must proceed with caution throughout this entire process.

42 Wachowich C.J.Q.B. affirmed the test set out by Tysoe J, in *United Used Auto & Truck Parts Ltd., Re* [(1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers])], that there must be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the parties whose position is being subordinated.

43 In this case, a determination of priorities is not before me but, from the record, the following appears to be the lineup. Prior to insertion in the line of the Administrative Charge and the DIP financing, Proprietary appears to have a secured position of $1,180,000, there are registered liens of approximately $9,000,000 and then the balance of the secured position of Proprietary. In addition, the landlords position of roughly $25,000 must be fit into the equation.

44 This facility has not been completed and, until it is, any cash flow is a pipe dream. Someone must come up with a plan to reorganize this unfortunate situation as a simple sale of the unfinished facility will, in all likelihood, yield the least in dollars for all to share.

45 There is conflicting evidence on what the plant may be worth. This is partly driven by the method chosen (liquidation vs. going concern, and who is preparing the report). The highest number for a completed facility is $23.3 million to $24.2 million and on an uncompleted basis it may be as low as $1.00.

46 The best chance for the lienholder's to be paid is likely on completion as a liquidation appears to lead to a shortfall even for them. I realize that I have potentially eroded their position by $400,000 with the DIP financing in a liquidation scenario. However, that money is coming from Proprietary and they are the ones who have the greatest interest in seeing value created and at this point they are also the only ones who will finance a scheme that might see the creation of greater value.

47 In my view given the magnitude of the numbers we are dealing with, at this stage the prejudice to the lienholder's is outweighed by the potential benefit for all concerned.

48 Having said that, I wish to add that all future applications which would seek to amend or vary the DIP financing in any way will receive the Court's careful scrutiny. Sulphur will be obligated to file evidence demonstrating that the DIP financing would have the impact of increasing the value of the facility so as to avoid any further erosion of the lienholder's position.

CONCLUSION

49 For the foregoing reasons, I answer the jurisdictional question posed in the affirmative.

COSTS

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50 The issue of costs may be spoken to at a latter date if Counsel wish.

Order accordingly.

Footnotes

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

2 R.S.B.C. 1997, Chapter 45.

3 (2001), 94 Alta. L.R. (3d) 389 (Alta. Q.B.).

4 (Alta. C.A.).

5 (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]).

6 (1975), [1976] 2 S.C.R. 475 (S.C.C.).

7 R.S.M.1970, c. C280.

8 R.S.M. 1970, c. M80.

9 (2000), 16 C.B.R. (4th) 141 (B.C. C.A.).

10 (B.C. C.A.)

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TAB 10

1994 CarswellOnt 285
Ontario Court of Appeal

St. Mary's Paper Inc., Re

1994 CarswellOnt 285, 1994 C.E.B. & P.G.R. 8174 (headnote only), [1994] O.J. No. 1426, 116 D.L.R. (4th) 448, 19 O.R. (3d) 163, 26 C.B.R. (3d) 273, 48 A.C.W.S. (3d) 1259, 4 C.C.P.B. 233, 73 O.A.C. 1

Re bankruptcy of ST. MARY'S PAPER INC.

Arbour, Osborne and Abella JJ.A.

Heard: January 26-28, 1994
Judgment: July 4, 1994
Docket: Doc. CA C16655

Counsel: *Lyndon A. Barnes* and *Gordon Marantz* , for appellant, trustee in bankruptcy, Ernst & Young.
Robert W. Staley and *Edward W. Purdy* , for respondent, Price Waterhouse Limited, administrator of pension plan for participant unions of St. Marys Paper Inc. and pension plan for non-union employees of St. Marys Paper Inc.
Ian G. Scott, Q.C., Martha Milczynski and *Clifton P. Prophet* , for respondent employees and Communications, Energy and Paperworkers Union of Canada and Locals 47-0, 67, 69 and 133.
Richard Stewart , for Attorney General of Ontario, intervenor.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Headnote

Bankruptcy --- Administration of estate — Trustee continuing bankrupt's business — Personal liability of trustee

Trustees — Duties and liability — Trustee operating business of bankrupt company and continuing both union and non-union pension plans — Agreement by trustee to continue current service contributions rendering trustee liable for other employer obligations under pension plans — Trustee being successor employer for purposes of Pension Benefits Act — Pension Benefits Act, R.S.O. 1990, c. P.8.

A trustee in bankruptcy decided to continue the operation of a bankrupt company in order that it might realize more proceeds from the eventual sale of the business as a going concern. The trustee offered employment to most of the company's employees and agreed to pay the employee pension contributions and current service costs to both the union and non-union pension plans, making it clear that it would not be held responsible for the obligations of the company for unfunded pension liabilities. The trustee also informed the Pension Commission of Ontario that it would not act as administrator of the pension plans.

The administrator appointed under s. 71(1) of the *Pension Benefits Act* (Ont.) advised the trustee that it had become an "employer" under the Act and was, therefore, liable for special payments required to be paid as a consequence of unfunded liabilities existing in both pension plans. The trustee's motion for directions resulted in a ruling that it was liable to make the payments. The trustee appealed. It also filed a notice of constitutional question, arguing that the interpretation given to the word "employer" in s. 1 of the *Pension Benefits Act* by the trial judge was not open to him because it would give rise to a conflict between the provincial *Pension Benefits Act* and the federal *Bankruptcy and Insolvency Act* .

Held:

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The appeal was dismissed.

Per Arbour and Osborne JJ.A.: The trustee was an "employer" under the *Pension Benefits Act* . To look to the plan to determine the status of the person from whom the workers received their wages, as suggested by the trustee, would be inconsistent with the scheme of the Act. While the trustee agreed to continue pension payments, it stated that it would not be responsible for unfunded pension liabilities. In doing so, the trustee tried to put in place a pension plan that did not conform with the Act. An employer cannot choose which of its funding obligations under an ongoing pension plan it will honour. If it could, the basic protection provided by the Act to members and former members of pension plans would be seriously eroded. Although it did not intend to do so, the trustee dealt with the employees in such a way as to make itself liable for special payments of the two pension plans' unfunded liabilities.

With respect to the constitutional question, by enacting a definition of "employer" in the *Pension Benefits Act* that was capable of including a trustee in bankruptcy, the province could not be said to be attempting to establish a priority to the claim for unfunded pension liabilities so as to elevate its ranking in the case of bankruptcy. The actions of the trustee caused it to become an "employer" and thereby incur special payment obligations separate from those of the bankrupt company. There was no reason that the liability of the trustee under the *Pension Benefits Act* could not be treated as separate and distinct from the obligations of the company as bankrupt employer.

Per Abella J.A. (dissenting): The trustee was under no obligation to continue the business of the bankrupt company. Having done so, it agreed to the request of the employees that it continue to pay current service costs owing under the pension plans, but disclaimed any responsibility for other obligations under the plans. No liability is imposed by the *Pension Benefits Act* on any employer unless that employer has agreed to provide a pension plan. The payment of current service costs and related actions by the trustee did not trigger all other employer duties under the Act. Under s. 55(2), contributions are made by the employer, but only by "an employer required to make contributions under a pension plan". The trustee was not a successor employer and did not constitute an employer under the Act.

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Salvation Army, Canada East v. Ontario (Attorney General) (1992), 40 C.C.E.L. 130, 88 D.L.R. (4th) 238 (Ont. Gen. Div.) — *considered*

By abella j.a. (dissenting)

Great Atlantic & Pacific Co. of Canada v. Vance (1994), 16 O.R. (3d) 816, 94 C.L.L.C. 14,010, 111 D.L.R. (4th) 328 (Div. Ct.) — *referred to*

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s. 32

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s. 136(1)(b)(i)

s. 141

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s. 1 "employer"

s. 3

s. 5

s. 6

s. 8

s. 9

s. 10

s. 13

s. 14

s. 18

s. 19

s. 55(1)

s. 55(2)

s. 55(2)(a)

s. 57

s. 69

s. 69(2)

s. 71(1)

s. 75

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Regulations considered:

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

General Regulation,

R.R.O. 1990, Reg. 909,

s. 4(1)

s. 4(2) [am. O.Reg. 712/92, s. 3(1)]

s. 5(1) [am. O.Reg. 712/92, R. 3(1)]

s. 5(1)(b) [am. O.Reg. 712/92, s. 3(1)]

Appeal from judgment reported at (1993), 1 C.C.P.B. 27, 15 O.R. (3d) 359, 107 D.L.R. (4th) 715 (Gen. Div. [Commercial List]) finding trustee in bankruptcy liable for funding pension plans.

***Arbour and Osborne JJ.A.*:**

1 This is an appeal by Ernst & Young Inc., the trustee in bankruptcy of St. Marys Paper Inc. (St. Marys), from the order of Farley J. dated September 29, 1993 [reported at 1 C.C.P.B. 27 (Ont. Gen. Div. [Commercial List])], made on the appellant's motion for directions. In its motion, the appellant sought a declaration that it was not liable for any pension obligations under St. Marys' union and non-union pension plans.

2 Farley J. found that the appellant had made itself the "employer" of St. Marys' union and non-union employees, for the purpose of assessing its obligations under the *Pension Benefits Act* , R.S.O. 1990, c. P.8 ("PBA"). In his reasons, he concluded that the appellant was obligated, by the PBA, to make the "special payments" required to be made by the employer because of the existence of unfunded liabilities in both St. Marys' union and non-union pension plans.

3 This appeal requires consideration of the appellant's status and consequent obligations under the PBA, that is whether, in the circumstances of its dealings with St. Marys workers, the appellant, trustee in bankruptcy, became the "employer" of the workers for PBA purposes. If it did become a PBA "employer", as Farley J. found it did, a further issue arises whether, as a statutory "employer", the appellant is required by the provisions of the PBA to make the special payments sought by the respondent Price Waterhouse, the administrator of St. Marys union and non-union pension plans. The resolution of the issue of the appellant's status under the PBA is to a large measure a matter of statutory interpretation, central to which is the meaning to be given to the words "employer" and "remuneration" in the regulatory scheme established for pensions in Ontario by the PBA.

4 The appellant raised a further issue in this court which it did not argue on the motion for directions. It submits that Farley J.'s interpretation of the definition of "employer" in the PBA and his application of that definition to the facts results in an impermissible, but avoidable, conflict between an Ontario statute (the PBA) and a federal statute (the *Bankruptcy and Insolvency Act* , R.S.C. 1985, c. B-3 ("BIA")). The appellant contends that Farley J.'s interpretation of the PBA definition of "employer" and his conclusion as to the appellant's obligations as an "employer" interfere with the scheme of distribution contemplated by s. 136 of the BIA, a federal and paramount statute. This latter issue arises because the appellant undertook the employment of the workers in its capacity as St. Marys' trustee in bankruptcy.

5 The appellant submits that the relevant provisions of the PBA can reasonably be interpreted, and therefore should be interpreted, in a way which would avoid this conflict. The appellant does not seek a declaration that any part of the PBA is unconstitutional. It resorts to the constitutional argument as a basis for supporting its contention that the trustee cannot be an employer within the meaning of the PBA. We will examine the constitutional issue in more detail below.

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6 The appellant also raised as a ground of appeal the validity of an arbitration award (the "SERP award") which was issued after St. Marys' bankruptcy in proceedings taken before the bankruptcy. This ground of appeal was abandoned.

The Facts

7 The facts, which are not in any material dispute, do not have to be set out in detail. It will be sufficient to note that St. Marys operated a large paper mill in Sault Ste. Marie, Ontario. By April 1993, if not before, it ceased to be able to meet its liabilities as they became due. On April 26, 1993, Farley J. appointed the appellant receiver-manager of St. Marys and all of its assets. On the same day, but after the order appointing the appellant as receiver-manager, Farley J. found St. Marys to be bankrupt and a receiving order was made against it. The appellant was appointed the trustee of the bankrupt estate.

8 The appellant, in its capacity as trustee in bankruptcy, went into possession on April 28, 1993, further to the April 26, 1993 reviewing order. By that time the appellant, on the instructions of a consortium of secured creditors (seven banks owed approximately $200 million) attempted to continue St. Marys' business, on the assumption that its sale price would be enhanced if it were offered for sale as a going concern. On May 14, 1993, the appellant entered into an agreement with itself in which it was provided that the appellant, as trustee in bankruptcy, would operate St. Marys' business and that in that capacity it would remit all accounts receivable and proceeds of assets sold to itself, in its capacity as receiver.

9 On the basis of the material, and what we were told by counsel, the beneficiaries of the decision to continue the operation of St. Marys' business could only be its secured creditors. It is unlikely that the unsecured creditors will receive anything.

10 Once the critical decision to continue St. Marys' business operation was made, an employment agreement with the union and non-union employees had to be concluded as the bankruptcy had terminated their employment, and the appellant obviously needed a labour force to carry on St. Marys' mill operation. After a short period of negotiations, the trustee engaged the services of St. Marys' union and non-union employees from April 28, 1993 onward, on a week to week basis, at the same hourly rate (except for prepaid vacation pay) with the same benefit package and the same work practices as existed before the bankruptcy. In addition, the appellant agreed to continue the union and non-union pension plans. Further to that aspect of its deal with the employees, the appellant agreed to continue to deduct employee pension plan contributions and to remit those contributions to the plans' trustee. The appellant also agreed to pay the plans' current service costs (referred to in the PBA as "normal costs"). These costs are the estimated costs of funding the benefits accruing under the plans in the current year. The appellant made it clear that it would not be responsible "for any obligations of St. Marys ... such as termination pay, severance pay *or unfunded pension liabilities* ". The employees agreed to these arrangements.

11 The pension arrangements were a manifestation of the workers' apparent insistence on maintaining existing working arrangements. It was important to St. Marys workers, which the appellant sought to hire, that their employment by the appellant give rise to a continued accrual of pensionable service. The appellant confirmed the basis upon which it hired St. Marys employees in correspondence with the Pension Commission of Ontario. The information provided to the Commission was consistent with the terms of employment set out above.

12 The appellant also advised the Pension Commission of Ontario that it would not act as administrator of the union and non-union pension plans. In that letter the appellant stated that it looked to the Pension Commission of Ontario to appoint an administrator of both the union and non-union plans.

13 The respondent Price Waterhouse was appointed administrator of the union and non-union pension plans on July 15, 1993, under s. 71(1) of the PBA. On August 12, 1993 it advised the appellant of its position that, by hiring St. Marys employees and by continuing the pension plans, the appellant had become an "employer" under the PBA, and was therefore liable for special payments required to be paid as a consequence of unfunded liabilities existing in both

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pension plans. The existence of unfunded liabilities in both union and non-union pension plans is not in issue, nor is the quantum of the plans' unfunded liabilities.

Analysis

1. The statutory scheme

14 Workers are not, as of right, entitled to a pension plan and employers are under no statutory obligation to provide one. However, if there is a pension plan, the employer's promise to pay pension benefits under the plan is a promise which is subject to the carefully calibrated regulatory scheme set out in the PBA and its regulations. The PBA sets out minimum standards which must be met. We have set out in Appendix "A" those sections of the PBA which we consider to be relevant [Appendix omitted]. Where desirable, for the purposes of clarity, we will set out specific sections that are referred to in these reasons.

15 The PBA applies to all pensions in Ontario (s.3). The standards set out in the PBA are minimum standards (s.5). Thus, a pension plan may provide benefits that are more generous than those re quired by the PBA, however, it may not provide lesser benefits. All pension plans must be registered (s.6). A pension plan is not eligible for registration unless it provides for funding sufficient to provide the benefits under the pension plan, in accordance with the PBA and its regulations (s.55(1)). Every pension plan must set out the obligation of the employer to pay current service costs, going concern unfunded actuarial liabilities and solvency deficiencies (Reg. 909, s. 4(1), R.R.O. 1990). The PBA sets out who is eligible to be a pension plan administrator (s. 8) and imposes an obligation on the plan administrator to register the plan within 60 days of the date on which the plan is established (ss. 9, 13 and 14). A plan administrator is required to administer the plan in accordance with the PBA and regulations (s. 19). The information required in pension plan documentation is set out in detail in the PBA (s. 10). The Superintendent of Pensions may refuse to register, or may revoke the registration, of a pension plan which does not comply with the PBA and regulations (s. 18).

16 An employer required to make contributions under a pension plan must make those contributions to the pension fund in the prescribed manner and in accordance with the prescribed requirements for funding (s. 55(2)(*a*)). An employer required to make contributions under a pension plan must pay to the pension fund amounts not less than the pension contributions received from the employees, the plan's current service costs (or normal costs) and special payments required to be paid on account of any going concern actuarial unfunded liabilities in the plan. These special payments must be paid in equal monthly instalments over a 15-year period (Reg. 909, ss. 4(2) and 5(1)).

2. The continuation of the pension plans

17 In April 1993, with the approval of the inspectors of St. Marys' bankrupt estate, the creditors of St. Marys made a pivotal decision that led to an employment arrangement which provides the factual underpinning for the motions judge's conclusion that the appellant was the employer of the members of St. Marys' union and non-union pension plans. As noted, a decision was made to continue St. Marys' business operation. The appellant was to operate the business. To do so it needed workers. It therefore negotiated employment arrangements with both union and non-union employees. As far as the workers were concerned it was business as usual; they were to receive the same wage and benefit arrangements as before the bankruptcy.

18 As a result of its deal with the workers, the appellant agreed to pay employee pension contributions and current service costs to the pension plans. It honoured those obligations, that is it deducted employee pension contributions, remitted those contributions to the trustee and paid the required current service costs. In proceeding as it did, the appellant continued the pension plans and in our view adopted them.

3. Was the appellant an "employer" under the PBA

19 "Employer" is defined in s. 1 of the PBA, as follows:

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"employer", in relation to a member or a former member of a pension plan, means the person or persons from whom or the organization from which the member or former member receives or received remuneration to which the pension plan is related, and "employed" and "employment" have a corresponding meaning;

20 The obligations of an employer required to make contributions under a pension plan (including special payment obligations) are established by the combined effect of s. 55(2) of the PBA and ss. 4(2) and 5(1)(*b*) of Regulation 909. Those sections provide:

55. ...

. . . . .

(2) An employer required to make contributions under a pension plan, or a person required to make contributions under a pension plan on behalf of an employer, shall make the contributions in the prescribed manner and in accordance with the prescribed requirements for funding,

(*a*) to the pension fund; or

(*b*) if pension benefits under the pension plan are paid by an insurance company, to the insurance company that is the administrator of the pension plan.

4. ...

(2) An employer required to make contributions under a plan or a person required to make contributions under a plan on behalf of an employer shall make payments to the pension fund or to the insurance company, as applicable, of amounts that are not less than the sum of, (*a*) all contributions received from employees, including money withheld by payroll deduction or otherwise from an employee, as the employee's contribution to the pension plan;

(*b*) all contributions required to pay the normal cost;

(*c*) all special payments determined in accordance with section 5; and

(*d*) all special payments determined in accordance with sections 31, 32 and 35.

5. (1) Except as otherwise provided in this section and in sections 4, 5.1 and 7, the special payments required to be made after the initial valuation date under clause 4(2)(c) shall not be less than the sum of,

. . . . .

(*b*) with respect to any going concern unfunded liability not covered by clause (a), the special payments required to liquidate the liability, with interest at the going concern valuation interest rate, by equal monthly instalments over a period of fifteen years beginning on the valuation date of the report in which the going concern unfunded liability was determined;

21 The appellant contends that it is not an "employer" for PBA purposes. With respect to the appellant's PBA status as an "employer" as defined in s. 1 of the PBA, the appellant's argument focuses on the meaning to be given to the word "remuneration" as it appears in the PA definition of "employer". Since there is no definition of the term "remuneration" in the PBA, the appellant submits that the applicable definition must be extracted from the language of the two plans which define "earnings" but not "remuneration".

22 The appellant submits that the PBA definition of "employer" does not include every person who engages workers. As the appellant's factum puts it, "employer" is restricted to persons "who pay remuneration to which the pension plan is related". The appellant notes that the plans define "earnings" as "salary, wages, payments under incentive plans and

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other remuneration for services, as determined by the Company in accordance with its normal practices from time to time". The appellant's position is that what it paid to the workers was "earnings" as defined in the pension plans.

23 The appellant completes the "remuneration" circle by arguing that what the employees received, although wages (that is earnings as referred to in the plans) in the generic sense, was not "... determined by the Company". The basis of this argument is that the appellant is not the "Company" as defined in the two pension plans. In those plans, "Company" is defined in this way:

> "Company" means St. Marys Paper Inc. or any successor thereof and any of its subsidiary [sic] associated or affiliated companies which shall adopt this Plan ...

24 The appellant submits that it is not St. Marys, a successor company or a subsidiary, and that it is, therefore, not the "Company", as defined in the plans. Accordingly, the appellant says what it paid the workers was not earnings as defined in the pension plans, and that what the workers received was not paid by the "Company", as defined in the pension plans. Therefore, the appellant submits that since the workers did not receive "earnings" from the appellant, what the workers did receive was not "remuneration" as referred to in the PBA definition of "employer". According to the appellant there is, therefore, in this case, no "remuneration to which the plans relate". In result, the appellant submits that it is not an "employer" for PBA purposes and that Farley J. was wrong in reaching the conclusion he did on the "employer" issue.

25 The appellant contends that it must be *both* an "employer" within the meaning of the PBA, and an employer "required to make contributions under a pension plan ..." under s. 55(2) of the Act, before it is required to pay the special payments on account of the plan's unfunded liabilities which are sought here. Its position is that it is neither an employer, nor an employer "required to make contributions under a pension plan". Thus by the combined operation of the definition of employer contained in s. 1 and the contribution requirements referred to in s. 55(2) of the PBA, the appellant submits that it is not liable for the special payments in issue here.

26 The appellant submits that even if it is an "employer" under s. 1, it is only obliged to make the special payments sought if, under s. 55(2) it is, as the appellant's factum states, "bound to do so by the terms of the Plans". The appellant argues that the plans do not explicitly bind it. This is a continuation of its argument that it is not St. Marys (the "Company") with the result that even if it is an employer for PBA purposes, it is not, under s. 55(2), an employer required to make contributions under a pension plan.

27 It is essential to the appellant's position that the inquiry move from the PBA to the two pension plans. That is to say, the appellant seeks to define "remuneration" in the PBA definition of "employer" by resort to the pension plans' definitions of "earnings". It is only on the basis of the pension plans' definitions of "earnings" and "Company" that the appellant is able to submit that what it paid to the workers was not remuneration to which the pension plans are related. The appellants, using the pension plans' definition of "earnings" as a proxy for the PBA reference to "remuneration" in the definition of "employer", and also using the pension plans' definition of "Company", puts it this way in its factum:

> The monies paid by the Trustee [the appellant] are not salary, wages ... or any other remuneration for services determined by the "Company" in accordance with the "Company's" normal practices.

28 In our opinion, this approach is inconsistent with the basic philosophy and purpose of the PBA. It would allow a pension plan's provisions to control status (the "employer" issue). In the result, it would be the definitional elements of the plan, not as we think was intended, the PBA, which would determine the status of the person from whom the workers received their wages. Consequent upon that determination, the plan would determine whether the payor had the PBA obligations of an "employer".

29 The interpretation urged upon us by the appellant would seriously erode the protection afforded to members and former members of the pension plans provided by the PBA, which is manifestly intended to impose a degree of control over the terms and operation of pension plans.

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30 Farley J. in this case and Henry J. in *Salvation Army, Canada East v. Ontario (Attorney General)* (1992), 40 C.C.E.L. 130 (Ont. Gen. Div.) , resorted to a dictionary definition of "remuneration" as that word appears in the PBA definition of "employer". We agree with that approach. To look to the plan to determine the status of the person from whom the workers received their wages is inconsistent with the scheme of the Act. Although Henry J. in *Salvation Army* did not deal explicitly with the issue, he concluded that a payment of remuneration which the Salvation Army characterized as gratuitous was, nonetheless, "remuneration" (in the context of the definition of "employer"). That decision can be more easily understood once one accepts the thesis that the payor's characterization of what is received by employees cannot defeat the objective meaning of the language used in the PBA, that is whether what was received was remuneration to which the pension plan is related.

31 Thus, it seems to us that the inquiry must be first, whether the members (or former members) of the plans received remuneration, as they clearly did here, and second, whether the remuneration was remuneration to which the pension plan was related.

32 What the pension plan members received was "remuneration" if that word is given its ordinary meaning. As we have stated, one of the goals of the plan members in their negotiations with the appellant was to achieve an employment deal under which the accrual of pensionable service would continue. The appellant was agreeable to that. However, the appellant essentially wanted to put in place a pension plan which did not conform with the PBA, in that the employer would not be responsible for unfunded pension liabilities. The employment arrangement achieved that purpose. The appellant withheld an agreed part of the employees' remuneration and remitted what was withheld to the trustee of the plans. In addition, as noted, the appellant paid the current service costs of the plans. The employees' retirement benefits were affected by their time of service, earnings and pension contributions while they were employed by the appellant. Further, the record reveals that some employees became eligible to retire, and did retire, with pension benefits after they were hired by the appellant. Their pensions, and all employees pensions, were affected by the pension arrangement made by the appellant and the plan members. In our view, the remuneration received by the employees was remuneration to which the relevant pension plan was related.

4. What are the appellant's obligations as employer

33 The PBA and regulations impose an obligation on an "employer" to ensure that a pension plan is adequately funded, both on an ongoing basis and on a windup of the plan. This obligation exists quite apart from the particular funding requirements set out in the pension plan itself. This obligation is central to the regulatory scheme established by the PBA. The Act requires that its minimum funding standards be met. It does not allow for special deals which dilute or might eliminate these minimum funding requirements. Thus, the fact that the workers may be taken to have agreed that the appellant would not be responsible for the plans' unfunded liabilities is no assistance to the appellant. Moreover, as the respondent union submits, there are interests which were not represented when the appellant and the union and non-union workers made their employment deal. The unrepresented interests include retirees, survivors of retirees and deferred vested plan members who are entitled to pension benefits but who are no longer employed.

34 In our opinion, the appellant was an "employer" which was obligated by its agreement with the employees, and was therefore required by statute to make contributions under the two pension plans. Section 4(1) of Regulation 909 makes no distinction among payments which must be made by an employer required to make payments under a pension plan. The employer must remit to the plans' trustee all of the contributions it receives from employees, pay current service costs and pay all required special payments. The employer's obligations include the obligation to make special payments attributable to the unfunded liabilities of the plan. An employer cannot choose which of its funding obligations in respect of an ongoing pension plan it will honour. If it could, the basic protection provided to members and former members of pension plans by the PBA would be substantially diminished in their value.

35 Although it undoubtedly did not intend to do so, in our view, the appellant dealt with St. Marys workers in such a way as to make itself liable for special payments in respect of the two pension plans' unfunded liabilities.

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5. The Constitutional Issue

36 The appellant filed a Notice of Constitutional Question for the first time on appeal. The Attorney General of Canada did not intervene in response to it, but the Attorney General of Ontario did. The Attorney General supports the preliminary position of the respondent that the constitutional question should not be permitted to be raised for the first time on the appeal. There is nothing to suggest that the appellant failed to raise this issue before Farley J. in the hope of gaining an advantage in the event of an appeal. As we find that we can dispose of the constitutional argument without the need for the additional facts that the Attorney General submits may have a bearing on the issue, we do not give effect to that preliminary objection.

37 The appellant submits that the interpretation given by Farley J. to the word employer in s. 1 of the PBA was not open to him in light of the conflict that such an interpretation produces between the PBA, a provincial statute, and the BIA, a federal and therefore paramount statute. More specifically, it is argued that if the appellant is an employer within the meaning of s. 1 of the PBA, the special payments that the appellant will be required to make on account of the unfunded liabilities under the two pension plans will become an expense of the appellant as trustee and, as such, will attract the priority provided for in s. 136(1)(*b*)(i) of the BIA. The appellant argues that this has the effect of elevating a claim provable in the bankruptcy to the priority reserved for the expenses of the trustee, and that a provincial statute cannot be interpreted so as to alter the priorities established in the federal BIA. This argument rests on the presumption of constitutionality which requires that, if two interpretations of a provincial statute are open, the statute be construed in a manner that avoids invalidation under the doctrine of paramountcy (see *Deloitte Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)*, [1985] 1 S.C.R. 785 at 806 , per Wilson J.).

38 We have heard a variety of arguments, many of which do not fall to be decided in this appeal, on the issue of whether the special payments required to be made by the appellant, if it becomes an employer within the meaning of the PBA, would alter the priorities provided for in the BIA. For example, Mr. Scott, for the employees and the Union, submits that the special payments do not constitute provable claims of the employees in the bankruptcy, as St. Marys' special payments were not in arrears as of the date of the bankruptcy. On that basis, Mr. Scott advanced the argument that if the special payments made by the appellant are recoverable under s. 136 of the BIA, there is no reranking of the employees' claim under the superior priority of the appellant, as trustee, for its fees and expenses, since the employees had no claim to start with.

39 Mr. Stewart, counsel for the Attorney General, contends that Farley J.'s interpretation of the word employer in the PBA is not offensive to the priority scheme in s. 136 of the BIA if the special pay ments for unfunded liabilities are secured claims of the administrator of the plans, pursuant to s. 57 of the PBA, and that such a question cannot be determined on the evidentiary record in this case.

40 All responding counsel support the position taken by Mr. Staley, for Price Waterhouse, that even if the special payments obligations of St. Marys are claims provable in the bankruptcy, to rank rateably under s. 141 of the BIA, and even if the appellant's special payments required by the plans' unfunded liabilities could be claimed as an expense of the trustee under s. 136(1)(*b*)(i) of the BIA, there is still no constitutional impediment to the appellant being an employer under the PBA. This is because the liability of the appellant is a separate obligation of the trustee, independent and possibly different in scope from the obligations of the bankrupt. The respondents submit that the trustee's obligation to make the special payments in issue arises as a result of the acts of the trustee and not as a result of the compulsion of a provincial statute.

41 The doctrine of paramountcy has no application unless there is an otherwise unavoidable conflict between the federal and the provincial statute. It should not be invoked to curtail the valid exercise of provincial powers as a prophylactic measure against situations in which the two statutes may come into play. We must therefore examine whether there is any conflict, operational or otherwise, between the PBA and the BIA, such as to require an interpretation of the word employer in the PBA that is different from the interpretation suggested by commonly accepted canons of constructions.

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42 The appellant cannot point to any direct, express, or apparent conflict between sections of the two Acts, as was the case, for instance in *Deloitte Haskins & Sells* , supra. Moreover, the appellant's argument is not based on the existence or effect of s. 57 of the PBA which deems the employees' contributions withheld by the employer, and the employer's own contributions to the plan, to be held in trust, and which creates a charge on the assets of the employer. On the record before us, it could not be determined whether this provision could be invoked in any event. Furthermore, if a charge existed in favour of the administrator of the plan, and was a validly created charge, it would put the administrator in the position of a secured creditor. This is not what the appellant alleges creates an impermissible provincial alteration of the BIA priorities. The appellant's argument is simply that the special payments that the appellant would be required to make if it became the employer under the PBA are claims provable in the bankruptcy which would be elevated, by operation of the provincial statute, to the priority afforded to fees and expenses of a trustee in s. 136 (1)(*b*)(i) of the BIA. Hence, it is argued that if the provincial legislation can have the effect of affecting the federal ranking of preferred creditors, it is in operational conflict with the BIA.

43 For the purpose of addressing the appellant's contention, it can be assumed that the employees would have a claim provable in the bankruptcy referrable to the unfunded liabilities under the plans. The appellant does not contend that the employees' claim is, as such, ranked as a preferred claim under s. 136 of the BIA. Within the appellant's argument, the employees' claim, assuming that it exists, is an unsecured claim which does not enjoy any priority under s. 136, and which therefore ranks rateably under s. 141 of the BIA. Assuming that the liability of the appellant as an employer would entitle the appellant to recover any amount paid under the priority afforded by the BIA to expenses and fees of the trustee, can it be said that the provincial statute generates an operational conflict with the BIA?

44 In our opinion, it cannot be contended that the province, by enacting a definition of employer in the PBA that is capable of including a trustee in bankruptcy, was attempting to establish a priority to the claim for unfunded pension liabilities so as to elevate its ranking in the case of bankruptcy. Nor do we think that the PBA has that effect. The PBA does not require a trustee in bankruptcy to become the employer of the bankrupt's employees. Nor, obviously, does the PBA require a trustee to discharge the obligations of the bankrupt to make the special payments for unfunded liabilities. The appellant, as trustee, was empowered to enter into a contract with the employees and to agree to make some contributions to the pension plans, by virtue of its general powers under the BIA, and particularly by virtue of its power to carry on the business of the bankrupt under s. 30(1)(*b*) of the BIA. The appellant agreed to continue the two pension plans as part of the deal it made with the employees. The consequences that flow under provincial law from the course of action taken by the appellant are not invalid or inoperative merely because they are attached to the acts of a trustee in bankruptcy. If the appellant can recover the payments required to be made under the PBA as an expense of the trustee, this would be by operation of the federal statute, and not by direction of the PBA.

45 Moreover, we agree with the respondent's contention that the liability imposed upon the appellant as employer under the PBA is a separate liability of the appellant rather than a duplication of the obligation of St. Marys, and therefore does not operate to alter the ranking of St. Marys' obligation under the BIA.

46 The PBA contemplates that there can be several different employers during the existence of a pension plan. Each employer incurs the obligation to make the special payments that s. 5 of Reg. 909 requires be paid. If the superintendent orders the winding-up of the plan, which may be done in the case of bankruptcy but is not automatic, pursuant to s. 69 of the PBA, the superintendent fixes the effective date of the winding-up (s. 69(2)). The obligations of the employer in the case of a winding-up of the plan are set out in s. 75 of the PBA.

47 We find it unnecessary in this case to address the issue raised by Mr. Scott to the effect that the appellant is a successor employer within the meaning of that term in the PBA. It is clear that the plan was not automatically terminated by the bankruptcy and that a subsequent employer, whether a successor employer or not, may incur the special payment obligations imposed on an employer by the PBA, for example, if there are unfunded liabilities in the plan. The actions of the appellant have led to the appellant becoming an "employer" and thereby incurring special payment obligations separate from those of the bankrupt previous employer. There is therefore no impediment under the PBA to treating the

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appellant's obligations as separate and distinct from that of the bankrupt. Such a conclusion is indeed consistent with the wording and intent of the PBA.

48 Nor do we see any impediment to that conclusion in the BIA. Section 31(4) of the BIA deems all debts incurred in carrying on the business of a bankrupt to be incurred by the estate of the bankrupt. This presumption is not irrefutable, nor is it incompatible with the personal liability of the trustee, in appropriate circumstances. In a section entitled "Trustee Protecting Himself Against Liability for Debts and Liabilities Incurred in Carrying on the Business of the Bankrupt", Houlden and Morawetz state, in *Bankruptcy and Insolvency Law of Canada* , 3rd ed., Vol. 1 (Toronto: Carswell, 1992) at pp. 103-104:

> Notwithstanding s. 31(4), there are still situations where a trustee may be personally liable for obligations incurred in carrying on the debtor's business. Thus, if a trustee enters into a contract to act as agent for a secured creditor in realizing its security and in doing so carries on the business of the bankrupt, s. 31(4) is no protection to the trustee. In these circumstances, the trustee is personally liable to account to the secured creditor for the proceeds of the realization and if he fails to do so, judgment will be given against him personally for the amount owing: *Re P.E. Lapierre Inc.; Bank of Nova Scotia v. Gagnon* (1970), 16 C.B.R. (N.S.) 43 (C.S. Que.) . Again, if a supplier will not supply goods unless the trustee pledges his personal credit and the trustee accepts the goods on that basis, the trustee will, notwithstanding s. 31(4), be personally liable to the supplier: *Transalta Utilities Corp. v. Hudson* (1982), 44 C.B.R. (N.S.) 97, 22 Alta. L.R. (2d) 139, 40 A.R. 134 (M.C.) .
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> In *Clifford Van & Storage Co. v. Clifford Van & Storage Co. (Trustee of)* (1989), 73 C.B.R. (N.S.) 129, 4 R.P.R. (2d) 292 (Ont. S.C.) , a trustee occupied the bankrupt's premises for a period of seven weeks and during this period, continued to operate the business of the bankrupt. When the trustee vacated the premises, he left them in such a state of disarray and uncleanliness that it cost $3,000 to clean them up. The court held that the bankrupt estate and the trustee personally were liable for the damages.
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> In *J.B. Ellis & Co. v. Deloitte Haskins & Sells Ltd.* (1989), 76 C.B.R. (N.S.) 160, 39 B.C.L.R. (2d) 388, [1990] 1 W.W.R. 350 (S.C.) , a customs agent, prior to bankruptcy, requested the release from Canada Customs of certain goods which had been purchased by the bankrupt. The goods were released after bankruptcy by Canada Customs and were received and sold by the trustee in bankruptcy. The customs agent paid excise tax on the goods after bankruptcy and claimed against the trustee personally for the amount of the tax. It was held that there was no personal liability on the trustee but that the customs agent only had a preferred claim in the bankruptcy. The *Ellis* case should be contrasted with *Re St. Louis Textiles Ltd.; Minister of National Revenue v. Blais* (1983), 48 C.B.R. (N.S.) 98 , affirmed , (sub nom. *Blais v. Dept. of Nat. Revenue)* 56 C.B.R. (N.S.) 1, [1985] 1 S.C.R. 49, 20 D.L.R. (4th) 160, 85 D.T.C. 5285, 60 N.R. 12 (S.C.C.) , where a trustee in bankruptcy sold goods that were subject to sales tax. It was held in the *St. Louis* case, that the trustee in bankruptcy was personally liable for the tax and could deduct the amount paid as an expense of the administration of the bankrupt estate.

49 Section 14.06(2) of the BIA expressly exempts trustees from personal liability for environmental damage occurring after their appointment unless the trustee has failed to exercise due diligence. There is no such statutory exemption to shelter a trustee from liabilities arising out of taxation or employment statutes.

50 The deal made by the appellant with the unionized and non-unionized employees of St. Marys was a deal made on behalf of and for the benefit of the secured creditors of St. Marys, who were hoping to increase their recovery if St. Marys could be sold as a going concern. As has been noted, this was a business decision implemented by the appellant. As for the fact that the appellant was apparently not aware of the full scope of its obligations under the PBA, and indeed attempted to contract out of the statutory obligation to make the special payments, this cannot, in our opinion, alter the legal consequences of appellant's chosen course of action. The appellant was entitled to refuse to undertake such obligations without proper indemnification by the secured creditors (s. 32 BIA).

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51 It is clear that the appellant had to engage its personal liability, presumably with the benefit of an appropriate indemnity, when it undertook this obligation since it was an obligation that the estate was in no position to satisfy.

52 As a result, the liability of the appellant as an employer under the PBA is distinct from St. Marys' obligations as a bankrupt employer. The possibility that the appellant may have a claim against the bankrupt's estate for the expense that it will incur as an employer does not elevate or in any other way alter the provable claim that the employees have in the bankruptcy. There is therefore no operational conflict between the provincial and the federal statutes, and thus no need to vary the interpretation of the word "employer" in the PBA so as to exclude a trustee in bankruptcy that would otherwise fall squarely within that definition.

Disposition

53 For these reasons, we would dismiss the appeal with costs.

Abella J.A. **(dissenting):**

54 I have had the benefit of reading the reasons of Arbour and Osborne JJ.A. but have a different view about whether the trustee is an "employer" within the meaning of the *Pension Benefits Act* , R.S.O. 1990, c. P.8 ("PBA").

55 There is no requirement in Ontario that an employer establish a pension plan. Its willingness to do so is a matter of contract between it and its employees. Once established, however, there is no doubt that compliance with the provisions of PBA is mandatory. There is also no doubt that a trustee in bankruptcy can, in extremely rare circumstances, become an employer and can, as such, become bound by statutory requirements. In the circumstances of this case, however, I am not persuaded that the trustee has stepped out of its traditional role and into the shoes of the employer.

56 The trustee was under no obligation to carry on the business of the paper mill. Its decision to do so was to the benefit of the 457 employees whose employment ceased with the bankruptcy. One of the terms of employment requested by the unionized and non-unionized employees was that the trustee pay current service costs owing under the pension plan. The trustee agreed, but disclaimed any responsibility for any other obligations under the plans, including the unfunded liability which it advised the employees was a claim in the bankruptcy. Every former employee hired by the trustee received a letter confirming the arrangement as part of the terms of employment. It is undisputed that the trustee would not have agreed to pay the current service costs under the plans if this had resulted in the trustee becoming liable for the unfunded pension fund liability.

57 In my view, no liability is imposed by the PBA on any employer unless that employer has agreed to provide a pension plan. A successor employer can undoubtedly explicitly agree to continue to be bound by a previous owner's plan. Once it so agrees, it is required to make all payments stipulated under the plan and to comply with all relevant legislative requirements. But I do not agree that the payment of current service costs and related actions by the trustee in the unusual circumstances such as existed in this case triggers all other PBA employer duties.

58 The trustee is not a successor employer (*Re Rizzo & Rizzo Shoes Ltd.* (1991), 6 O.R. (3d) 441 (Gen. Div.)). It has not been so found by the Ontario Labour Relations Board, which has exclusive jurisdiction to make such a declaration in a unionized workplace (*Great Atlantic & Pacific Co. of Canada v. Vance* , a judgment of the Ontario Court (General Division) Divisional Court, released January 24, 1994 [now reported at 16 O.R. (3d) 816]); it has not purchased the assets of the former employer; and most decidedly did not agree to become contractually bound by the terms of the pension plans. On the contrary, its legal position as a trustee temporarily arranging to keep the business viable until a new employer could be found, and as one agreeing to restrict its obligations to current service costs contributions, was made clear to all employees when the trustee agreed to continue the business of the bankrupt company.

59 Section 55(2) of the PBA states that contributions should be made by an employer "in the prescribed manner and in accordance with the prescribed requirements for funding." But only "an employer required to make contributions

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under a pension plan" is caught by this duty. The trustee is not *required* to make contributions. It is not, therefore, an employer under the PBA liable for the special payments or any unfunded liability. Similarly, its payments of the current service costs would not entitle it to apply for any surplus in the plans. Its behaviour has not attracted either any benefits or burdens under the plans.

60 Any other interpretation unduly interferes with the fiduciary nature of the trustee's role. Except in clearly defined circumstances, the duties it assumes in discharging responsibilities to creditors, including employees, do not make it personally liable for liabilities of the bankrupt that arose prior to the bankruptcy. This is clear from s. 31(4) of the *Bankruptcy and Insolvency Act* , R.S.C. 1985, c. B-3 which provides that all debts incurred and credit received in carrying on the business of a bankrupt are deemed to be incurred and received by the estate. Making the trustee responsible for the plan's unfunded liability makes the trustee liable for previously incurred liabilities.

61 The trustee is a creature of statute whose mandate is to liquidate the assets of the bankrupt so that they can be distributed to those who are entitled to them. It holds any property of the bankrupt in trust for those entitled to a share of it.

62 In fulfilling this mandate, the trustee may carry on the business for a limited time. It is obviously not at liberty to do so without regard to operative employment laws that seek to protect workers from exploitation, but that is far from the situation here.

63 Contracts of employment with employees, including collective agreements, terminate with a bankruptcy. The trustee decided to try to save the business and, in so doing, the jobs of almost 500 workers. It had no obligation whatever to continue the pension plans and could easily have wound them up. Instead, the employees asked that current services cost contributions be paid so that a new purchaser would have the option of continuing the plans and assuming employer obligations under them. The trustee acceded to the request in the interests exclusively of the employees.

64 This concession unravelled a chain of unanticipated events that resulted ultimately and ironically in a claim by those same employees for a result neither they nor the trustee had intended or expected.

65 Their assertion, if accepted, acts as a determinative barrier to the assumption by a trustee of any pension plan continuity where a bankrupt business is operated and sold as a "going concern." This invites the automatic termination of pension plans upon bankruptcy by trustees unwilling to risk extraordinary long-term liabilities for the short-term accommodation of employees.

66 The PBA is legislation designed to protect employees' pension plans from arbitrary erosion and should be interpreted accordingly. I would prefer to interpret the PBA in a way which both respects the unique role of the trustee in circumstances such as these, and encourages conduct which inures to the benefit of employees covered by pension plans. A more technical reading of the PBA, rendering the trustee an inadvertent employer under the Act by its current service cost payments, discourages both.

67 I agree with Farley J.'s comments when he states in his reasons [at p. 33 C.C.P.B.]:

> ... it would seem to be in everyone's best interests to allow a trustee in bankruptcy the flexibility of seeing if an undertaking could be sold on a going concern basis while maintaining current payments but not exposing the Trustee to liability for past unfunded liabilities.

68 I do not, however, share his view that the PBA precludes this option. In my opinion, the trustee is not an "employer required to make contributions under a pension plan" as contemplated by s. 55(2), and accordingly is not liable for any of the unfunded liabilities.

69 I would allow the appeal with costs, set aside the order of Farley J., and declare that the trustee is not liable as an employer for any special payments for unfunded liabilities under the plans.

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Appeal dismissed.

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TAB 11

Most Negative Treatment: Distinguished
Most Recent Distinguished: Vesnaver, Re | 2015 QCCS 3357, 2015 CarswellQue 11729, 2015 CarswellQue 6930, J.E. 2015-1261, EYB 2015-254595, 258 A.C.W.S. (3d) 666 | (C.S. Qué., Jul 16, 2015)

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation —

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No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

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Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

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Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec

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les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée

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en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

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***Deschamps J.*:**

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

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4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

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11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost

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invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA's* remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA's* objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

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> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the CCAA

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This

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was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at § 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

> **222.** (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ....

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35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

> **18.3** (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ....

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

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40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be

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inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA.* Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA.* The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA.* However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA.*

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA.* However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA.*

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of

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both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA's* override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

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59 Judicial discretion must of course be exercised in furtherance of the *CCAA's* purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA.* Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA's* supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

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64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing*

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Ltd., Re (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA's* purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA.* Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA.*

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA.* The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA.* In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA.* The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA's* objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA.* That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA.* Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA.*

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent

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of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 Express Trust

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the

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liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

***Fish J. (concurring)*:**

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

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II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

> **227 (4) Trust for moneys deducted** — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> **(4.1) Extension of trust** — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
> >
> > ...
>
> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

> **67** (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

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(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...

...

... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA*

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deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

***Abella J. (dissenting)*:**

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11 [1] of the *CCAA* stated:

> **11**. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

> **222 (3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

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> (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest
>
> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA's* general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

> **18.3** (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* .... The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and

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Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA.* Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA.*

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA.* [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogani*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

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127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> [T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005, [2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

> **37.**(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

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131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA.*

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act.* That includes the *ETA.* The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA.* Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at December 13, 2007)**

11. (1) Powers of court — Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) Initial application court orders — A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (i);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

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(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) Other than initial application court orders — A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

...

(6) Burden of proof on application — The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) Her Majesty affected — An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and\

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

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(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) When order ceases to be in effect — An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

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(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) Deemed trusts — Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) Status of Crown claims — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

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...

(3) Operation of similar legislation — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

...

20. [Act to be applied conjointly with other Acts] — The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at September 18, 2009)**

11. General power of court — Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

...

11.02 (1) Stays, etc. — initial application — A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

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(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) Stays, etc. — other than initial application — A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) Burden of proof on application — The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) Stay — Her Majesty — An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

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(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) When order ceases to be in effect — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

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(3) Operation of similar legislation — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

37. (1) Deemed trusts — Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

***Excise Tax Act*, R.S.C. 1985, c. E-15 (as at December 13, 2007)**

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222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act)*, to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (as at December 13, 2007)**

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be

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regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Exceptions — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection

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23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Footnotes

1 Section 11 was amended, effective September 18, 2009, and now states:
11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 The amendments did not come into force until September 18, 2009.

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TAB 12

2009 CarswellOnt 5474
Financial Services Tribunal

Victorian Order of Nurses for Canada v. Ontario (Superintendent of Financial Services)

2009 CarswellOnt 5474, 2009 CarswellOnt 8516, 78 C.C.P.B. 244

In the Matter of the Pension Benefits Act, R.S.O. 1990, c.P.8, as amended by the Financial Services Commission of Ontario Act, 1997, S.O. 1997, c.28 (the "PBA" or the "Act") and the regulations thereunder ("Regulations")

In the Matter of certain partial wind ups of the VON Canada Pension Plan, Registration Number 315937 (the "Plan")

In the Matter of a request for hearing made by the Victorian Order of Nurses for Canada ("VON Canada") in respect of a Notice of Proposal issued by the Superintendent of Financial Services dated February 8, 2008 in relation to the Plan

In the Matter of a Hearing in accordance with subsection 89(8) of the PBA

Victorian Order of Nurses for Canada (Applicant) and Superintendent of Financial Services, and Aberdeen Health & Community Services, Acclaim Health, NOVA Montreal, NOVA West Island, Health and Home Care Society of British Columbia and Community & Primary Health Care — Lanark, Leeds & Grenville (the "Six Separate Branches"), and the Ontario Public Service Employees Union ("OPSEU"), and the Ontario Nurses Union ("ONA") (Respondents)

Florence A. Holden, V-Chair; Paul W. Litner, David A. Short, Members

Heard: April 1-3, 6, 7, 2009
Judgment: July 3, 2009
Docket: FST P0304-2008

Counsel: Mr. Markus F. Kremer, Mr. Christiaan A. Jordaan for Applicant
Ms. Deborah McPhail for Superintendent of Financial Services
Mr. Ian R. Dick, Ms. Susan L. Nickerson, Ms. Natasha Monkman for Respondent, Six Separate Branches
Ms. Clio M. Godkewitsch for Respondent, Ontario Public Service Employees Union ("OPSEU")
Mr. Jorge Hurtado, Ms. Michelle Dagnino for Respondent, Ontario Nurses Association

Subject: Corporate and Commercial; Insolvency; Employment; Public

Headnote

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — Miscellaneous

Corporation declared five partial wind ups of pension plan in respect of four separately incorporated branches that became insolvent or bankrupt — Superintendent issued notice of proposal that corporation pay amounts due under plan — Corporation brought application for declaration that it was not responsible for deficit — Application granted — Corporation was not responsible under s. 75 of Pension Benefits Act for any payments under plan — Corporation was not employer of plan members employed at insolvent branches — Branches paid remuneration to their own employees and therefore were their employers within meaning of Act.

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Amherst (Town) v. Nova Scotia (Superintendent of Pensions) (2009), 2009 CarswellNS 39, 2009 CarswellNS 40 (S.C.C.) — referred to

C.U.P.E., Locals 1144 & 1590 v. Ontario (Superintendent of Pensions) (1998), 1998 CarswellOnt 5776, 20 C.C.P.B. 312 (F.S. Trib.) — followed

CBS Canada Co. v. Ontario (Superintendent of Financial Services) (2002), 2002 CarswellOnt 7907, 2002 CarswellOnt 2990, 34 C.C.P.B. 199 (F.S. Trib.) — considered

Dustbane Enterprises Ltd. v. Ontario (Superintendent of Financial Services) (2001), 27 C.C.P.B. 1, 2001 CarswellOnt 673 (F.S. Trib.) — distinguished

Dustbane Enterprises Ltd. v. Ontario (Superintendent of Financial Services) (June 7, 2002), Doc. 219/01 (Ont. Div. Ct.) — referred to

GenCorp Canada Inc. v. Ontario (Superintendent of Pensions) (1998), 158 D.L.R. (4th) 497, 114 O.A.C. 170, 1998 CarswellOnt 1036, 39 O.R. (3d) 38, 37 C.C.E.L. (2d) 69, 17 C.C.P.B. 268, 1998 C.E.B. & P.G.R. 8336 (headnote only) (Ont. C.A.) — followed

Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services) (2004), 45 B.L.R. (3d) 161, 41 C.C.P.B. 106, 2004 C.E.B. & P.G.R. 8112, 242 D.L.R. (4th) 193, 324 N.R. 259, 189 O.A.C. 201, 17 Admin. L.R. (4th) 1, [2004] 3 S.C.R. 152, 75 O.R. (3d) 479 (note), 2004 CarswellOnt 3172, 2004 CarswellOnt 3173, 2004 SCC 54 (S.C.C.) — considered

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour*) 98 C.L.L.C. 210-006 (S.C.C.) — referred to

St. Marys Paper Inc., Re (1994), 1994 C.E.B. & P.G.R. 8174, 116 D.L.R. (4th) 448, 1994 CarswellOnt 285, 26 C.B.R. (3d) 273, 19 O.R. (3d) 163, (sub nom. *St. Marys Paper Inc. (Bankrupt), Re*) 73 O.A.C. 1, 4 C.C.P.B. 233 (Ont. C.A.) — considered

671122 Ontario Ltd. v. Sagaz Industries Canada Inc. (2001), 2001 SCC 59, 204 D.L.R. (4th) 542, 274 N.R. 366, 55 O.R. (3d) 782 (headnote only), [2001] 4 C.T.C. 139, 17 B.L.R. (3d) 1, 2001 CarswellOnt 3357, 2001 CarswellOnt 3358, 11 C.C.E.L. (3d) 1, 12 C.P.C. (5th) 1, 150 O.A.C. 12, 8 C.C.L.T. (3d) 60, [2001] 2 S.C.R. 983, (sub nom. *Sagaz Industries Canada Inc. v. 671122 Ontario Ltd.*) 2002 C.L.L.C. 210-013 (S.C.C.) — referred to

Statutes considered:

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Pt. II — referred to

Legislation Act, 2006, S.O. 2006, c. 21, Sched. F
s. 67 — considered

Pension Benefits Act, R.S.O. 1990, c. P.8
Generally — referred to

s. 1(1) "employer" — considered

s. 1(1) "multi-employer pension plan" — considered

s. 8(1)(a) — considered

s. 9(2)(c) — referred to

s. 24(7) — referred to

s. 39(3) — referred to

s. 55(2) — considered

s. 70(5) — referred to

s. 74 — considered

s. 75 — considered

s. 75(1) — considered

s. 86(1) — referred to

s. 87 — referred to

s. 88 — referred to

s. 89 — referred to

s. 89(9) — considered

s. 99 — referred to

s. 112(2) — referred to

Pension Benefits Act, R.S.N.S. 1989, c. 340
s. 2(p) "employer" — referred to

Regulations considered:

Pension Benefits Act, R.S.O. 1990, c. P.8
General, R.R.O. 1990, Reg. 909

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Generally — referred to

ss. 4-8 — referred to

s. 4(2) — considered

s. 11 — referred to

s. 12 — referred to

s. 31 — considered

s. 31(1) — considered

s. 31.1 [en. O. Reg. 116/06] — referred to

s. 32 — referred to

s. 35 — referred to

APPLICATION by corporation for declaration that it was not responsible for payment deficit in pension plan.

***The Tribunal*:**

1. Background

1 Between 2003 and 2004, VON Canada declared five partial wind ups of the Plan (the "Partial Wind Ups") in respect of the following four (separately incorporated) VON Canada branches that became insolvent or bankrupt: the Waterloo-Wellington-Dufferin Branch, the Sudbury Branch, the Eastern Lake Ontario Branch, and the Niagara Branch (collectively, the "Insolvent Branches").

2 Broadly stated, the overarching issue before us in this case, is which entities participating in the Plan are an "employer" for purposes of the Plan and the PBA, and as such required to make contributions to fund the Plan, including any funding deficits in relation to the Partial Wind Ups.

2. Nature of the Application:

3 The Superintendent of Financial Services ("Superintendent") issued a Notice of Proposal dated February 8, 2008, in respect of the Plan ("Notice of Proposal") which proposed to:

a) Order, pursuant to Sections 75 and 87 of the PBA, that VON Canada pay the sum of:

i) the total of all payments that under the PBA, Regulations, and the Plan are due or that have accrued and have not been paid into the pension fund for the Plan ("Fund"); and

ii) the amount by which:

1. the value of the pension benefits accrued and vested under the Plan, and

2. the value of benefits accrued resulting from the application of section 39(3) and section 74 of the PBA,

exceed the value of the assets of the Fund,

with respect to the Partial Wind Ups; and

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b) Refuse, pursuant to s. 70(5) of the PBA, to approve certain wind up reports filed in respect of the Partial Wind Ups (the "Partial Wind Up Reports"); and

c) Order, pursuant to s. 88 of the PBA that VON Canada prepare and file new partial wind up reports and update the initial filed Partial Wind Up Reports to address the issues set out in the Notice of Proposal and to reflect VON Canada's requirement to make additional contributions under the PBA to pay the wind up deficits in relation to the Partial Wind Ups.

4 Current and former employees of the Six Separate Branches are members and/or former members of the Plan. OPSEU and ONA are certified bargaining agents for certain members and former members of the Plan. Each of the Six Separate Branches, OPSEU and ONA sought and were granted full party status with respect to the Application prior to this hearing.

5 The Notice of Proposal does not directly address funding obligations with respect to deficits in the Plan associated with current and former employees of the Six Separate Branches.

6 VON Canada, the Applicant, seeks from the Tribunal an Order:

a) Declaring that VON Canada is not responsible for funding any deficits accrued in respect of the current or former employees of the Insolvent Branches or any potential solvency deficits in respect of the current or former employees of the Six Separate Branches;

b) Directing the Superintendent to approve the filed Partial Wind Up Reports relating to the Insolvent Branches; and

c) Directing the Superintendent to declare the Pension Benefits Guarantee Fund ("PBGF") to be applicable on the Partial Wind Ups.

3. Issues:

7 The parties identified and agreed on the following issues to be addressed by the Tribunal for purposes of this hearing and as expressed in the Notice of Hearing dated January 12, 2009 ("Issue(s)"):

a) Is VON Canada responsible under section 75 of the PBA for any payments into the Plan with respect to the Insolvent Branches?

b) If the answer to (a) is yes, is VON Canada responsible for any special payments to the Plan for any solvency deficiencies related to employees and former employees of the Six Separate Branches, as of the date each Separate Branch ceased to participate in the Plan?

c) Given the answer to issues (a) and (b), what, if any, Order should the Superintendent be directed to make with respect to any deficits relating to the Insolvent Branches?

8 For the reasons that follow, the Tribunal concludes that (i) VON Canada is not the employer of Plan members employed at the Insolvent Branches and thus is not responsible under section 75 of the PBA for any payments into the Plan with respect to the Insolvent Branches and/or their employees under the first Issue (a); and (ii) the Tribunal does not have any jurisdiction to make an order in respect of solvency deficiencies relating to employees and former employees of the Six Separate Branches under the second Issue.

Jurisdictional Issues:

9 We will deal with the second Issue (b) first as it raises the matter of jurisdiction of this Tribunal.

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10 At a pre-hearing conference in this matter, all parties agreed that the Tribunal had jurisdiction to deal with the Issues described above. However, the Tribunal asked each of the parties at the hearing to make oral submissions as to the jurisdiction of the Tribunal to deal with the second Issue (b) in respect of any special payments owing to the Plan for any solvency deficiencies related to the current employees and former employees of the Six Separate Branches, in view of the fact that this issue was not addressed in the Notice of Proposal although it was included in the Notice of Hearing.

11 Having carefully considered the submissions made by the parties, the Tribunal has concluded that it does not have the jurisdiction to decide the second Issue (b) as outlined above.

12 Our conclusion is primarily based on the fact that this Issue was not part of the Superintendent's original Notice of Proposal; the Six Separate Branches had not originally received the Notice of Proposal of the Superintendent's proposed order; and most importantly the Six Separate Branches had not been the subject of any order or proposed order by the Superintendent. The Notice of Proposal dealt with Partial Wind Up Reports that were filed only in respect of the Insolvent Branches. The arguments put forward by the Six Separate Branches focused on attaching liability to VON Canada, not the Insolvent Branches, for any special payments related to the Partial Wind Up deficits and not on its own potential liability for any deficits on wind up in relation to any of its employees. In fact, to our knowledge, there are no declared partial wind ups in respect of the Six Separate Branches.

13 Section 89 (9) of the Act empowers the Tribunal to direct the Superintendent to carry out or refrain from carrying out the proposed orders, and permits the Tribunal to "take such action as the Tribunal considers the Superintendent ought to take in accordance with this Act and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Superintendent."

14 Counsel for VON Canada referred the Tribunal to two cases: (i) *CBS Canada Co. v. Ontario (Superintendent of Financial Services)* [2002 CarswellOnt 2990 (F.S. Trib.)], a decision of this Tribunal on March 4, 2002 (the "*CBS case*") and (ii) a decision of the former Pension Commission of Ontario in a matter between *Stelco Inc. v. Superintendent of Pensions, et al.* dated March 18, 1993 (the "*Stelco case*").

15 In the *CBS case*, the application of subsection 89 (9) of the Act was considered, and the Tribunal stated that:

> We are of the opinion that any direction by the Tribunal to the Superintendent to take particular action, in accordance with the Act or regulations, must be closely related to the subject matter of, or the circumstances underlying, the proposal that the Tribunal has directed the Superintendent to carry out or to refrain from carrying out. [1]

16 Applying this reasoning, the Applicant argued that the Tribunal could find that the second Issue (b) is properly within its jurisdiction on the basis that the underlying subject matter (namely whether VON Canada or each of its former Branches is responsible for paying amounts to the Plan for funding deficits) is "closely related" to the subject matter of the Notice of Proposal, and in fact that the issues are inextricably linked.

17 However the implications of a decision to accept jurisdiction go beyond the Superintendent's proposed order in the Notice of Proposal which does not address any partial wind ups attributable to the Six Separate Branches, or any obligations on the Six Separate Branches or VON Canada to make special payments in respect of the participation in the Plan by the Six Separate Branches and its employees.

18 While we accept that Section 89(9) of the Act confers jurisdiction on the Tribunal to make orders which go beyond simply directing the Superintendent to carry out (or refrain from carrying out) the orders proposed, that jurisdiction is not unlimited, and in our view must be exercised cautiously.

19 As noted in the *CBS case*, any orders made by the Tribunal under Section 89(9) of the Act must be "closely related" to the subject matter of or the circumstances underlying the Superintendent's proposed order.

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20 While the issues and subject matter addressed in the Notice of Proposal taken in their broadest sense (which entity is the employer of Plan members and as such is responsible for funding deficits in the Plan) are related to the issues and the subject matter applicable to the Six Separate Branches and their funding obligations in relation to the Plan, in our view the issues and subject matter in the Notice of Proposal (employer funding liabilities in relation to the Insolvent Branches and the Partial Wind Ups) are too far removed from the issues and subject matter in relation to the Six Separate Branches to warrant our taking jurisdiction over the second Issue (b) above. In support of our ruling we note the following:

- The Insolvent Branches and the Six Separate Branches are separate legal entities.

- The timing and circumstances of the withdrawal of the Six Separate Branches from the Plan are very different than the circumstances resulting in the termination of participation by the Insolvent Branches in the Plan.

- The question of which entity is the employer of Plan members is, at least in part, a question of fact which could potentially be different for each employer.

- The employer funding obligations under the PBA and the Regulations are different for ongoing plans (where the obligation is to fund going concern deficits and solvency deficiencies) from those applicable on plan wind up (where the obligation is to fund the Ontario wind up liabilities).

- The Six Separate Branches are not the subject of the proposed orders in the Notice of Proposal, which were confined to the Partial Wind Ups and the Partial Wind Up Reports. In fact, as noted above, we have no evidence that the Superintendent has made or proposed partial wind up orders in respect of the Six Separate Branches.

21 We are persuaded that, as in the *Stelco case*, the proper course would be for the Superintendent to conduct a preliminary inquiry to determine whether or not an order is appropriate in respect of the Six Separate Branches and its employees, as a pre-condition for holding a hearing under the PBA in respect of the funding obligations of the Six Separate Branches. To adopt the words of the former Pension Commission of Ontario in the *Stelco* case:

> This statutory scheme clearly contemplates that the Superintendent will inquire into a possible wind up before the Commission holds a hearing into the matter. Indeed, if the Superintendent declines to make an order, there will be no hearing. In short, the Superintendent must inquire into the matter before it comes before the Commission. [2]

22 In this case, the Superintendent had not proposed to make or to refuse to make an order in respect of the Six Separate Branches that could be the subject of an application for a hearing. Although the Six Separate Branches received notice of this hearing and have an interest in the outcome of this hearing (evidenced in part by their decision to participate as parties in this hearing), we have little indication as to whether the Superintendent has had an opportunity to fully consider these issues and put before the Tribunal all facts necessary for the Tribunal to make a decision in respect of the Six Separate Branches.

23 We also note that Section 89(9) of the Act only permits the Tribunal to direct the Superintendent to take (or refrain from taking) particular actions, not other parties to the proceeding. What would the Tribunal direct the Superintendent to do in this case? The parties did not in their submissions provide us with any legal authority to support our ability to direct the Superintendent to make any orders or proposed orders against the Six Separate Branches other than by way of a notice of proposal to make an order under the Act. We would be reluctant to direct the Superintendent to take particular actions, such as making a further order under the Act, when the Superintendent has not yet had a chance to consider making such a proposed order in the first instance.

24 Further, any subsequent proposed order of the Superintendent in relation to the Six Separate Branches, even if directed by the Tribunal, would have to be included in a notice of proposal to the interested parties in accordance with Section 89 of the PBA, which would give the interested parties the right to a (further) hearing before the Tribunal

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in respect of that proposed order. Consequently, we would have the same result: another potential hearing before the Tribunal.

25 We note that all parties recognize that the second Issue (b) in this case is linked to any finding we may make on the first Issue (a) and in fact could ultimately be determined by such findings in a separate proceeding. It is however incidental to the determination of the order that we may make under this Application.

26 We also note that the Superintendent's counsel reluctantly agreed to support the Six Separate Branches in its arguments against jurisdiction by the Tribunal, noting that the Superintendent recognizes that the question as to any liability of the Six Separate Branches for funding deficits, on wind up or otherwise, may come back to the Superintendent and this Tribunal under a future order and application for hearing. If so, this would have the unfortunate consequence of resulting in additional cost to the parties even though the Six Separate Branches by receipt of Notice of the Proceedings, clearly understood the issue to be before the Tribunal, but we find that potential outcome a necessary result of our decision.

4. The Facts:

27 The Applicant, the Superintendent and the other Respondents appeared before the Tribunal and each filed written submissions, together with an Agreed Statement of Facts and an Agreed Book of Documents. In addition, the parties introduced at the hearing additional documents and witnesses. The Tribunal has fully reviewed the documents before us, as well as the witness' evidence, the salient portions of which are summarized below.

28 Based on the evidence before us, the Tribunal finds the following as fact:

a) The Applicant, VON Canada was founded in 1897. It was continued under the *Canada Corporation Act* - Part II by letters patent dated December 31, 1974. VON Canada is a national health care organization that delivers community health care to thousands of communities across Canada. It is a not-for-profit corporation and a registered charity having charitable number 12948 2496 RR0001. VON Canada now has approximately 13,000 staff and volunteers.

b) The "Six Separate Branches" consist of Aberdeen Health & Community Services, Acclaim Health, NOVA Montréal, NOVA West Island, Health and Home Care Society of British Columbia and Community & Primary Health Care — Lanark, Leeds & Grenville, jointly acting as Respondents in this matter. At all times, each of the Six Separate Branches has been a separately incorporated not-for-profit corporation. The Six Separate Branches are also registered charities and deliver services similar to those provided by VON Canada. The dates on which the Six Separate Branches were actually incorporated are as follows:

Current Name	**Former Name**	**Date of Incorporation**
Aberdeen Health & Community Services	Victorian Order of Nurses, Brant-Norfolk-Haldimand Branch	April 29, 1957
Acclaim Health	Victorian Order of Nurses Halton Branch	January 1, 1973 (amalgamation)
NOVA Montréal	VON Montréal	April 22, 1955
NOVA West Island	VON West Island	June 20, 1956
Health and Home Care Society of British Columbia	Victorian Order of Nurses (VON) British Columbia	April 1, 1971 (amalgamation)
Community & Primary Health Care — Lanark, Leeds & Grenville	The Victorian Order of Nurses Lanark, Leeds & Grenville Branch	January 19, 1954

c) OPSEU is the certified bargaining agent for:

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i) up to 124 OPSEU members and former members included in the partial wind up of the Plan effective March 4, 2003 arising out of the bankruptcy and closure of the Waterloo-Wellington-Dufferin Branch; and

ii) up to 48 OPSEU members whose employment was terminated as a result of the discontinuation of a significant portion of the business at the Niagara Branch included in the partial wind up of the Plan effective September 30, 2004.

OPSEU also represents a minority of members and former members in the remainder of the Plan. The precise number and identities of OPSEU members at the above-noted Branches who were also Plan members and included in the partial wind ups is solely within the knowledge of VON Canada as the Plan administrator.

d) ONA advised, by way of letter dated February 6, 2009, that it was their intention to seek party status at this hearing. Full party status was granted prior to this hearing.

e) The Plan was created effective January 1, 1958 as the continuation of two prior plans established October 1, 1945 and November 1, 1949. The Plan has been amended and restated on a number of occasions. The most recent restatement was effective June, 2002. The Plan is registered with the Financial Services Commission ("FSCO") under registration number 0315937. It is also registered with the Canada Revenue Agency ("CRA") under registration number 0315937.

f) The Plan is a contributory defined benefit pension plan. Membership in the Plan is available, after a stipulated term of service, to employees of VON Canada, including employees of provincial or local branches (collectively the "Branches" or individually a "Branch") authorized to carry on the objects of VON Canada. It was not until 1993 that the Plan was amended by VON Canada (retroactive to January 1, 1992) to refer explicitly to the Branches.

g) On September 24 and 25, 1993, VON Canada's Board of Directors (the "BOD") voted to implement amendments to the Plan which included an amendment to require the Branches, along with VON Canada, to remit contributions to the Plan required to amortize any unfunded liability or solvency deficiency that might arise from time to time. The amendments approved by the BOD on September 24 and 25, 1993 were subsequently made effective January 1, 1992

h) The Plan was restated effective January 1, 1992 and provides:

s. 1 "*employee*" means a person employed by *VON*. In this Plan, an *employee* who reports for work at or is paid from a location of the *VON* situated in a given Province of Canada is said to be an *employee* in that Province;...

s. 1 — "*VON*" means the Victorian Order of Nurses for Canada, as incorporated under the Canada Corporations Act - Part II. For purposes of this Plan, *VON* shall also include provincial and local branches authorized to carry on the objects of the *VON*.

s. 5.3 — *VON* CONTRIBUTIONS

Subject to the requirements of the *Pension Benefits Act* and of the *Income Tax Act*, the VON, along with participating provincial and local branches authorized to carry on the objects of the *VON*, shall remit to the *Plan* amounts equal to contributions remitted by members in accordance with clauses 5.1(a), (b), (c) and (d). In addition the *VON*, along with participating provincial and local branches authorized to carry on the objects of the *VON*, shall remit contributions which in the opinion of the Actuary are required to amortize any unfunded liability or solvency deficiency, determined in accordance with the provisions of the *Pension Benefits Act*, that may arise from time to time."

Sections 1 and 18.1, read together, define VON Canada as the Administrator of the Plan.

Section 16.5, *VON* LIABILITY, states:

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> Subject to the provisions of the *Pension Benefits Act*, the *VON* shall be under no contractual liability for any contributions to the *Fund* in excess of those required under the provision of the *Pension Benefits Act*, and in making such contributions to the *Fund*, it may rely upon the estimates made and obtained by the *Administrator* from the *Actuary*. The *VON*, the investment advisor or the *Actuary* shall not be liable in any manner if the *Fund* shall be insufficient to provide for the payment of all benefits subject to the provisions of the *Pension Benefits Act*. Such benefits shall be payable only from the *Fund* and only to the extent that the *Fund* shall suffice, provided that at the discretion of the *Administrator*, *pension benefits* may be provided by the purchase of an annuity, or annuities from an *insurer*, subject to the rights of a *spouse* upon the death of a *member* and the *member's* portability rights specified in section 10.3 upon termination of employment.

There was no evidence put to, or argument made before, the Tribunal that the January 1, 1992 Plan terms were invalid or made unlawfully.

i) On January 9, 1999, the BOD voted to implement further amendments to the Plan which included an amendment to specify a formula to calculate the contributions required to amortize any unfunded liability or solvency deficiency that might arise based on the ratio of their annual current service contributions to the total annual current services contributions of VON Canada and the Branches. The amendments approved by the BOD on January 9, 1999 were subsequently made effective January 1, 1998.

Section 5.3 was restated as follows:

> **5.3 *VON* CONTRIBUTIONS**
>
> Subject to the requirements of the *Pension Benefits Act* and of the *Income Tax Act*, the *VON*, along with participating provincial and local branches authorized to carry on the objects of the *VON*, shall remit to the *Plan* amounts equal to contributions remitted by members in accordance with clauses 5.1(a), (b), (c) and (d). In addition the *VON*, along with participating provincial and local branches authorized to carry on the objects of the *VON*, shall remit contributions which in the opinion of the Actuary are required to amortize any unfunded liability or solvency deficiency, determined in accordance with the provisions of the *Pension Benefits Act*, that may arise from time to time. *VON*, along with each participating provincial and local branches shall pay a proportionate share of such payment contributions based on the ratio of their annual current service contributions to the total annual current service contributions of *VON* and the participating provincial and local branches.

As with the January 1, 1999 amendments, no evidence was put before the Tribunal to suggest that these amendments were unlawful.

j) In 2000, VON Canada commenced an initiative initially entitled "Strategy 2000" and subsequently entitled "One VON" to bring the activities of the various Branches within a single organization. We accept the uncontradicted evidence of Mr. Richard McConnell, the current Vice President, People and Organization for VON Canada and a witness for the Applicant, that prior to the initiative, VON Canada was an umbrella organization of about thirty people servicing the local Branches. He indicated that the rationale for the "One VON" initiative was to allow VON Canada to assert stronger national discipline over the Branches and to make the VON organization more competitive on a national scale, in the face of new competition and declining market share.

k) Mr. McConnell's evidence was also that VON Canada never paid salaries to employees of the Branches, and could not have any direct contract with any Branch employees without the direct permission of the Branch Executive Director, such as for the purpose of focus group surveys.

l) The uncontradicted evidence of Ms. Ruth Kitson, the current Executive Director of the Community and Primary Health Care — Lanark, Leeds and Greville, a witness for the Six Separate Branches, was that the One VON initiative

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was initially voluntary in early 2000. By 2005 it had come to mean that One VON was intended to ensure that monies were used to the best advantage, to best serve the community and to assist VON Canada in retaining its home health care business. Consequently, VON Canada advised the Branches that participation in the initiative was mandatory, and that Branches failing to indicate their intention to participate by the deadline of September 2006 would be required to disassociate themselves from VON Canada.

m) As part of "One VON", most but not all Branches transferred their employees, operations and sufficient assets to cover their liabilities to VON Canada on or before October 15th, 2006. The Branches that agreed to join in the "One VON" initiative and that transferred their employees and operations to VON Canada, agreed to guarantee a portion of the Plan deficit corresponding with accrued pension liabilities. The Six Separate Branches and the Carefor Health & Community Services Branch ("Carefor") did not agree to participate in the One VON initiative or to any transfer of employees, operations and assets to VON Canada.

n) Prior to October 16, 2006, there were a number of separately-incorporated Branches, including the Six Separate Branches, whose employees were accruing service under the Plan. No employees of the Six Separate Branches have accrued service under the Plan since October 16, 2006. The former employees of the Insolvent Branches who were members of the Plan (the "Affected Employees") have also ceased to accrue service under the Plan because the Insolvent Branches have ceased to carry on business. All remaining active Plan members, with the exception of Carefor employees, are now employed by VON Canada and continue to accrue service under the Plan in that capacity.

o) VON Canada was at all times the sole administrator of the Plan. The Plan has never been administered as a multi-employer pension plan ("MEPP") within the meaning of the PBA. None of the parties takes the position that the Plan is a MEPP. In accordance with the PBA and the Regulations all required premiums have at all times been paid to the PBGF.

p) The Plan has, at times, had close to 4,000 active members, including employees of more than 70 separately-incorporated Branches. The current active employees of the Plan are represented by 78 Locals of 18 different unions, which are listed in VON Canada's Request for Hearing, and include the respondents OPSEU and the ONA. All of the unions received notice of these proceedings.

q) The Fund assets are held pursuant to a trust agreement made as of April 1, 1990, between VON Canada and the Royal Trust Corporation of Canada. The Fund trustee is currently RBC Dexia Investor Services, which is a joint venture between Royal Trust Corporation of Canada and Dexia that was formed in 2006.

r) Prior to January 1, 2003, all of the filed actuarial valuations for the Plan had demonstrated that the Plan was either fully funded or had a surplus, both on a going concern and on a solvency basis.

s) The initial actuarial valuation prepared for the Plan as at January 1, 2003 disclosed that the Plan was fully funded on a going concern basis and on a solvency basis, but had a wind up deficit.

t) When a wind-up deficit arose in the Plan with the January 1, 2003 valuation, VON Canada in consultation with the Plan's actuaries determined that VON Canada and the Branches would pay a "surcharge" on the contributions that they would otherwise have been required to make in order to match employee contributions. The VON Canada BOD approved a resolution to allow VON Canada to pay, from January 1, 2003 to December 31, 2005, commuted values to terminating members at 100% of their entitlements despite the transfer ratio being less than 100%. This VON Canada BOD decision was not disclosed to the Branches until a formal communiqué from VON Canada was released by way of a memorandum to the Branches dated February 13, 2004. VON Canada also amended the Plan to reduce certain benefits in order to decrease the cost of the Plan.

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u) The actuarial valuation of the Plan as of January 1, 2006 revealed a wind- up deficit and a solvency deficit. Effective January 1, 2006, contributions of active plan members, VON Canada and the Branches were further increased in light of the required special payments.

v) Upon leaving the Plan in 2006, the Six Separate Branches and Carefor stopped all contributions to the Plan.

w) In October 2006, six months after the April 30, 2006 deadline imposed by VON Canada on the Six Separate Branches to join the One VON initiative, VON Canada advised the Six Separate Branches for the first time in writing that as a result of severing ties with VON Canada the Six Separate Branches would be responsible for funding any solvency deficit associated with their employees or former employees.

x) As determined in the most recent actuarial valuation for the Plan, prepared as at January 1, 2007, the Plan was fully funded on a going concern basis. Determined on a solvency basis, however, the total unfunded liabilities of the Plan were approximately $20.3 million as at January 1, 2007 and this figure excludes any assets or liabilities in respect of the Insolvent Branches. The unfunded liabilities incurred in relation to pension benefits accrued by current and former members with the Six Separate Branches represent approximately 9% of this total. Similarly, unfunded liabilities incurred in relation to pension benefits accrued by the current and former members with Carefor represent approximately 9% of this total. The remaining unfunded liabilities as set out in the January 1, 2007 report (approximately 82% of the total) relate to pension benefits accrued by current and former members whose unfunded liability now rests with VON Canada, and excludes any unfunded liabilities related to the Insolvent Branches under their Partial Wind Ups.

y) Since the departure of the Six Separate Branches and Carefor, VON Canada has been contributing only in respect of employees and former employees of VON Canada and the Branches that joined VON Canada as part of the "One VON" initiative. No contributions have been made in respect of the other members and former members of the Plan, including members of the Six Separate Branches and the Affected Employees of the Insolvent Branches.

z) Insolvent Branches

As noted above, between 2003 and 2004, VON Canada declared Partial Wind Ups with respect to the Insolvent Branches. Specifically:

The Waterloo-Wellington-Dufferin Branch (the "WWD Branch") became bankrupt and closed effective March 4, 2003. VON Canada voluntarily declared a partial wind up of the portion of the Plan relating to 181 members and former members previously employed at the WWD Branch. The original partial wind up report filed with respect to the WWD Branch disclosed a partial wind up deficit of $1,506,028 and provided for VON Canada to fund the wind up deficit on a without prejudice basis. No explanation was provided to the Tribunal as to why this amount differed from that indicated in the January 1, 2003 report referred to in paragraph 3 (m) above. A revised partial wind up report was subsequently filed which stated that VON Canada had determined that the WWD Branch was solely responsible for funding the deficit identified in that partial wind up report (the "WWD Deficit"). As at March 4, 2006, the WWD Deficit was $975,026. To date, no contributions have been made to eliminate the WWD Deficit.

VON Canada filed a proof of claim against the estate in bankruptcy of the WWD Branch, and recovered a portion of its claim in respect of the current service cost contributions payable by WWD Branch. VON Canada's claim in respect of the WWD Deficit was recognized as an unsecured debt by the estate in bankruptcy; however, the estate has not made any payment with respect of the WWD Deficit.

All Plan members affected by the WWD Branch partial wind up who have elected to start their pension since October 19, 2005 have received monthly payments equal to 89% of their pension. No payment of commuted values or purchase of annuities has occurred.

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The Victorian Order of Nurses, Sudbury Branch (the "Sudbury Branch") closed effective June 14, 2004 and became bankrupt effective June 23, 2004. VON Canada voluntarily declared a partial wind up of the Plan relating to 113 members and former members previously employed at the Sudbury Branch. The partial wind up report filed with respect to the Sudbury Branch disclosed a partial wind up deficit of $721,376 and stated that VON Canada had determined that the Sudbury Branch was solely responsible for funding the deficit identified in that partial wind up report (the "Sudbury Deficit"). As at June 14, 2005, the Sudbury Deficit was $699,550. No employer contributions have been made to fund the Sudbury Deficit.

VON Canada filed a proof of claim against the estate in bankruptcy of the Sudbury Branch, and recovered a portion of its claim in respect of the current service cost contributions payable by the Sudbury Branch. VON Canada's claim in respect of the Sudbury Deficit was recognized as an unsecured debt by the estate in bankruptcy; however, the estate has not made any payment in respect of the Sudbury Deficit.

The Eastern Lake Ontario Branch (the "ELO Branch") experienced a major discontinuance of its business in May of 2004, resulting in the termination of a large number of its employees. VON Canada voluntarily declared a partial wind up with respect to the 73 affected active members of the ELO Branch, effective May 21, 2004. On March 31, 2006, the employment of all remaining active employees at the ELO Branch was terminated, but the employees were transferred to the Kingston Branch, and there was no break in service for those members. The ELO Branch became bankrupt on June 18, 2006. Effective December 6, 2006, a partial wind up was declared with respect to the 49 inactive former members previously employed by the ELO Branch who had not been included in the previously declared partial wind up relating to the ELO Branch. The two wind up reports stated that VON Canada had determined that the ELO Branch was solely responsible for funding the deficits identified in those partial wind up reports (the "ELO Deficit"). As at June 18, 2006, the ELO Deficit was $465,551. No employer contributions have been made to fund the ELO Deficit.

VON Canada filed a proof of claim against the estate in bankruptcy of the ELO Branch, and recovered a portion of its claim in respect of the current service cost contributions payable by the ELO Branch. VON Canada's claim in respect of the ELO Deficit was recognized as an unsecured debt by the estate in bankruptcy; however, the estate has not made any payment in respect of the ELO Deficit.

The Victorian Order of Nurses, Niagara Branch (the "Niagara Branch") experienced a major discontinuance of its business due to a loss of a major nursing service contract in 2004. VON Canada voluntarily declared a partial wind up of the Plan effective September 30, 2004 with respect to 60 members of the Plan whose employment at the Niagara Branch had been terminated. The partial wind up report filed with respect to the Niagara Branch disclosed a partial wind up deficiency of $816,906 and stated that VON Canada had determined that the Niagara Branch was solely responsible for funding the deficit identified in that partial wind up report (the "Niagara Deficit"). As at September 30, 2006 the Niagara Deficit was $295,684. No employer contributions have been made to fund the Niagara Deficit.

Each of the Insolvent Branches is either bankrupt or insolvent. The Tribunal was advised by the Applicant that the claims by VON Canada against the trustee in bankruptcy for the WWD Branch, the Sudbury Branch and the ELO Branch have been stayed until the outcome of these proceedings have been dealt with by the Tribunal and if necessary, the courts on appeal.

aa) Carefor entered into an agreement with VON Canada, pursuant to which the liabilities associated with Carefor's current and former employees would be transferred, together with a proportionate share of the Fund's assets, to a successor plan to be established by Carefor. Carefor would then be solely responsible for funding any deficit in the successor plan. The transfer of assets has not yet occurred.

bb) Each of the Six Separate Branches, the Insolvent Branches and Carefor is, and was at all times, separately incorporated as a not-for-profit corporation. Each Branch had its own by-laws.

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Following the implementation of the "One VON" initiative, the Six Separate Branches continued as separately incorporated not-for-profit corporations without using the VON name. All of the Six Separate Branches, with the exception of Health and Home Care Society of British Columbia, ceased to participate in the Plan as of October 16, 2006. Health and Home Care Society of British Columbia ceased to participate in the Plan as of April 19, 2006. As a result, and in accordance with the terms of the Plan, the employees of the Six Separate Branches are no longer eligible to actively participate in the Plan, and ceased to accrue service under the Plan on or before October 16, 2006. Those employees and former employees whose pension entitlements had vested under the Plan on or before October 16, 2006 remain entitled to receive either current or deferred pensions from the Plan. As a result of the employees of the Six Separate Branches ceasing to accrue service by October 16, 2006, or April 19, 2006 in the case of the Health and Home Care Society of British Columbia, the Six Separate Branches now have no current service costs under the Plan.

5. Analysis

29 We agree with the parties that this case turns on how the term "employer", as used in sections 55 (2) and 75 (1) of the Act and sections 4(2) and 31(1) of the Regulations (collectively the "Funding Provisions") should be interpreted. Our finding as to who is the "employer" within the meaning of the Funding Provisions will determine which entity(ies) should be required under the Funding Provisions to fund any funding obligations under the Act, including any deficits attributable to the Partial Wind Ups of the Insolvent Branches (the "PWU Deficits").

30 Three possible interpretations of the term "employer", as used in the Funding Provisions, emerge from the submissions made by the various parties:

1) "Employer" could be interpreted to mean "the employer who paid remuneration to the employees to whom the deficits relate". This is the interpretation advanced by VON Canada.

2) "Employer" could be interpreted to mean the one and only "controlling employer" of the Plan. This is the position put forward by the Six Separate Branches, and in the first instance, by the Superintendent, OPSEU and ONA.

3) "Employer" could be interpreted to mean "all participating employers jointly and severally", notwithstanding their separate legal status. This interpretation is the alternative position put forward by the Superintendent, OPSEU and ONA. The written submission of the Superintendent however limits such joint and several liability to that of VON Canada and the Insolvent Branches for the Partial Wind Ups based on the Plan terms. Both OPSEU and ONA submitted that such joint and several liability was the responsibility of VON Canada and the participating Insolvent Branch in respect of its own employees, and that other Branches had no liability for employees of either the Insolvent Branches or of any other Branches.

Consideration of the Pension Benefits Act (Ontario)

31 This case turns on how the term "employer", as used in the Funding Provisions should be interpreted. Whichever entity is determined to be the "employer" of the Affected Members within the meaning of the Funding Provisions should be required to fund the PWU Deficits under the Act.

32 In our view, the appropriate approach to resolve the Issues is to first turn to the provisions of the Act and Regulations. We reproduce the salient provisions below.

33 Sections 1, 55 and 75 of the Act provide as follows:

Definitions

1. (1) In this Act,

. . . . .

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"employer", in relation to a member or a former member of a pension plan, means the person or persons from whom or the organization from which the member or former member receives or received remuneration to which the pension plan is related, and "employed" and "employment" have a corresponding meaning; ("employeur", "employé", "emploi") ...

55(2) An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times,

(a) to the pension fund; or

(b) if pension benefits under the pension plan are paid by an insurance company, to the insurance company that is the administrator of the pension plan.

75(1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

34 Section 4(2) of the Regulations provides that:

Subject to subsection (2.1), an employer who is required to make contributions under a pension plan or, if a person or entity is required to make contributions under the pension plan on behalf of the employer, that person or entity and, if applicable, the members of the pension plan or their representative shall make payments to the pension fund or to an insurance company, as applicable, that are not less than the sum of,

(a) all contributions, including contributions in respect of any going concern unfunded liability and solvency deficiency and money withheld by payroll deduction or otherwise from an employee, that are received from employees as the employees' contributions to the pension plan;

(b) all contributions required to pay the normal cost;

(c) all special payments determined in accordance with section 5; and

(d) all special payments determined in accordance with sections 31, 32 and 35 and all payments determined in accordance with section 31.1.

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35 Section 31(1) of the Regulations provides that:

> 31. (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by **the employer** to the pension fund.
>
> (emphasis ours)

36 We note that the actual calculation of the payments that must be made to fund a pension plan is governed by sections 4-8, 11 and 12 of the Regulations (with respect to the funding of ongoing plans) and sections 31, 31.1, 32 and 35 of the Regulations (with respect to complete or partial plan wind ups). The quantum of the required payments is not at issue in this case.

First Interpretation of "employer"

37 As set out above, the PBA contains a statutory definition of "employer" as the person or persons from whom or the organization from which the member or former member receives or received remuneration to which the pension plan is related..

38 The proper approach to statutory interpretation as articulated by the Supreme Court of Canada, and the one which we see fit to employ in this case, is best summarized in the following passages from *Monsanto*:

> The established approach to statutory interpretation was recently reiterated by Iacobucci J. in *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 (S.C.C.), at para. 26, citing E. A. Driedger, Construction of Statutes (2nd. ed. 1983), at p. 87:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [3]
>
> . . .
>
> The purpose of the Act was well stated in *GenCorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at p. 503:
>
> > [T]he Pension Benefits Act is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and "evinces a special solicitude for employees affected by plant closures"...
> >
> > On the one hand, the protection of the rights of vulnerable groups is a central and long standing function of the courts. The protectionist aim of the legislation is especially evident in s. 70(6), which seeks to preserve the equal treatment and benefits between situations of partial wind up and full wind up. **On the other hand, pension standards legislation is a complex administrative scheme, which seeks to strike a delicate balance between the interests of employers and employees, while advancing the public interest in a thriving private pension system.** [4]
> >
> > [Emphasis added]

39 We think that the passages highlighted above best summarize the objects and scheme of the Act that ought to guide the Tribunal in interpreting the Act.

40 In determining which entity is the employer under the Act, we note that the Act contains a clear and unambiguous definition of "employer". Under this statutory definition, the only relevant criterion is which person or organization paid

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remuneration to the Plan members who were Branch employees ("Branch Members"). Counsel for the respondents urged us to accept that determining the identity of the employer for purposes of a pension plan necessarily involves more that simply determining who paid the salary of the employees — it involves a determination of which entity was the employer at common law, as well as a determination of who controlled the participating entities in the plan.

41 Whether or not it is necessary for us to go beyond the definition of "employer" in the PBA is debatable. Under the reasoning of the Court of Appeal for Ontario in *St. Marys Paper Inc., Re* [5], referred to hereafter as the "*St. Marys* case", it is sufficient to look merely to the Act without reference to the Plan terms to determine the status of the person from whom the workers received their wages. [6] In that case Justices Arbour and Osbourne stated:

> Thus, it seems to us that the inquiry must be first, whether the members (or former members) of the plans received remuneration, as they clearly did here, and second, whether the remuneration was remuneration to which the pension plan was related. [7]

42 We note that the Applicant also referenced the case of *C.U.P.E., Locals 1144 & 1590 v. Ontario (Superintendent of Pensions)* (1998), 20 C.C.P.B. 312 (F.S.T.), also referred to as the "*Sisters of St. Joseph* case", as standing for the proposition that the Pension Commission of Ontario (the predecessor of the Tribunal) focused on the payment of remuneration as the determinative factor in identifying the employer for PBA purposes:

> In the panel's view, **none of the three Hospitals controlled bank accounts from which employees' remuneration was paid, with the result that none of the Hospitals could be considered employers as defined in the Act**. [8]
>
> [Emphasis added]

43 Based on the undisputed evidence before us, at no time did VON Canada pay salaries or other remuneration to individuals employed by the Insolvent Branches or by the other Branches, including the Six Separate Branches, who were members of the Plan. Based on representations by counsel for the Six Separate Branches and OPSEU and the uncontradicted witness evidence of Ms. Kitson, we conclude that on its face and further at common law, each of the Insolvent Branches and the remaining individual Branches was an employer in respect of its own employees under the PBA. Although the Insolvent Branches were not represented, the parties agreed that each Branch employer was responsible for paying its employees remuneration within the ordinary meaning of that term. We also find under the definition of "pensionable earnings" in section 1 of the current Plan terms, that such remuneration was remuneration to which the Plan is related.

44 This is the analysis mandated by the PBA and, in particular, the statutory definition of "employer". Applying the analysis used in the *Sisters of St. Joseph* case to the present case, the Branches paid remuneration to their own employees and therefore are their "employers" within the meaning of the PBA. Conversely, VON Canada did not pay remuneration to the Branch Members with the result that VON Canada cannot be considered the "employer" of the Branch Members, as defined in the Act.

45 Therefore, the application of these two tests is sufficient in our view to make a finding that VON Canada was not an "employer" in respect of Branch employees, including Affected Employees of the Insolvent Branches.

Second Interpretation of "employer"

46 Although our finding in this regard is determinative of the issue, in response to submissions by counsel, we also considered the definition of "employer" at common law, and the various additional factors which have been considered in relevant case law [9] as indicia of an employer-employee relationship. We have set out below those factors which support our conclusion that each individual Branch and VON Canada in respect of its own employees was an "employer" within the meaning of section 1 of the PBA.

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(a) *Control* (meaning the right to give orders and instructions to the employees regarding the manner in which to carry out their work): On the evidence before the Tribunal, we find that the terms of employment of Branch Members were governed by employment contracts between the members and their Branch and by collective agreements between the Branch and the local unions. Based on the evidence of Ron Mills we find that VON Canada was never a signatory to those individual or collective agreements, although they did provide support, if requested, during negotiations. We do acknowledge that the face page of the 2001 Collective Agreement for members of the Practical Nurses Federation of Ontario employed by the Sudbury Branch identifies "Victorian Order of Nurses" as the employer. However the signature page shows "VON Sudbury Branch" as the employer and the Sudbury Branch is also the signatory on the Letters of Understanding attached to the Agreement. This evidence, similar to that of other sample collective agreements put before us further supports our finding that VON Canada was not the employer or party to the collective agreements before us in evidence.

Further, each Branch developed its own human resources policies. The officers and employees of each Branch reported ultimately to the Executive Director of that Branch. The Executive Director of the Branch reported to, and could only be removed by, the Board of Directors of that Branch. Ultimately, the only control that VON Canada could exercise over the Branches was to withdraw from them the right to operate under the "VON" name. This relationship was akin to a licensing agreement, but bore no resemblance to a relationship in which VON Canada could be deemed to be the employer of the Branch's employees.

(b) *Ownership of Tools*: Each Branch maintained its own computer systems, owned or leased its own buildings and other assets, as well as the equipment used by its employees (with the exception of a few computers that in or about 2004 VON Canada acquired and distributed to the Branches).

(c) *Chance of Profit / Risk of Loss*: The issue of profits does not arise in this case, since VON Canada and the Branches were all not-for-profit corporations that, by definition, were not permitted to retain or distribute profits. However, we find that each Branch received revenues directly from government funding agencies, private contracts and/or donations and used those revenues to fund its activities. Each Branch administered its own payroll. Each Branch developed its own business plans and budgets, made its own decisions as to what services it would offer, and decided independently whether and to what extent to allocate part of its budget to employee training. The financial relationship between VON Canada and the Branches was arm's length, as demonstrated by the fact that loans extended by VON Canada to the Branches were subject to interest, that services provided by VON Canada to the Branches were paid for through Branch membership fees, and the fact that VON Canada was not responsible to pay the debts of the Insolvent Branches when they went bankrupt.

47 Based upon the above, it is clear to us that VON Canada was not the employer of Branch employees under the PBA or at common law, and specifically not the employer of the Affected Employees or Branch Members. It should also be noted that if the Branches were also not the employers of the Branch Members for the purposes of the Plan, then there would be no basis upon which the Branch Members could contribute to, and accrue service under, the Plan. Since they did not work for VON Canada, they will have accrued no service under the Plan, unless they worked for some other participating employer, namely one of the Branches.

48 We also have taken into account the following agreed facts as further indicia of each Branch being the employer of its own Branch employees:

(d) As at October 15, 2006, each of the Six Separate Branches was party to its own collective agreement with any unions representing the employees that worked in that Branch. VON Canada was not named as a party to those collective agreements. We are not provided with copies of all of the relevant agreements, but note that the collective agreement in effect for OPSEU members as at the partial wind-up of the WWD Branch names OPSEU Local 253 and Victorian Order of Nurses Waterloo-Wellington-Dufferin Branch. The collective agreement in effect for

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OPSEU members as at the partial wind-up of the Niagara Branch names OPSEU Local 267 and the Victorian Order of Nurses Niagara Branch.

(e) Each VON Branch made its own decisions as to what services it would offer. Information about the services offered by each VON Branch was communicated to VON Canada for the purposes of maintaining liability insurance. VON Canada was the sole policyholder for the liability insurance, with VON Canada and each of the Branches included as insured parties.

(f) Each VON Branch developed its own human resources policies. These were often modeled after VON Canada's human resources standards, but were not always identical.

(g) Most Branches participated in a national group benefits plan administered by VON Canada, but some Branches chose to operate their own group benefits plans for the employees who worked in that Branch. We do not find the offer of a national group benefits plan determinative of any "control" by VON Canada of Branch employees or evidence of an employment relationship with VON Canada.

(h) Each VON Branch paid regular "branch management fees" to VON Canada in return for which it received certain pooled services from VON Canada. For example, VON Canada provided advice to the VON Branches with respect to labour relations issues. In cases where VON Canada was specifically asked to do so, VON Canada also negotiated collective agreements on behalf of individual Branches. In some circumstances where some Branches could not themselves provide certain services, VON Canada agreed to provide the services. We do not find this serves as indicia of an employer relationship.

(i) VON Canada at times asserted the exclusive right to determine who could use the "VON" name. As a result, VON Canada could determine which Branches were able to operate as "VON" Branches. Through the "One VON" initiative, VON Canada withdrew the right to use the "VON" name from all of the Branches that did not transfer their employees and operations to VON Canada. In this context, VON Canada performed regular audits of the Branches to ensure that the quality of service offered by the Branches met VON Canada's standards.

(j) The Branches had their own by-laws and Board of Directors. We reject the submission of counsel for the Six Separate Branches that the ability of VON Canada to review the by-laws was evidence of "control" by VON Canada over the Branches that constituted employer status. We agree with that same counsel that the by-laws had no status as a contract between VON Canada and the Branch. Further, the Six Separate Branches' own witness, Ms. Kitson, alluded to at least one instance of having deliberately flouted national policy, which came to the attention of VON Canada, without consequence. Neither she nor the Branch Directors were removed from office. In fact no evidence was put before use to prove that VON Canada ever unilaterally dissolved any Branch, as the "controlling" entity. Consequently we give the by-laws no weight in assessing employer status.

49 We also wish to address certain additional arguments advanced by counsel for the Respondents with respect to the issue of which entities employed Plan members.

50 First, we reject the argument that VON Canada acted as the employer of the Insolvent Branches when it declared the Partial Wind Ups. We accept that while it was clear to VON Canada that the Branches were insolvent and that the Superintendent could order a partial wind up; there was no one working at the Branches who could or would be likely to declare the partial wind ups; a partial wind up would be in the best interests of the members; and VON Canada was under the mistaken impression that declaring the Partial Wind Ups was part of its role as Plan administrator and its right under the Plan provisions to amend the Plan. Based on the evidence before us we find that it acted as the Plan administrator based on the Plan provisions that provided that it was the only entity to authorize such a plan amendment.

51 Secondly, under the terms of the current Plan, section 17.1, the Administrator has the sole right to amend the Plan. The "Administrator" is defined to be VON Canada which for purposes of Plan amendment acted through its BOD. It is a reasonable interpretation to conclude that participation by the Branches in the Plan included consent to the Plan

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terms, including delegation of the right of amendment. Such participation and delegation would not have prohibited the Branches from exercising their right to declare a partial wind up or discontinue Plan participation and set up a successor plan (as did Carefor upon withdrawal from VON Canada), since those rights would prevail under the Act. The right of Plan amendment exercised by VON Canada did not otherwise in our view make it an employer for purposes of the Act and Funding Provisions.

52 In any event, none of the parties alleged that the Partial Wind Ups hadn't been properly declared, which would be the real result of any successful argument that VON Canada had improperly declared the Partial Wind Ups as Plan Administrator. There was no evidence before us that such amendments were declared without proper authority or unlawful. If the respondents were concerned that VON Canada declared the Partial Wind Ups without proper authority under the Plan and the PBA, they could have contested that declaration before the Superintendent. It is telling that they did not do so.

53 Thirdly, we reject the notion that as the sole signatory under the Trust Agreement, that somehow this fact made VON Canada the only employer under the Plan. There is a requirement under the Act that a registered pension plan have a document that "creates and supports the pension fund" [10] is not determinative in our view of employer status in respect of the Affected Members.

54 Lastly, the fact that Branch Members were allowed to participate in group insurance policies for which they or their Branch paid does not mean that VON Canada paid them "remuneration".

55 VON Canada submits that the fact that it never paid remuneration to Branch Members is entirely determinative of the issue before this Tribunal. Since the Insolvent Branches alone paid remuneration to the Affected Employees, only they are required to fund the PWU Deficits. By the same reasoning, each Branch is responsible for funding its own deficits. Under the first test and at common law, we find that VON Canada is not the employer of the Affected Employees.

56 The PBA contains a clear and unambiguous definition of "employer". Under this statutory definition, the only relevant criterion is which person or organization paid remuneration to the Branch Members to which the pension plan is related. Only the Branch at which a given employee worked paid remuneration to such employee. VON Canada never did so. While the *St. Marys* and *Sisters of St. Joseph* cases and our findings of fact might be considered on its face determinative of the issue, the Six Separate Branches contended that the PBA only recognizes two types of plans: a Single Employer Pension Plan (SEPP) and a multi-employer pension plan (MEPP), the latter as defined in the Act as:

> a pension plan established and maintained for employees of two or more employers who contribute or on whose behalf contributions are made to a pension fund by reason of agreement, statute or municipal by-law to provide a pension benefits that is determined by service with one or more of the employers, but does not include a pension plan where all the employers are affiliates within the meaning of the Business Corporations Act.

57 Under a SEPP, the Six Separate Branches contended that there is only one "employer", namely the "controlling employer" who bears the liability under the Funding Provisions to fund any obligations under the Act, including the PWU Deficits.

58 All parties, including VON Canada agreed that it was the administrator for purposes of the PBA. Clause 8(1)(a) of the PBA states that the administrator of a non-MEPP plan can be "the employer or, if there is more than one employer, one or more of the employers", so there is no compliance issue with VON Canada being the plan administrator. As noted previously, all parties agreed that the Plan had not been administered as a MEPP. It was conceded that the Plan operated with multiple participating Branch employers as well as VON Canada as an employer.

59 The Tribunal was not asked to consider, in fact the parties vigorously argued against such consideration, whether or not the Plan was in fact a MEPP. To make such a finding of course would leave members outside of the protection of the PBGF, to which VON Canada had remitted contributions for many years. The Superintendent correctly points out

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that section 86(1) of the *PBA* provides that where money is paid out of the PBGF as a result of the wind up of a pension plan, the Superintendent has a lien and a charge on the assets of "the *employer or employers* who provided the pension plan [emphasis added]." The Applicant argued that the use of the word "employers" in this section is conclusive evidence that the intention of the Legislature was that there could be non-MEPPs with more than one participating employer for the purposes of the *PBA*. This argument negates the argument of the Six Separate Branches that such plans are not permitted by the *PBA*.

60 The hearing panel was not presented with any evidence that contributions to the Plan were made by reason of statute or municipal by-law. Ultimately the Tribunal concluded that it had insufficient evidence before it to make a finding that the Plan was a MEPP assessing whether or not contributions were being "made by reason of an agreement".

61 The Tribunal was asked to consider the Funding Provisions of the PBA, as if the Plan were not a MEPP, but a SEPP. The Superintendent recognized in its submissions that there "is some indication in the PBA that a plan can have more than one employer without being a MEPP". We agree. In fact as a practical matter, the phrase "Single Employer Pension Plan" is somewhat misleading since in practice it could easily include, for example, a single employer plan sponsor that has additional participating affiliated employers in the plan, but that fact alone does not qualify it as a MEPP.

62 No definition of a "Single Employer Pension Plan" exists under the PBA. Much was made by counsel for the respondents as to the use of the phrase "an employer" and "the employer" in sections 55(2) and 75 of the PBA, with the corresponding suggestion by the respondents that there could under the second possible interpretation of employer under the Act, namely a single "controlling" employer liable under the Funding Provisions for any solvency deficiency on partial wind up in a SEPP with multiple participating employers. This argument is the basis for the second interpretation of "employer" put before us for consideration.

63 This approach would require us to read in the word "controlling" in front of "employer" wherever it appears in the Act and to simultaneously read out the statutory definition of "employer", which clearly and unambiguously defines "employer" as the person or organization that pays remuneration to an employee. As noted earlier, it is a fundamental principle of statutory interpretation that provisions in a statute cannot be "read out" or simply ignored. [11]

64 Indeed, the word "controlling" does not appear a single time in the entire PBA. The word "control" appears only three times: once in respect to information that is in the "control" of the plan administrator; once in respect of a person who is given "control" over money by the Superintendent; and finally in a provision that states that a person shall not be deemed to have been given notice of a document where they did not in fact receive it, due to circumstances beyond their "control" [12]. Neither word appears a single time in the Regulations. Most importantly, neither word appears in the Funding Provisions. It seems unreasonable for us to interpret the Act in a manner which is contrary to its plain meaning and would cause in imbalance among the interests of participating employers in a SEPP.

65 The Six Separate Branches relies for this alternative second interpretation of employer as the "controlling employer" on the cases of (i) *Dustbane Enterprises Ltd. v. Ontario (Superintendent of Financial Services)* ("*Dustbane*"), and (ii) the *Amherst (Town) v. Nova Scotia (Superintendent of Pensions)* ("*Amherst*"), [13] for the proposition that a determination of who controlled the participating entities and the Plan itself determines the "employer" under a SEPP for funding purposes.

66 We do not agree with this proposition. As discussed above, we find that the Insolvent Branches were the "employers" under the PBA in respect of their own employees who were the subject of the Partial Wind Ups and the Superintendent's Notice of Proposal.

67 *Dustbane* can be distinguished on a number of fronts factually. Most notably, only Dustbane not the Distributors was found to be an employer under the Plan and the Pension Commission of Ontario found that the Plan was not a MEPP. By the same token, the *Dustbane* decision is entirely consistent with the statutory definition of "employer", because it was found that Dustbane had paid remuneration to the employees of the Distributors.

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68 Unlike Dustbane, VON Canada is not arguing that this Plan is a MEPP to avoid having to make special payments to fully fund the Plan, or to reduce accrued pension benefits, even though it previously administered the Plan as a SEPP. To the contrary, VON Canada has consistently asserted that the Plan is a SEPP, as it has always been administered. Unlike Dustbane, we find that VON Canada did not withhold Plan information or documentation from the Branches, instead the evidence suggests that Branches did not specifically request full Plan documentation. Information was disseminated largely by way of memorandums to Branch Executives, by the annual meeting and representation, by some Branches on the VON Canada Board of Directors.

69 Further, unlike the Distributors in *Dustbane*, there is no evidence before us that the Branches, once deficits arose, were unaware that they had funding obligations. In fact they remitted contributions first in the form of the surcharge of 14% of employer contributions on February 7, 2004, to take effect as of July 1, 2004. The surcharge was paid by the Branches and VON Canada from July 1, 2004 to December 31, 2005. The actuarial valuation of the Plan as of January 1, 2006 revealed a wind-up deficit and a solvency deficit. Effective January 1, 2006, contributions of active plan members, VON Canada and the Branches were further increased in light of the required special payments.

70 We agree with the following statement from the dissenting judgment in *Dustbane*:

> The Act is remedial intended to ensure that pension benefits which are promised are paid. The purposes of the Act do not; however, prefer payment by one employer rather than the other. [14]

71 The Six Separate Branches submit that VON Canada has, at all times, exercised total control over both the Plan and the Branches. Based on our findings of fact above we find that VON Canada has not exercised control over the Branches to the extent that it would be an "employer" for PBA purposes in respect of Branch employees. We do find that it did exercise control over the Plan, both as plan sponsor and administrator however this is not, in our view, determinative as to which entity may be an employer under the PBA with related liability for funding obligations under the Funding Provisions.

72 In its submissions, VON Canada cites the reasoning of the Nova Scotia Court of Appeal in the *Amherst* decision as applicable to the present case. VON Canada submits that the *Amherst* case supports the proposition that excluding participating employers (the towns in that instance), from involvement in administration and key decisions with respect to the pension plan (i.e. amendments) did not affect the participating employers' statutory funding obligations. We agree.

73 The *Amherst* decision was decided under Nova Scotia pension legislation, which contains different statutory provisions regarding an employer's obligation to fund a solvency deficit, and while not binding on this Tribunal is persuasive. The term "Employer" under Nova Scotia pension legislation (the central issue in the *Amherst* case) was defined as "the employer required to make contributions under the pension plan". However, Six Separate Branches argues that the definition of "employer" under the *PBA* for purposes of a SEPP, as considered in *Dustbane*, is broader and involves an overall assessment of who is the controlling employer in respect of the plan, of which remuneration is only one consideration.

74 In the *Amherst* case, the issue before the Court was whether the participating towns were required to make contributions under the pension plan. The Court found that the towns, through signing certain collective agreements requiring them to contribute to the plan, had committed to make payments and were, therefore, "employers" within the meaning of the Nova Scotia legislation. The Court went on to find that the lack of involvement by the towns in the administration and amendment of the pension plan did not overcome the fact that the towns were obliged to contribute to the plan and, therefore, were "employers" within the meaning of the legislation. [15]

75 While dealing with a different legislative definition of "employer" in the *Amherst* case, the Superintendent and the Court still considered the involvement, or lack thereof, of the towns in the administration of the pension plan when determining whether they met that definition.

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76 It should also be noted that in the *Amherst* case, the towns had certain express rights to appoint representatives to the pension committee and trustees, yet failed to do so. This is very different than the case at hand where there is evidence that at least some of the Branches did participate in the Plan's Pension & Benefits Committee, all Branches had full documentation available to them on request and could withdraw from participation in the Plan by withdrawing from the VON organization and setting up their own plan as was the case for Carefor.

77 As a corollary to the second interpretation of a "controlling" employer, the Six Separate Branches argued that as the PBA only imposes liability for solvency and wind up deficits on the *single* employer of a SEPP, that single employer must contractually allocate its statutory funding obligation to other entities participating in the plan by way of the plan text or participation agreements. Six Separate Branches argued that VON Canada did not provide for any allocation of its statutory funding obligations under the PBA to the Branches by means of participation agreements. Instead, it amended the Plan effective January 1, 1992 and January 1, 1998 to provide in Section 5.3 a formula to share its funding obligation in respect of any unfunded liability or solvency deficiency. That formula, argued the Six Separate Branches, did not explicitly provide for the Branches to pay wind up deficits, but limited the Branches' obligation to pay current service costs.

78 While such an argument may, if true, permit a Branch to claim against VON Canada under the terms of the Plan or contractually for reimbursement or payment of funding deficits on wind-up, it is not an answer under the Act as to who the employer is for funding purposes. In this regard we do not need to rely on the Plan provisions to make a finding of funding liability in respect of the Partial Wind Ups as solely against the Insolvent Branches.

79 While the *St. Marys case* can be distinguished from the present circumstances in that in *St. Marys* , the applicant was a trustee in bankruptcy disputing its employer status under the legislation, and the court in that instance did not consider similar facts of multiple participating employers under a single employer pension plan, the court did recognize that the Act and Regulations

> impose an obligation on an "employer" to ensure that a pension plan is adequately funded, both on an ongoing basis and on a wind up of the plan. This obligation exists quite apart from the particular funding requirements set out in the pension plan itself. This obligation is central to the regulatory scheme established by the PBA. The Act requires that its minimum funding standards be met. It does not allow for special deals which dilute or might eliminate these minimum funding requirements. ....The employer's obligations include the obligation to make special payments attributable to the unfunded liabilities of the plan. An employer cannot choose which of its funding obligations in respect of an ongoing pension plan it will honour. [16]

80 For purposes of the PBA, we also find under the second argument for the Applicant.

Third interpretation of "employer"

81 The third argument is that "Employer" under the Act could be interpreted to mean "all participating employers jointly and severally", notwithstanding their separate legal status. This is the alternative position put forward by the Superintendent, OPSEU and ONA. The written submission of the Superintendent limits such joint and several liability to that of VON Canada and the Insolvent Branches for the Partial Wind Ups based on the Plan terms. Both OPSEU and ONA agreed that such joint and several liability was the responsibility only of VON Canada and the participating Branch in respect of its own employees, not the other Branches.

82 The Superintendent argues that if the Act contemplates a non-MEPP with more than one employer, and a partial wind up in insolvent circumstances with respect to one of those employers, then the funding obligation on partial windup is the obligation of the plan *as a whole*, and not only or necessarily the employer having the closest connection to the circumstances that caused the partial wind up. The rationale in the context of this argument is "spread the pain funding",

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to permit plan members to be able to count on the security of another participating organization. For this counsel relies on the provisions of sections 74 of the Act and s. 31 of the Regulations, which for convenience we repeat:

> 75(1) Where a pension plan is wound up in whole or in part, ***the employer*** shall pay into the pension fund,
>
> (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
>
> (b) an amount equal to the amount by which,
>
> (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
>
> (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
>
> (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74, exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario."
>
> (emphasis ours)

83 Section 31 of the Regulations reads:

> 31. (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by **the employer** to the pension fund.
>
> (*emphasis ours*)

84 These provisions refer to "*the* employer" whether the Plan is a MEPP or SEPP. The Superintendent argues that under the provision of the *Legislation Act, 2006*, [17] in section 67, "Words in the singular include the plural and words in the plural include the singular", as support for the view that in the case of a plan with multiple participating employers, that the funding obligations on wind up are of the plan as a whole, with joint and several liability, and that the phrase "the employer shall pay" could be interpreted as "the employers shall pay".

85 We disagree with this interpretation. Had that been the case the legislature could have chosen consistently to only use "employer" throughout the Act, when it did not do so. In interpreting the Act, we rely on the principle noted above that,"*the words of an Act are to be read in their entire context and in their grammatical and ordinary sense*". It is our view that the usage of "the employer" in section 75 is consistent with the definition of an employer that pays remuneration to the member affected by the Partial Wind Ups for whom a pension benefit has accrued, and not an employer with no such employment relationship with the member.

86 As noted previously, the Superintendent points out that section 86(1) of the *PBA* provides that where money is paid out of the PBGF as a result of the wind up of a pension plan, the Superintendent has a lien and a charge on the assets of "the *employer or employers* who provided the pension plan." [emphasis added] The Superintendent's argument, if accepted, would mean in this case that if a PBGF payment is made in respect of the PWU Deficit, the Superintendent would have a lien over not only VON Canada's assets but over the assets of all of the Branches as well. No cases were put before the Tribunal to support the Respondents' interpretation of the Act in this regard. In fact the claim is only as against VON Canada.

87 This third interpretation requires one to ignore the statutory definition of "employer." The Superintendent argued that the use of the word "employers" in this section is conclusive evidence that the intention of the Legislature was

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that there could be non-MEPPs with more than one participating employer for the purposes of the *PBA*. If, as the Superintendent argues, this provision should be interpreted such that funding on a partial wind up need "not be done by the employer having the closest connection to the partial wind up", then we would not be able to "cherry-pick" among which participating employers would have liability, which is the position put forth by the Superintendent and Respondents ONA and OPSEU. We think that reading the PBA so as to give the Superintendent the ability to "cherry pick" among participating employers under a SEPP as to which is responsible for funding the Plan on a partial wind up is an unreasonable and unsupportable interpretation of the legislation. If the legislature had wanted to attach liability to all of the participating employers in a pension plan, whether or not they had any connection to the affected plan members under a wind up, it could have done so explicitly, but did not.

88 As previously noted, this Tribunal has already decided that it lacked sufficient evidence before it to make a determination as to whether or not the Plan was a MEPP and whether or not the PBGF applies to the Plan. If it is a MEPP, we are of the view that it would be unreasonable to conclude that the Legislature intended there to be more than one employer for some purposes (e.g. PBGF payments), but not for other purposes (e.g. funding) in respect of the same members and events without expressly saying so. If that was the intention, as noted above, we would find both VON Canada and all of the participating Branches would bear joint-and several liability without preference for payment by one over the other.

89 We do not, however, agree with the Superintendent that s. 86(1) of the *PBA* would give the Superintendent a lien over the assets of all participating employers where a payment has been made out of the PBGF. Since the section applies to both partial and full wind ups, the reference to "the employer or employers", when read together with the statutory definition of "employer", must be read to mean that the lien applies only to the employer or employer who paid remuneration to the members affected by the full or partial wind up. As noted above, given the very different fact situation and issues before the court in *St. Marys* and this case, we do not find *St. Marys* to stand for the proposition of joint and several liability: the court in that case simply did not have a similar fact situation nor did it address its mind to the issue of joint and several liability under a SEPP.

90 Lastly we turn our attention to the current Plan provisions stated above, which by agreement of all the parties were not explicit with respect to funding obligations on plan wind up. We note however that the funding provisions in Section 5.3 of the 2002 Plan document make all such contributions "Subject to the requirements of the Pension Benefits Act and the Income Tax Act".

91 The Plan documents do not prevail over the Act in respect of the Funding Provisions, as parties cannot contract out of their legal obligations under public policy statures. As a result, even if VON Canada and the Branches had all agreed that the Branches would not have to fund deficits associated with their own employees, that agreement in our view would have no legal effect on the statutory requirement under the Act. We adopt the approach of the Ontario Court of Appeal in the *GenCorp* case referenced in *Monsanto* as noted above which stated that pension standards legislation seeks to strike a delicate balance between the interests of employers and employees". [18] To provide that balance, employers should not be subject to a "tonteen" approach which leaves the last employer in a SEPP standing holding the bag for all funding obligations.

92 Finally, we reject the Superintendent's suggestion that VON Canada as drafter of the Plan documents should be liable as a participating employer for the wind up deficits of the Insolvent Branches by application of the doctrine of *contra proferentum.* VON Canada is not seeking to solely rely on the Plan provisions to restrict any potential liability for solvency deficits or unfunded liabilities under the Partial Wind Ups.

93 We have concluded that this is not a case where we ought to apply the doctrine of *contra proferentum*. As noted by the court in *Milner*, *supra*. we only ought to have resort to *contra proferentum* if all other rules of construction first fail to ascertain the meaning of the document. In this case, the Plan provisions are not determinative as to who will fund the wind up deficits: the Act provides a complete answer.

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6. Decision and Order

94 For all of these reasons, the Tribunal finds that VON Canada is not an "employer" under the Act for the purpose of funding obligations related to Branch employees. We therefore order that:

a) VON Canada is not responsible for funding any statutory funding obligations under the Act with respect to the Partial Wind Ups of the Insolvent Branches; and

b) The Superintendent shall proceed with the review of the filed Partial Wind Up Reports relating to the Insolvent Branches as quickly as possible.

c) The Superintendent is directed to make a finding as to the application of the PBGF to the Partial Wind Ups and the related pension benefits of the Affected Employees.

95 We have not been asked to make an order as to costs in the matter. However, we remain seized of this matter in respect of any written submissions made for costs within 30 days of the date of this decision.

Application granted.

Footnotes

1 (2002), 34 C.C.P.B. 199 (F.S. Trib.), at paragraph 11.

2 Stelco Inc. and The Superintendent of Pensions and A Group of Persons Represented by Koskie & Minsky ("Gold Group") and A Group of Persons Represented by Stockwood, Spies, Ashby & Craigen ("Craigen Group") and Mr. Neil K. Veinot - a Decision Relation to Neil K. Veinot (March 18, 1993), paragraph 9.

3 *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 (S.C.C.) ("*Monsanto*"), at para. 19. Also see: *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.).

4 *Monsanto*, at para. 13

5 *St. Marys Paper Inc., Re* (1994), 19 O.R. (3d) 163 (Ont. C.A.).

6 Ibid, at page 172.

7 Ibid, at page 173

8 *C.U.P.E., Locals 1144 & 1590 v. Ontario (Superintendent of Pensions)* (1998), 20 C.C.P.B. 312 (F.S.T.) at para. 32.

9 *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 (S.C.C.) at paras. 36-48.

10 Pension Benefits Act, Ontario. S. 9(2)(c).

11 Stephane Beaulac, Handbook on Statutory Interpretation: General Methodology, Canadian Charter and International Law (Markham, Ontario: LexisNexis, 2008) at 104.

12 Pension Benefits Act, R.S.O. 1990, c. P.8, sections 24 (7), 99 and 112(2).

13 *Dustbane Enterprises Ltd. v. Ontario (Superintendent of Financial Services)* (2001), 27 C.C.P.B. 1 (F.S. Trib.), aff'd (Ont. Div. Ct.) ("*Dustbane*"); *C.U.P.E., Locals 1144 & 1590 v. Ontario (Superintendent of Pensions)* (1998), 20 C.C.P.B. 312 (F.S. Trib.) ("*Sisters of St. Jospeph*"); *Amherst (Town) v. Nova Scotia*

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(Superintendent of Pensions), 2008 NSCA 74, 2008 CarswellNS 431 (N.S. C.A.), leave to appeal to SCC denied (2009) (S.C.C.) ("*Amherst*")

14 Dissent of K. Bush, paragraph 60.

15 *Amherst*, paras. 27 and 88, and at paras. 66-79.

16 Ibid., section 4, paragraph 1.

17 *Legislation Act, 2006*, S. O. 2006, Schedule F.

18 *Monsanto* at para 14.

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Court File No. CV-15-11192-00CL

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

AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C-43, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VICTORIAN ORDER OF NURSES FOR CANADA, VICTORIAN ORDER OF NURSES FOR CANADA – EASTERN REGION AND VICTORIAN ORDER OF NURSES FOR CANADA – WESTERN REGION

Applicants

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

(PROCEEDING COMMENCED AT TORONTO)

BRIEF OF AUTHORITIES OF THE ONTARIO NURSES' ASSOCIATION

(Returnable August 30, 2016)

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