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by

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COMPANIES' CREDITORS ARRANGEMENT ACT

R.S.C. 1985, c. C-36

as am. R.S.C. 1985, c. 27 (2nd Supp.), ss. 10 (Sched., item 3), 11; S.C. 1990, c. 17, s. 4; 1992, c. 27, s. 90(1)(f); 1993, c. 28, s. 78 (Sched. III, item 20) [Repealed 1999, c. 3, s. 12 (Sched., item 4).]; 1993, c. 34, s. 52; 1996, c. 6, s. 167(1)(d), (2); 1997, c. 12, ss. 120-127; 1998, c. 19, s. 260; 1998, c. 30, s. 14(c); 1999, c. 3, s. 22; 1999, c. 28, s. 154; 2000, c. 30, ss. 156-158; 2001, c. 9, ss. 575-577; 2001, c. 34, s. 33; 2002, c. 7, ss. 133-135; 2004, c. 25, ss. 193-195; 2005, c. 3, ss. 15, 16; 2005, c. 47; 2007, c. 29, ss. 104-109; 2007, c. 36; 2009, c. 33, ss. 27-29.]

An Act to facilitate compromises and arrangements between companies and their creditors

SHORT TITLE

1. This *Act* may be cited as the *Companies' Creditors Arrangement Act.*

Section 1

N§1 Introduction to the *Companies' Creditors Arrangement Act*

The *Companies' Creditors Arrangement Act* is a facilitative statute, aimed at allowing financially distressed businesses to devise a plan of compromise or arrangement with their creditors, with a view to becoming viable in the future. The original *Act*, S.C. 1932-33, c. 36, came into force May 23, 1933 (see 16 C.B.R. 447 for the original *Act*). The *CCAA* is derived from s. 153 of the *English Companies Act*, 1929 (19 and 20 Geo. V, c. 23). Although the *CCAA* has been amended on other occasions, the principal amendments were made in 1953 by S.C. 1952-53, c. 3. The 1953 amendments enlarged the definition of "unsecured creditor". The present statute is called the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. For convenience, the statute will be referred to as the *CCAA*. The *Act* permits compromises or arrangements to be made between an insolvent company and its unsecured creditors or any class of them and between secured creditors and any class of them.

Extensive amendments to the *CCAA* were undertaken in *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, Chapter 47, Royal Assent November 25, 2005, the *CCAA* provisions proclaimed in force as of September 18, 2009 (Chapter 47). Further amendments were introduced under Bill C-52 *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2007*, Royal Assent June 22, 2007, Chapter 29 Statutes of Canada 2007; and *An Act to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005* (2007, c. 36 proclaimed in force as of September 18, 2009).

A *CCAA* proceeding is different from an ordinary civil action and trial, and the dynamic process is such that "real time" process should only be stifled when to do otherwise would operate as a significant prejudice to a creditor or group of creditors: *Re 1587930 Ontario Ltd.* (2006), 2006 CarswellOnt 6419, 25 C.B.R. (5th) 260 (Ont. S.C.J. [Commercial List]).

In *Reference Re Companies' Creditors Arrangement Act (Canada)* (1934), 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75, the Supreme Court of Canada held that the *Act* was *intra vires* Parliament, coming within the domain of bankruptcy and insolvency, vested in Parliament by s. 91(21) of the *Constitution Act, 1867*.

The *CCAA* and the *Bankruptcy and Insolvency Act* are two distinct statutes, and one is not auxiliary to the other: *Parisian Cleaners & Laundry Ltd. v. Blondin* (1938), 20 C.B.R. 452, 66 Que. K.B. 456 (Que. C.A.); *Québec (Sous-ministre du Revenu) v. Wynden Canada Inc.* (1982), 47 C.B.R. (N.S.) 76, [1983] C.S. 194 (Que. S.C.). The *CCAA* does, however, adopt some of the definitions of the *BIA*.

The reorganization of a company's affairs under the *CCAA* may take many forms, and solutions are limited only by the creativity of those structuring the plan of arrangement: *Re Blue Range Resource Corp.* (1999), 1999 CarswellAlta 597, [1999] A.J. No. 788, 245 A.R. 154, 1999 ABQB 1038 (Alta. Q.B.), leave to appeal allowed (1999), [1999] A.J. No. 975, 1999 CarswellAlta 809, 244 A.R. 103, 209 W.A.C. 103, 12 C.B.R. (4th) 186, 1999 ABCA 255 (Alta. C.A.), reversed (2000), 2000 CarswellAlta 731, [2000] A.J. No. 830, 2000 ABCA 200, 261 A.R. 162, 225 W.A.C. 162, [2000] 11 W.W.R. 117, 84 Alta. L.R. (3d) 65 (Alta. C.A.); and *Re 843504 Alberta Ltd.* (2003), 2003 CarswellAlta 1786, 2003 ABQB 1015, 4 C.B.R. (5th) 306, 30 Alta. L.R. (4th) 91, 351 A.R. 222 (Alta. Q.B.).

If a conflict arises between the *CCAA* and either federal or provincial statutes, the *CCAA* prevails: *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* (1995), 34 C.B.R. (3d) 4 (B.C. C.A.); *Re Smoky River Coal Ltd.* (1999), 175 D.L.R. (4th) 703, 237 A.R. 326, 12 C.B.R. (4th) 94, 1999 CarswellAlta 491, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 74, 197 W.A.C. 326 (C.A.); *Montreal Trust Co. v. Abitibi Power & Paper Co.* (1938), 20 C.B.R. 32, [1938] O.R. 589, [1938] 1 D.L.R. 548 (C.A.). In *PCT Building Ltd. v. Canadian Airlines Corp.* (2001), 34 C.B.R. (4th) 266, 2001 CarswellAlta 1800, 296 A.R. 128 (Alta. Q.B.), this statement of the law was held to apply to statutory tax provisions.

Provincial legislation that confers a right on shareholders to enjoin a proposed sale of the whole or substantially the whole of the undertaking of a company unless it has been approved by a special resolution of shareholders is unenforceable if it conflicts with a plan under the *CCAA*: *Re Loewen Group Inc.* (2001), 32 C.B.R. (4th) 54, 2001 CarswellOnt 4910, 22 B.L.R. (3d) 134 (Ont. S.C.J. [Commercial List]).

The doctrine of paramountcy will apply either where a provincial and a federal statutory provision are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. Parliament's intent for the operation of the *CCAA* regime should not be thwarted by the operation of provincial legislation: *Re Nortel Networks Corp.* (2009), 2009 CarswellOnt 7383, [2009] O.J. No. 4967, 2009 ONCA 833 (Ont. C.A.). For a discussion of this judgment, see N§65 "Scope of Order under Initial Application".

While historically, the statute was not used as a means of winding-up a company *Re D.W. McIntosh Ltd., supra; Re Avery Const. Co., supra;* and *Re Arthur Flint Co., supra*, in recent years there have been a number of cases where it is in the best interests of creditors to avoid bankruptcy or winding-up proceedings and to conduct an orderly liquidation under a plan of compromise or arrangement under the *CCAA*: *Re Quintette Coal Ltd.* (1991), 10 C.B.R. (3d) 197, 1991 CarswellBC 444, 62 B.C.L.R. (2d) 218 (S.C.). The court in *Re Assoc. Investors of Can. Ltd.* held that the *CCAA* may be invoked as a means of liquidating a company if the benefits that would flow to creditors from utilizing the *Act* would not be available if liquidation occurred under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*; there is judicial control over the liquidation process and an effective means of investigating the affairs of the company; the company may be investigated and the results of the investigation made available to the court; the plan must be fair and reasonable and there must be an absence of any findings of illegality: *Re Associated Investors of Canana Ltd.* (1987), 67 C.B.R. (N.S.) 237, 56 Alta. L.R. (2d) 259, 46 D.L.R. (4th) 669 (Alta. Q.B.). With respect, these conditions may be too rigorous. If the court finds that the plan is fair and reasonable and in the best interests of creditors, there seems no reason why an orderly liquidation could not be carried out under the *CCAA*. See *Re Amirault Fish Co.* (1951), 1951 CarswellNS 6, 32 C.B.R. 186 (N.S. S.C.) where a company that was being wound up under provincial legislation proved to be insolvent so that it was not possible to use provincial legislation to make a distribution to creditors, and the court held that is was appropriate to use the *CCAA* to carry out the distribution. To the same effect, see *Re Olympia & York Developments Ltd.* (1995), 34 C.B.R. (3d) 93, 1995 CarswellOnt 340 (Ont. Gen. Div. [Commercial List]); *Re Anvil Range Mining Corp.* (2001), 25 C.B.R. (4th) 1, 2001 CarswellOnt 1325 (Ont. S.C.J. [Commercial List]), affirmed (2002), 34 C.B.R. (4th) 157, 2002 CarswellOnt 2254 (Ont. C.A.). However, in Alberta, the preference may be to expect the corporate entity to continue in some form or another and liquidations proposals are allowed only in exceptional circumstances: *Re 843504 Alberta Ltd.* (2003), 2003 CarswellAlta 1786, 2003 ABQB 1015, 4 C.B.R. (5th) 306, 30 Alta. L.R. (4th) 91, 351 A.R. 222 (Alta. Q.B.).

See Shelley Fitzpatrick, "Liquidating *CCAA*s - Are We Praying to False Gods?"; and Bill Kaplan, "Liquidating *CCAA*s: Discretion Gone

Awry?", in J. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009).

Unlike a proposal under the *Bankruptcy and Insolvency Act*, if a plan under the *CCAA* is not accepted by creditors, the company is not automatically bankrupt.

If proceedings are taken by a creditor for appointment of a receiver and proceedings are taken by the debtor company under the *CCAA*, the *CCAA* is the dominant legislation, since it is directed to the overall purpose of providing for arrangements and compromises of the claims of creditors that meet the requirements of the *Act*. Where appropriate, the court will stay the receivership proceedings to permit the debtor to present a plan of reorganization under the *CCAA*: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 138, 1988 CarswellBC 552 (B.C. S.C. [In Chambers]).

Since the *Act* is a Federal *Act*, an order made under the *Act* in one province will be binding in other provinces: *Lehndorff United Properties (Canada) Ltd. v. Confederation Life Insurance Co.* (1993), 17 C.B.R. (3d) 198, 82 Man. R. (2d) 286, 1993 CarswellMan 25 (Q.B.).

The rights of creditors under the *CCAA* cannot be compromised unless

1. the creditor has been given a right to vote in the appropriate class on the proposed plan;
2. the creditor's vote is in accordance with a value ascribed to the claim by a court approved procedure;
3. the class in which the creditor has been appropriately placed has voted by a majority in number and two-thirds in value in favour of the plan; and
4. the court has sanctioned the plan on the basis that it is fair and reasonable (with considerable deference being given by the court in this regard to the votes of the creditors): *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500, 17 C.B.R. (3d) 1, 1993 CarswellOnt 182 (Gen. Div.); *Menegon v. Philip Services Corp.* (1999), 11 C.B.R. (4th) 262, 1999 CarswellOnt 3240 (Ont. S.C.J. [Commercial List]).

The Ontario Court of Appeal held that the fact that a plan of arrangement under the *CCAA* is put forth by a secured creditor, the plan vests all of the debtor company's assets into a non-arm's length purchaser, and operates exclusively for the benefit of secured creditors, does not, in and of itself, negate the fairness and reasonableness of such a plan where it can be shown that, even outside of the plan, the assets of the debtor company will not generate any recovery for unsecured creditors: *Re 1078385 Ontario Ltd.* (2004), 2004 CarswellOnt 8034, 16 C.B.R. (5th) 152 (Ont. C.A.).

The Ontario Superior Court of Justice noted that if any stakeholder does not voluntarily participate in the mediation between all stakeholders of an insolvent corporation in a *CCAA* proceeding, the monitor, at the mediator's request, may move for an order that such participation be directed and ordered by the court: *Re Stelco Inc.* (2005), 2005 CarswellOnt 2010, 11 C.B.R. (5th) 163 (Ont. S.C.J. [Commercial List]).

The British Columbia Court of Appeal held that while *CCAA* proceedings may require those with a financial stake in the company to compromise some of their rights in order to sustain the business, it cannot be said that the priorities between those with a financial stake are meaningless as priorities are always in the background and influence the decisions of those who vote on the plan: *Caterpillar Financial Services Ltd. v. 360networks Corp.* (2007), 2007 CarswellBC 29, 2007 BCCA 14, 61 B.C.L.R. (4th) 334, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 10 P.P.S.A.C. (3d) 311 (B.C. C.A.).

[*Continued on page 11-5*]

The Ontario Divisional Court held that it is appropriate to appoint a receiver at the request of a secured creditor in the context of a debtor's *CCAA* proceedings and to permit the secured creditor to enforce on its security where there is evidence before the court that the assets and property subject to the secured creditor's security are in jeopardy of material deterioration: *I.F. Propco Holdings (Ontario) 36 Ltd. v. 1228851 Ontario Ltd.* (2002), 2002 CarswellOnt 6613, [2002] O.J. No. 1667 (Ont. Div. Ct.).

The Supreme Court of Canada has held the history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA,* making the former more responsive to complex reorganizations. The Supreme Court of Canada held that 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 that allowed the company to survive was optimal. It held that 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. The Court held that 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: *Re Ted Leroy Trucking Ltd.* (2010), 2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, 72 C.B.R. (5th) 170 (S.C.C.). For a full discussion of this case, see N§101 "Claims under the *Excise Tax Act*".

There have been a number of articles and books written about the *CCAA*. See, for example, S. Edwards, "Reorganization under the *Companies Creditors Arrangement Act*" (1947), 25 Can. Bar Rev. 587; Robert Thornton *et al,* "Air Canada and Stelco: Legal Developments and Practical Lessons", in J. Sarra, ed., *2006 Annual Review of Insolvency Law* (Toronto: Carswell, 2007) at 73-114; Derrick C. Tay, "Inherent Jurisdiction: The Silver Bullet of James M. Farley", *ibid,* at 1-18; Fred Myers, "Justice Farley in Real Time", *ibid.* at 19-32; William E. Aziz, Richard M. Grudzinski and Edward A. Sellers, "Practical Aspects of Governing Distressed Enterprises in Canada", *ibid.* at 365-420; L. J. Crozier, "Good Faith and the *Companies' Creditors Arrangement Act*" 15 Can. Bus. L.J. 89; D. Baird, D. Goldman, and M. Wrinczok, "Arrangements under the *Companies' Creditors Arrangement Act*" 1 C.B.R. (3d) 135; Mark E. Meland, "Extending 'Protection' to Third Parties in a Restructuring Plan", 20 C.B.R. (3d) 61; Elizabeth Murphy, Janis Sarra and Michael Creber, "Credit Derivatives in Canadian Insolvency Proceedings, 'The Devil will be in the Details'", in J. Sarra, ed., *2006 Annual Review of Insolvency Law* (Toronto: Carswell, 2007) at

187-234; Keith Pritchard, "Analysis of Recent Cases under the *Companies' Creditors Arrangement Act*" (2004) 40 Canadian Business L. J. 116; Rupert Chartrand, Edward Sellers and Natasha MacParland, "AT&T Canada: A New Brand of Telecom Restructuring", *Annual Review of Insolvency Law, 2003* (Toronto: Carswell, 2004) at 211; Ronald B. Davis, "Restructuring Proceedings and Pension Fund Deficits: A Question of Risk and Reward", *Annual Review of Insolvency Law, 2003* (Toronto: Carswell, 2004); Janis P. Sarra, *Rescue! The Companies Creditors Arrangement Act* (Carswell, Toronto, 2007); Derrick C. Tay and Charles Pasparakis, "Shareholder Approval Not Needed for Transfer of All the Company's Assets When Done Under the *CCAA*" 32 C.B.R. (4th) 64; Stephanie Ben-Ishai and Virginia Torrie, "A 'Cost'-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings" and David P. Bowra and Heather Ferris, "Real Estate Development Insolvencies, a British Columbia Perspective", in Janis Sarra, ed., *Annual Review of Insolvency Law, 2009* (Toronto: Carswell, 2010) at 144-167 and 315-342; Derrick C. Tay and Jennifer L. Stam, "The Challenges of Restructuring an Integrated International Business: The Nortel Experience", in Janis Sarra, ed., *Annual Review of Insolvency Law, 2009* (Toronto: Carswell, 2010) at 233-242; Robert J. Chadwick and Derek R. Bulas, "*Ad Hoc* Creditors' Committees in *CCAA* Proceedings: The Result of a Changing and Expanding Restructuring World", in J. Sarra, ed., *Annual Review of Insolvency Law, 2011* (Toronto: Carswell, 2012) 119-133; William C. Kaplan, "Stays Of Proceedings under The *Canada Business Corporations Act*: A Question Of Balance", in J. Sarra, ed., *Annual Review of Insolvency Law, 2011* (Toronto: Carswell, 2012) 135-164; Jay Carfagnini and Caterina Costa, "Claims for Post-Filing Interest and Prepayment Premiums in a CCAA Proceeding", in J. Sarra, ed., *Annual Review of Insolvency Law, 2011* (Toronto: Carswell, 2012) 165-190; Brendan O'Neill, "New Battlegrounds - Update on Intercreditor Tranche Warfare in the Fields of Credit Bidding and Intercreditor Agreements", in J. Sarra, ed., *Annual Review of Insolvency Law, 2011* (Toronto: Carswell, 2012).

N§2 Purpose of the *CCAA*

While the *CCAA* does not have an express objective clause, its long title, *An Act to facilitate compromises and arrangements between companies and their creditors* indicates that its objective is to assist insolvent companies in developing and seeking approval of compromises and arrangements with their creditors. The *CCAA* has a broad remedial purpose, giving a debtor company an opportunity to find a way out of financial difficulties short of bankruptcy, foreclosure or the seizure of assets through receivership proceedings. It allows the debtor to devise a plan that will enable it to meet the demands of its creditors through

company on any claim against directors that arose before the commencement of *CCAA* proceedings, where it relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations. The stay can be granted until a plan of compromise or an arrangement in respect of the company is filed and approved by the court or is refused by the creditors or the court. The stay does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company: s. 11.03(2). If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section: s. 11.03(3) (2007, c. 36 proclaimed in force as of September 18, 2009). See N§70 "Stay on Actions against Directors" and N§39 "Where Directors have Resigned or have been Removed".

The British Columbia Supreme Court gave directions as to the most appropriate process for employees to follow in filing claims against directors and officers of an estate that first filed under the *CCAA* and then under the *BIA*. In making its decision, the court also considered whether it had jurisdiction under s. 11 of the *CCAA* or whether it had to consider the statutory preconditions under s. 119(2) of the *CBCA*: *Re Pope & Talbot Ltd.* (2010), 2010 CarswellBC 3648, 2010 BCSC 1902 (B.C.S.C.).

N§105 Exceptions to Stay where Directors Gave Guarantee

The stay does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company: s. 11.03(2) (2007, c. 36 proclaimed in force as of September 18, 2009). See s. 11.03 and notes under N§70 "Stay on Actions against Directors".

N§106 Where Directors have Resigned

See N§39 "Where Directors have Resigned or have been Removed".

N§107 Governance of the Insolvent Debtor Company and Director Obligations

Issues may arise as to the most effective governance of the insolvent debtor company. Some provisions of the *CCAA* are aimed at encouraging directors to remain, where their skills and knowledge are of value to the debtor company as it attempts to restructure.

The Supreme Court of Canada in *Re People's Department Stores Ltd.* held that the duty of directors and officers under the *CBCA* does not change when the corporation is approaching or is in financial distress, and that directors and officers owe their fiduciary duties solely to the corporation at all times. It held that directors owe a duty of care to creditors, but that duty does not rise to a fiduciary obligation. However, in acting in the best interests of the corporation, the Court held that it may be legitimate for directors to consider the interests of shareholders, employees, suppliers, creditors, consumers, and the environment: *Re People's Department Stores Ltd. (1992) Inc.* (2003), [2003] Q.J. No. 505, 2003 CarswellQue 145, 41 C.B.R. (4th) 225 (Que. C.A.), leave to appeal allowed (2003), [2003] S.C.C.A. No. 133, 2003 CarswellQue 3487, 2003 Carswell Que 3488 (S.C.C.), affirmed (2004), [2004] S.C.J. No. 64, 2004 CarswellQue 2862, 2004 CarswellQue 2863 (S.C.C.).

By s. 5.1, a plan under the *CCAA* may include in its terms provision

[*Continued on page 11-165*]

for the compromise of claims against directors where the directors are legally liable in their capacity as directors for payment of such claims. To facilitate the making of a compromise, s. 11.5(1) permits a stay order to be made against creditors with such claims.

Allowing a creditor to pursue a claim against an officer or director of a debtor corporation does not subvert or undermine the purposes of the *CCAA*: *NBD Bank, Canada v. Dofasco Inc.* (1999), 15 C.B.R. (4th) 67, 46 O.R. (3d) 514, 1 B.L.R. (3d) 1, 47 C.C.L.T. (2d) 213, 181 D.L.R. (4th) 37, 127 O.A.C. 338, 1999 CarswellOnt 4077 (C.A.).

No provisions under the *CCAA* address or contemplate court applications for exemption from filing requirements under securities legislation, and the court's discretionary power under the *CCAA* cannot be used to override provincial statutes; the Legislature has decided that the Ontario Securities Commission is the proper forum for balancing company and stakeholder interests against the public interest and thus was the proper forum for determining the filing requirement issue. The requested order was intended to grant directors personal protection for their reputations because failure to meet filing requirements would result in their names being placed on the securities regulators' default list and the requested order had nothing to do with the restructuring process and was not contemplated by s. 11 of the *CCAA*. Companies under *CCAA* protection are not immunized from complying with regulatory regimes and directors are not immunized from carrying out their responsibility to serve the company and its stakeholders diligently: *Re Richtree Inc.* (2005), 2005 CarswellOnt 255, [2005] O.J. No. 251, 7 C.B.R. (5th) 294, 74 O.R. (3d) 174, 13 C.B.R. (5th) 111, 10 B.L.R. (4th) 334 (Ont. S.C.J. [Commercial List]).

The Saskatchewan Court of Appeal held a sole director liable for unpaid wages of employees of a corporation that were employed during a stay under the *CCAA*. The corporation's bank appointed a receiver and the following day the corporation obtained a stay of all actions, including the receivership, under the *CCAA*. The employees continued their employment until the bank petitioned the corporation into bankruptcy a few months later. Under Saskatchewan legislation, directors are personally liable for any unpaid employee wages. In this case, however, an adjudicator and the Saskatchewan Court of Queen's Bench had ruled that the director was not liable because the employees had been terminated by the appointment of the receiver, but their date of entitlement was the date of the bankruptcy. The Saskatchewan Court of Appeal overturned these rulings, calling them patently unreasonable. It held that nothing in the stay of proceedings granted under the *CCAA* limited the director's liabilities to the employees of the corporation. As well, since the *CCAA* stay permitted the director to exercise his authority during the stay, including the authority to continue employing employees, it was inconsistent with the exercise of this power to claim no liability for unpaid wages from this employment could be imposed. Directors who continue to serve during a stay under the *CCAA* should seek any limitation of liability in the initial order and/or seek an order giving them a priority over other creditors for claims against them arising from their performance of directors' duties during this period: *Bull v. Klaptchuk* (2005), 2005 CarswellSask 291, 2005 SKCA 54, 262 Sask. R. 229, 347 W.A.C. 229, 9 C.B.R. (5th) 177 (Sask. C.A.).

Where a creditor leased equipment to a debtor company on the basis that the creditor had the right to any funds generated by rental of the equipment and the debtor subsequently filed under the *CCAA* and sold some of the creditor's equipment without forwarding the proceeds to the creditor, the creditor brought an action against the debtor and the debtor's vice-president of finance and administration, including an oppression action under s. 242 of the *Alberta Business Corporations Act ("ABCA")* and an action alleging breach of the duty of care under the *ABCA*. The vice-president sought summary judgment on the basis that she claimed she was not a director or officer. The court granted the application in part, but held that there was a question of whether the vice-president had the power or authority to affect the debtor's business and affairs that could not be resolved on an application for summary judgment. The court held that the alleged breach of duty of care contemplated by s. 122(1)(b) did not give the creditor a direct action under the *ABCA*, but might constitute a standard of conduct owed by directors and officers to creditors at common law in an action based on tort or negligence, and that the relationship between the vice-president and the creditor might have been sufficiently proximate to support an action in negligence without reliance on s. 122 of the *ABCA*, matters that would be left to the trial judge to determine: *Transportation Lease Systems Inc. v. Weaver* (2007), 2007 CarswellAlta 539, 77 Alta. L.R. (4th) 179, 2007 ABQB 246, 35 C.B.R. (5th) 110 (Alta. Q.B.). With respect, the court in this case appears to have misinterpreted the Supreme Court of Canada's findings in *People's Department Stores* in respect of the duty of care.

See at 73-114; William E. Aziz, Richard M. Grudzinski and Edward A. Sellers, "Practical Aspects of Governing Distressed Enterprises in Canada", in J. Sarra, ed., *2006 Annual Review of Insolvency Law* (Toronto: Carswell, 2007) at 365-420; Paul Martel, "La responsabilité des administrateurs d'une compagnie insolvable envers ses créanciers: existe-il un « insolvent trading » au Québec?", in J. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009); Anthony Shea, "Directors' Liability in Corporate Reorganizations" 17 Nat. Insol. Rev. 4; Pamela L.J. Huff and Linc A. Rogers, "Fortune Favours the Bold: Lending in a Proceeding and Priority Charges to Facilitate Restructurings", 16 Comm. Insol. Rep. 57; Jeffrey Cathcart, "Limiting Compromises of Director and Senior Officer Liability in *CCAA* Proceedings: *NDB Bank v. Dofasco Inc.*", 17 Comm. Insol. R. 38.

(1) *Court Order Removing Directors*

The court may order that a director or person acting in such capacity be removed if the court is satisfied that the director is or is likely to unreasonably impair the debtor's ability to complete a viable plan of compromise or arrangement: s. 11.5(1). The court has the authority to fill any vacancy created under subsection (1): s. 11.5(2) (2007, c. 36 proclaimed in force as of September 18, 2009). With this 2009 amendment, *Stelco,* *supra*, will no longer be good law, although its reasoning in respect of statutory interpretation may be helpful in other cases.

N§108 Court May Fill Vacancy

If a court orders that a director or person acting in such capacity be removed, s. 11.5(2) specifies that the court has the authority to fill any vacancy created by an order removing directors (2007, c. 36 proclaimed in force as of September 18, 2009).

N§109 Court May Order Indemnification

The court also has authority to grant a priority charge over all or part of the property of the debtor in favour of any director or officer of the company for an amount necessary to indemnify them against obligations and liabilities they may incur following commencement of proceedings: s. 11.51(1). Notice is required to be given to secured creditors that are likely to be affected by the security or charge: s. 11.51(1). By providing directors with indemnification under specific circumstances, more directors may be willing to continue to act, thereby increasing the potential of a successful restructuring plan: s. 11.51 (2007, c. 36 proclaimed in force as of September 18, 2009).

Section 11.51(2) specifies that the court may order that the security or charge ranks in priority over the claim of any secured creditor. The court may not make the order if, in its opinion, the company could obtain adequate indemnification insurance at a reasonable cost: s. 11.51(3). Section 11.51(4) specifies that the court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if, in its opinion, the liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Québec, the director's or officer's gross or intentional fault (2007, c. 36 proclaimed in force as of September 18, 2009).

In determining a request for a directors' and officers' indemnification charge, the court will determine whether notice was given to affected secured creditors. The court must also be satisfied with the amount and that the charge was for obligations and liabilities the directors and officers may incur after the commencement of proceedings; that it is not to extend to coverage of willful misconduct or gross negligence; and no order should be granted if adequate insurance at a reasonable cost could be obtained. Here, the amount had been negotiated with the DIP lender and the *ad hoc* committee; existing D&O coverage was scheduled to expire in a matter of weeks and the debtor had been unable to obtain additional or replacement coverage. The court held that it is important to keep directors and officers in place during restructuring by providing them with protection against liabilities they could incur during the restructuring. Retaining the current directors and officers would avoid destabilization and would assist in the restructuring. The proposed monitor believed that the charge was required and was reasonable in the circumstances. The court granted the order: *Re Canwest Global Communications Corp.* (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]). The same criteria were adopted in: *Re Canwest Publishing*

Inc./Publications Canwest Inc. (2010), 2010 CarswellOnt 212, 63 C.B.R. (5th) 115, 2010 ONSC 222, [2010] O.J. No. 188 (Ont. S.C.J. [Commercial List]).

In granting a charge for directors and officers in a *CCAA* proceeding, the court held that due to the exceptional circumstances, and given the support of significant creditors, the directors' charge would be applied retroactively to a specified limited date prior to the initial order, only for extremely limited purposes. It was to apply only to independent directors, limited to defence costs, and limited in period and amount. The charge was granted in order to ensure that the independent directors remained during the restructuring proceedings: *Re Mecachrome International inc.* (2009), 2009 CarswellQue 5141, 58 C.B.R. (5th) 15 (Que. S.C.).

The debtor company was owned by a partnership, which in turn was fully owned by another applicant, a holding company. The debtors were found insolvent because of a significant liquidity shortfall in respect of the pension fund. A significant amount of the debt related to past service cost contributions in light of the existence of solvency deficits. The court was satisfied that a proposed D&O charge was reasonable and met the statutory criteria and it was approved: *Re White Birch Paper Holding Co.* (2010), 2010 CarswellQue 1780 (Que. S.C.J.).

In granting *CCAA* protection to a group of entities, which included a partnership, Morawetz J. was satisfied that it was also appropriate to grant a directors' charge in the amount of $9.8 million to protect directors and officers and the CRO from certain potential liabilities. In arriving at this determination, the provisions of s. 11.5(1) of the *CCAA* were considered: *Re Priszm Income Fund* (2011), 2011 CarswellOnt 2258, 2011 ONSC 2061 (Ont. S.C.J.).

(1) *Ranking of the Directors' Charge*

Section 11.51(2) specifies that the court may order that the security or charge ranks in priority over the claim of any secured creditor. The court may not make the order if, in its opinion, the company could obtain adequate indemnification insurance at a reasonable cost: s. 11.51(3) (2007, c. 36 proclaimed in force as of September 18, 2009).

See Fred Myers and Peter Kolla, "Directors' Charges under the *CCAA*: Where are we Going and Why?" in J. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009).

The indemnification provisions in a debtor company's initial *CCAA* order and continued in a receivership order in favour of directors will extend to liabilities for which the former directors of the debtor company may be personally liable and that existed before the date of the initial *CCAA* order if such liabilities otherwise fall within the scope of the indemnities included in the initial *CCAA* order. A directors' charge that secures the indemnification provisions in the orders is exclusive of legal fees and disbursements that have been paid by the debtor company to counsel for the former directors in accordance with the terms of the orders and the indemnity regarding legal fees applies to the reasonable fees and disbursements of their counsel in connection with a claim that has been asserted against such group of former directors by another for-