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Bankruptcy Court File No.: 31-388643

DATE: 20020107

ONTARIO

SUPERIOR COURT OF JUSTICE

IN BANKRUPTCY AND INSOLVENCY
COMMERCIAL LIST

IN THE MATTER OF THE) Submissions made by:
BANKRUPTCIES OF THE SONG)
CORPORATION, SONG PUBLISHING) **T. Reyes** for the Trustee in Bankruptcy
INC., SONG RECORDINGS INC., SONG)
ENTERTAINMENT DISTRIBUTION INC.,) **J.A. Thorburn** for the Respondents
ATTIC MUSIC LIMITED) Gordon Downie, R. Gordon Sinclair,
) Robert Baker, Joseph Langlois (p.k.a.
) Paul Langlois), Johnny Fay, jointly and
) severally also p.k.a. "The Tragically
) Hip", also c.o.b. as Little Smoke Music
)
) And for the Respondents Julian Taylor,
) Daniel Black, Jeremy Elliot, Darrell
) O'Dea and Bruce Adamson, p.k.a.
) Staggered Crossing, d.b.a. Stag X
) Music
)
) **V.R. Morrison** for the Respondents
) Wildfire Entertainment Productions Inc.,
) The Nylons Ltd. and The Nylons
)
)
) **H. Wolch** for the Respondents Leo
) Song Copyright Services Limited, Music
) Copyright Holdings Ltd., Complete
) Music Limited, Canadian Musical
) Reproduction Rights Agency, Don
) Walsh carrying on business as
) Downchild Music, and Lynne Green-
) Melincoff carrying on business as
) Winston Publishers and Hoffman House
) Music
)
) **J. Lewis** for the Respondents Gordon

) Lewis, Frank Kerr, Steve Mahon, Nick
) Stipanitz, (Collectively referred to as
) "Teenage Head")
)
) **S. H. Abramovitch** and **S. Fraser** for
) the Respondent Peermusic Canada Ltd.
)
) **J. Feehely** and **M. Lavigne** for Unidisc
) Music Inc.
)
) **J. Woloschuk** for Magentalane Music
) Limited
)
) **F. Davies** for Let Me Be Frank Inc.
)
) **P. Ruby** for Universal Music Publishing
) Group
)
) **N. Khanna** for Sony Music
)
)
)
)
) **Heard:** October 5 and 25 and
) November 5, 2001 followed by written
) advice from counsel received December
) 14, 2001 and further advice received in
) court from counsel on December 17 and
) 21; 2001 and January 4, 2002.
)
)
) *

SPENCE J.:

REASONS FOR DECISION

[1] Mintz and Partners, the Trustee in Bankruptcy of the five named bankrupt companies (the "Trustee"), moves for orders that involve issues relating to the application of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, (the "Act" or the "BIA"), to the music industry in Canada. * The motion as to Tragically Hip remains under reserve as to issues relating to provisions unique to their agreement referred to below.

The Notice of Motion: Relief Sought

[2] The Trustee seeks an order declaring that s.83 of the *Act* does not apply to copyrights in sound recordings held by the bankrupt companies as the makers of such

recordings or to copyrights held by them in musical works, and an order declaring that certain contractual provisions in agreements between certain of the bankrupt companies and the authors or artists are not effective as against the Trustee, or orders providing specified alternative relief, and an order dealing with contractual breaches by the bankrupt companies or the Trustee.

Overview of Issues

[3] The Trustee wishes to complete a sale of the copyrights held by Song Recordings Inc. ("Recordings") in approximately 150 sound recordings and a sale of the copyrights held by Song Publishing Inc. ("Publishing") and Attic Music Limited ("Attic") in approximately 4700 musical works.

[4] For this purpose, the Trustee seeks the determination by this court of certain issues of law. These issues emanate from two sources, namely (a) s.83 of the *BIA*, which appears to affect 'copyrights' generally, but which may or may not be applicable to sound recordings and musical works, and (b) the invocation by contracting parties of alleged common law restrictions or contractual provisions that permit the termination of contracts upon bankruptcy or insolvency, or otherwise restrict the Trustee's ability to deal with the bankrupts' copyright assets.

[5] According to the Trustee, these issues are as follows:

- (a) Does s.83 of the *BIA* apply to copyrights in sound recordings, or copyrights in musical works?
- (b) If so, what is the effect of that section, and can the estates be administered, and the sales of assets completed, in accordance with that section?
- (c) Are contractual provisions terminating the bankrupts' interest in copyrights or administration rights, based solely upon the bankrupts' bankruptcy, enforceable against the Trustee or its assignees?
- (d) Are contractual provisions restricting or eliminating the Trustee's ability to assign its interest in copyrights or administration rights, or imposing formalities in relation thereto, enforceable against the Trustee?
- (e) Are contractual provisions containing 'matching rights', applicable to the Trustee and the contemplated sales of copyrights, or enforceable against it? If so, how can the estates be administered to afford to the appropriate parties these 'matching rights'?

- (f) Do pre-bankruptcy or bankruptcy-period breaches deprive the estates of the benefit of rights that they otherwise have in those copyrights, fetter title to the assigned copyrights, or release contracting parties from their obligations, in circumstances where the proposed assignees agree to cure by paying the royalties due with respect to those copyrights?

[6] Other issues, specific to certain copyrights or contracts, also exist. Some or all of these party-specific issues may need to be dealt with later by agreement or by subsequent proceedings.

[7] Notice of these proceedings has been given by publication in English and French in Canadian newspapers, and by priority post mailing to approximately 250 people, being those persons on an address list provided by the bankrupts, and certain persons who had previously corresponded with the Trustee or its counsel.

Facts

[8] In the process of conducting its business, Recordings would typically enter into a contract with a recording artist (who would not necessarily be the writer of the musical work being recorded), then co-ordinate all production activities, including the rental of recording studios and equipment and the hiring of other musicians and performers where required, and make other financial and technical arrangements in order to produce a 'master' of the sound recording. It is from the master recording that all subsequent copies of the sound recording would be manufactured in the form of compact discs, audio tapes or other media. (For Teenage Head it was submitted that in their case, the master was to be prepared by the party who was to be the "Producer", and this was not one of the bankrupt companies. This feature of the Teenage Head arrangements does not seem to bear on the issue of the copyright interests in respect of Teenage Head musical works that were acquired by the bankrupt companies.)

[9] Recordings normally paid to the recording artists an advance toward any royalties that would ultimately be payable to the recording artist from the sales of the sound recording. Until these advances and the costs of producing the master recording, music videos and other costs and expenses were 'recouped' by Recordings, Recordings would retain royalties otherwise payable to the recording artist. Only five to ten percent of recording artists were eventually 'recouped'.

[10] The principal business of each of Publishing and Attic was to acquire, by way of assignment of copyrights from songwriters (or others entitled to the services of songwriters), and thereafter to administer, copyrights in those and other musical works. A publishing agreement would typically convey to the music publisher, in this case Publishing or Attic, a proprietary interest in all or part of the copyrights with respect to musical works. An administration agreement would typically convey to the music publisher the exclusive right to administer copyrights in musical works, that is, to protect and defend copyright, promote copyrights, secure exploitations for the copyrights and collect income derived from such exploitations.

[11] Administration rights in respect of musical works are interests in copyright, as copyright includes the "right ... to authorize any such acts" which constitute rights of copyright.

[12] Publishing's and Attic's expenses, such as the costs of producing demonstration recordings of the musical works, were often recoupable in whole or in part out of the songwriters' or others' royalties. Publishing would contract to pay the songwriter or other party a share of royalties collected, and would frequently pay to the songwriter or such other party a separate advance toward such future royalties. The advances to songwriters/other parties and other recoupable expenses were typically lesser in scale than the advances and expenses involved in sound recordings, but still were only normally recouped after several years, if they were recouped at all.

[13] Publishing and Attic maintained 'catalogues' of musical works that they administered. Any person who utilized a musical work in that catalogue would be obligated to pay royalties to Publishing, who in turn would credit and account for a share of such royalties to the appropriate songwriter or other party, paying such share out if and when that songwriter or other person was 'recouped'. As an owner and/or administrator of all or part of the copyright in the musical work, Publishing or Attic would also be entitled to retain a portion of the royalties in its own right.

[14] Approximately fifty percent of the musical works in the Publishing and Attic music catalogues were recorded by various record companies prior to the bankruptcies. Publishing and Attic would receive mechanical royalties for each copy of such records manufactured and sold, and performance royalties when musical works embodied in these sound recordings were performed publicly, on radio, television or in live performance.

[15] The remaining fifty percent of the musical works in the Publishing and Attic music catalogues were unrecorded in the form of a master recording. In most cases, 'demo tapes' had been recorded at the expense of Publishing or Attic; these 'demo tapes' were then normally distributed to recording artists and their agents, managers and record companies by 'song pluggers' employed by Song, in order to solicit interest from recording artists and/or their record companies for the recording of the musical works.

[16] The two offers for the copyrights owned or administered by Recordings, Publishing and Attic do not specify a dollar amount for each sound recording or musical work. The Trustee states that it does not have and doubts that it could obtain, current contact information for the 4700 musical works in the Publishing/Attic music catalogues. The Trustee says that the administrative difficulties involved in attempting to undertake a comprehensive program to offer matching rights would have a prohibitive cost, and would likely preclude the estates from realizing upon many of the Publishing/Attic assets.

[17] The Trustee advises that the proposed purchasers will covenant to pay royalties or shares of profits at rates not less than the bankrupts were liable to pay, and not to commit further breaches under those contracts once they have been assigned.

[18] The Trustee says that bankruptcies of the bankrupts and other factors have delayed the distribution of royalties to songwriters and others (in cases where those persons are recouped) and accountings to all (whether or not recouped). In some cases, these monies remain with collective societies charged with the collection and distribution of such royalties, pending the determination of the issues in this proceeding, and clarification as to whom those royalties should be paid to. The proposed purchaser of the copyrights in the musical works owned and/or administered by Publishing and Attic, Peermusic Canada Ltd. ("Peer"), will covenant to ensure that such delayed distributions and accountings are effectuated for the copyrights and administration rights acquired promptly following Peer's acquisition of same. Further, Peer will covenant to cure past breaches committed by the bankrupts in respect of the musical work copyrights and administration rights acquired by Peer by paying out royalties due prior to the bankruptcy of the bankrupts to songwriters and other parties, promptly following Peer's acquisition of same.

Section 83 of the Bankruptcy and Insolvency Act

[19] The central issue is the extent to which s.83 of the *Act* applies to music copyright interests held by the bankrupt companies.

[20] Section 83 provides as follows:

Copyright and manuscript to revert to author – s.83(1)

83.(1) Notwithstanding anything in this Act or in any other statute, the author's manuscripts and any copyright or any interest in a copyright in whole or in part assigned to a publisher, printer, firm or person becoming bankrupt shall,

(a) if the work covered by the copyright has not been published and put on the market at the time of the bankruptcy and no expense has been incurred in connection therewith, revert and be delivered to the author or his heirs, and any contract or agreement between the author or his heirs and the bankrupt shall then terminate and be void;

(b) if the work covered by the copyright has in whole or in part been put into type and expenses have been incurred by the bankrupt, revert and be delivered to the author on payment of the expenses so incurred and the product of those expenses shall also be delivered to the author or his heirs and any contract or agreement between the author or his heirs and the bankrupt shall then terminate and be void, but if the author does not exercise his rights under this paragraph within six months of the date of the bankruptcy, the trustee may carry out the original contract; or

(c) if the trustee at the expiration of six months from the date of the bankruptcy decides not to carry out the contract, revert without expense to

the author and any contract or agreement between the author or his heirs and the bankrupt shall then terminate and be void.

If copies of the work are on the market – s.83(2)

(2) Where, at the time of the bankruptcy referred to in subsection (1), the work was published and put on the market, the trustee is entitled to sell, or authorize the sale or reproduction of, any copies of the published work, or to perform or authorize the performance of the work, but

(a) there shall be paid to the author or his heirs such sums by way of royalties or share of the profits as would have been payable by the bankrupt;

(b) the trustee is not, without the written consent of the author or his heirs, entitled to assign the copyright or transfer the interest or to grant any interest therein by licence or otherwise, except on terms that will guarantee to the author or his heirs payment by way of royalties or share of the profits at a rate not less than the rate the bankrupt was liable to pay; and

(c) any contract or agreement between the author or his heirs and the bankrupt shall then terminate and be void, except with respect to the disposal, under this subsection, of copies of the work published and put on the market before the bankruptcy.

Marketable copies to be first offered for sale to the author – s.83(3)

(3) The trustee shall offer in writing to the author or his heirs the right to purchase the manufactured or marketable copies of the copyright work comprised in the estate of the bankrupt at such price and on such terms and conditions as the trustee may deem fair and proper before disposing of the manufactured and marketable copies in the manner prescribed in this section.

The Copyright Act, R.S.C. 1985, c.C-42

[21] The following provisions of the *Copyright Act* are relevant:

Copyright in works – s.3(1)

3. (1) For the purposes of this Act, 'copyright', in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(a) to produce, reproduce, perform or publish any translation of the work,

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

(g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

(h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, and

(i) in the case of a musical work, to rent out a sound recording in which the work is embodied,

and to authorize any such acts.

Copyright in sound recordings – s. 18(1)

18.(1) Subject to subsection (2), the maker of a sound recording has a copyright in the sound recording, consisting of the sole right to do the following in relation to the sound recording or an substantial part thereof:

(a) to publish it for the first time,

(b) to reproduce it in any material form, and

(c) to rent it out,

and to authorize any such acts.

Definitions – s.2

2. In this Act,

'book'

'book' means a volume or a part or division of a volume, in printed form, but does not include

(a) a pamphlet,

(b) a newspaper, review, magazine or other periodical,

(c) a map, chart, plan or sheet music where the map, chart, plan or sheet music is separately published, and

(d) an instruction or repair manual that accompanies a product or that is supplied as an accessory to a service;

'maker'

'maker' means

(a) in relation to a cinematographic work, the person by whom the arrangements necessary for the making of the work are undertaken, or

(b) in relation to a sound recording, the person by whom the arrangements necessary for the first fixation of the sounds are undertaken;

'sound recording'

'sound recording' means a recording, fixed in any material form, consisting of sounds, whether or not of a performance of a work, but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work;

Whether s.83 of the Act Applies

[22] The bankrupt companies hold two types of copyright interests in respect of works of a musical nature:

(a) Copyright interests in musical works, as referred to in s.3(1) of the *Copyright Act*, which have been assigned to those companies by their authors.

(b) Copyright interests in sound recordings by reason of being the maker of such recordings, pursuant to s.18(1) of the *Copyright Act*.

[23] It is true, as the Trustee submits, that s. 83 obviously does not refer expressly and specifically to copyright interests in works of music, but this observation does little to advance the analysis. In *The Path of the Law*, Oliver Wendell Holmes Jr. mentions "the story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant".¹ Holmes J. made it clear that he considered this to be an unduly narrow approach to adjudication.

¹ 1987, Harvard Law Review, reprinted in L.H. Davenport (ed.) *Voices in Court* (MacMillan, 1958) p.496 at p.510.

[24] Section 83 of the *Act* applies only to “the author’s manuscript and any copyright or any copyright interest in whole or part assigned to” a bankrupt person. (Emphasis added). As a matter of grammar, the phrase “assigned to [a bankrupt person]” modifies each of the subjects “manuscript”, “copyright” and “copyright interest” because there is no other connective between those subjects and the “bankrupt person”. So, the section only applies in respect of such property interests that have been acquired by way of assignment from another. This application of the section is also evident from the design of the operative parts of the provision, which deal with the respective interests of the assignee bankrupts and the assignor authors. Accordingly, the section would not apply to copyright interests of the type mentioned in (b) above, because those interests are acquired through the originating activity of making, and not by way of assignment from another.

[25] On this basis, the result could be that the companies’ copyrights, as maker, in the sound recordings is not subject to s.83 but (subject to what is said below) its interest in the assigned copyrights to the musical works is subject to s.83.

[26] Whether this result is commercially reasonable needs consideration. One way to test the question is to disregard the occurrence of the bankruptcy and consider what the situation would be if one of the companies which held both an assigned copyright in respect of a musical work and an original copyright in respect of a sound recording of that work were to cease to hold the assigned copyright in the musical work, for example, by reason of a termination of the assignment for breach. In that case, the company would have the copyright in the sound recording but another party would have the copyright in the musical work itself. Is such a result inappropriate in law?

[27] It would seem not, because the *Copyright Act* would seem to permit it. For example, a holder of the copyright in the musical work could, without assigning it, licence another party to produce and market a sound recording of the work, and that other party would, subject to the contractual arrangements, acquire the copyright in the recording. In that situation, the author would continue to hold the copyright in the musical work, but the rights that the copyright would afford to the author would not include the rights that the other party had acquired as the holder of the copyright in the sound recording. The *Copyright Act* would appear to permit this situation, so it would not seem to be objectionable if it were to occur as a result of the operation of s.83 of the *BIA*.

[28] It was submitted that s.83 applies only to books and written works and not to musical works. The term “manuscript” may or may not readily fit the music industry, but s.83 is not limited to manuscripts. It applies to copyrights and copyright interests. These are recognized in s.3 of the *Copyright Act* to pertain to musical works, among others. The term “publisher” is used in s.83, but that term is not limited by the *Copyright Act* to book publishers. Indeed it is used in s.3 of the *Copyright Act* in respect of musical works.

[29] The words “put into type” in s.83(1) would seem not to apply very aptly to the music industry. Indeed, with changes in technology, they may not apply very aptly to

book publishing. A reading of s.83 in its entirety suggests that it is intended to deal with copyright interests generally, without distinction as to kind. So it would seem unduly restrictive to allow the words "put into type" to narrow the application of the section to exclude musical works, without the most careful consideration.

[30] In the scheme of s.83(1), if a work has "been put into type and expenses have been incurred by the bankrupt", para.(b), enables the bankrupt to recover those expenses either from the author or by carrying out the original contract. It appears that the intent is that, if the bankrupt had incurred expenses that resulted in work product specific to the production of the work in question for purposes of its public marketing (as opposed to, say, general overhead expenses), those expenses should be recoverable.

[31] This intent may not be expressed as well as possible in the section, having regard to changes in technology and differing practices of production in respect of different kinds of copyright works. That should not be allowed to impede the reasonable application of the *Act*.

[32] The *Act* should be interpreted in a practical and not in a legalistic manner. It should be given a reasonable interpretation which supports the framework of the legislation; an absurd result should be avoided.

Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, updated to Bkcy (3d) 2001 – Rel.7 at pp.1-5 to 1-6

[33] In the notice of motion, the Trustee, in its alternative requests, seeks direction on the proper application of the "put into type" requirement. In view of the need to give the *Act* reasonable business application, this matter would be best dealt with by way of the giving of direction, rather than adopting an unduly narrow interpretation of s.83. Nothing in the submissions suggest it cannot be dealt with adequately that way.

[34] So far then, no basis is established for not applying s.83 to the assigned copyright interests held by the bankrupt companies.

Particular Features of the Music Industry

[35] The Trustee submits that, on the basis of the initial part of s.83(2), i.e. the part prior to para.(a), s.83(2) is to be interpreted as granting only rights to sell copies of the work and to perform the work and not to other aspects of copyright which are equally important in the case of musical works, such as the synchronization of the work in cinematographical works. Section s.83(2) cannot be interpreted in a piecemeal fashion. When read in its entirety, s.83(2) must, like all provisions of the *Act*, be read in the light of s.67 of the *Act* which vests all of the bankrupt's property in the Trustee. Section 83(2) does not purport to limit the application of s.67 in the case of copyright interests, but only to provide for the ways in which the Trustee may realize upon those interests. Specifically, in respect of a proposed assignment by the Trustee to a third party, s.83(2)(b) imposes no restrictions on the nature or the aspects of the constituent copyright interests that may be assigned but only on the conditions that must be satisfied for an assignment to be permitted. In the present case, the Trustee seeks to

realize on the copyright interests by assigning them to the proposed buyer; subject to what is said below, this is consistent in principle with the scheme in s.83(2).

[36] The Trustee submits that s.83(2)(c) would work a hardship upon the Trustee by leaving it without compensation for the amounts previously paid by the bankrupt companies. It is not evident how the situation would be different from that of a bankrupt book publisher in such circumstances. Section 83(2)(c) comes into operation only after the requirements of subparas.83(2)(a) and (b) have been complied with and satisfied. Thus, assuming for the moment that the Trustee is afforded a route for realization upon the value of the copyright, by assigning it under para.(b), it makes sense that, thereafter, under para.(c) there are no further obligations between the author and the bankrupt companies. There is nothing evidently objectionable or unsatisfactory in this scheme or in its being applied to copyrights in musical works.

[37] The Trustee submits that to calculate the expenses described in s.83(1) would be difficult to do and would be open to challenge, so a separate and costly mechanism would be required to deal with these issues. A separate mechanism could be provided for by way of directions. That there would be cost associated with complying with the requirement cannot, without more, be regarded as a relevant consideration as to whether the requirement should be construed to apply: the need for compliance with the law is not usually determined on such a basis. There is nothing to suggest that some concept of undue cost should be considered to apply here.

Effect on the Interests of Creditors

[38] The Trustee objects that applying s.83 would be detrimental to the proper interests of the creditors of the bankrupt companies in receiving equal treatment. Two grounds for the objection are given: (i) s.83 gives the authors a right to reclaim property and, (ii) s.83 allows the Trustee to be left without any compensation for the amounts paid by the bankrupt companies to acquire the copyright interests.

[39] To the extent that these grounds are supportable, they would also seem to apply in respect of book publishing copyrights.

[40] As to the first ground, the author has a right to "reclaim property" only upon compliance with the requirements of s.83(1), and this subsection provides in para.(b) for the recovery of expenses incurred by the bankrupts.

[41] The second ground is addressed in the preceding section. This assumes that the Trustee is given the right to assign the copyright interest on the terms set out in s.83(2)(b). This issue is dealt with further below.

Special Treatment for Copyright

[42] The Trustee submits that s.83 ought to be given a narrow reading because it represents a departure from the basic principle of the law of bankruptcy that all unsecured creditors are to be treated equally. Reference was made to the special treatment accorded under s.81.1 in respect of suppliers of goods and the approach

taken by the court to that section in the decision in *Thomson Consumer Electronics Canada, Inc. v. Consumers Distributing Inc. (Receiver of)* (1997), 43 C.B.R. (3d) 77 (Ont.Gen.Div.), affirmed (1999), 5 C.B.R. (4th) 141 (Ont.C.A.), at pp.79 to 80:

Section 81.1 provides an exception to the general policy of the BIA (a *pari passu* sharing amongst unsecured creditors) by giving a right to reclaim property to certain unsecured creditors (suppliers) of a bankrupt which is not available to the general body of unsecured creditors. Thus the court is required to narrowly construe such an exception to the fundamental policy of the BIA.

[43] It must be recognized that there are various different kinds of unsecured obligations owed by bankrupt companies. Some of the obligations may be simple debts for money borrowed or goods or services purchased. Other obligations may relate to contracts that require continuing performance; leases are an example. The *Act* recognizes some continuing contractual obligations by according specific treatment to them.

[44] The typical assignment of copyright has a number of features that are different from a simple debt. The assignee has a continuing obligation to remit royalties to the assignor from the exploitation of the copyright. The business premise of the assignment must be taken to be the shared expectation of the parties that the assignee will endeavour to exploit the copyright because otherwise its acquisition will have no value. The amount of the royalty payable to the assignor is dependent upon the revenues from the exploitation.

[45] These factors differentiate a copyright assignment from a debt owed to a supplier, which is the subject of s.81 and the decision in the *Thomson Consumer Electronics* case.

[46] In view of these features of copyright assignments it is understandable that the *Act* accords special treatment to such assignments. So it is not apparent that the fact that the treatment is special provides a reason for giving s.83 a narrow interpretation. In any event, if a narrow interpretation were warranted, it would have to be supportable based on the terms of the provision. A restriction of s.83 simply to exclude the music industry cannot be supported on that basis, for the reasons given above.

Balancing the respective interests

[47] The Trustee submits that, on the basis of the views expressed in *Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois* (1996), 133 D.L.R. (4th) 643 (S.C.C.) at p. 654, the court should, in determining the proper interpretation and application of s.83, engage in a balancing of the interests of the authors against those of the creditors. Courts frequently mention, in particular contexts, the need for the court to balance certain interests or considerations. But whether, in any particular instance, the court should consider its task to involve such an exercise necessarily depends upon the context. In interpreting and applying a simple and clear statutory prohibition, for

example, there would not usually be any reason for a court to consider that its task involved such an effort of balancing. Here the question to be addressed concerns the proper application of s.83 in circumstances involving the music industry. Nothing in the terms of s.83 by itself suggests the court is to exercise a discretion as to how the competing interests of authors and other creditors are to be weighed, for purposes of determining whether the Act applies to copyright interests in the music industry. Indeed, a reading of s.83 suggests that on the contrary, Parliament has tried to set out a regime applicable to all assigned copyright interests regardless of the particular industry involved and that the court is directed to follow that regime. It is correctly said that in interpreting and applying the *Bankruptcy and Insolvency Act* the court should try to achieve a result that makes sense commercially, but that admonition should not be taken as an invitation to the court to exercise a discretionary authority to balance competing interests where the statutory provision does not create such an authority with reference to the particular matter in issue.

Conclusion About s.83

[48] For the above reasons, s.83 applies to the copyright interests in works of music which any of the bankrupt companies hold as assignee.

Directions with respect to the application of s.83

[49] In its factum, the Trustee states that it seeks the following directions as to the application of s.83:

- (a) "published and put on the market" should be interpreted with reference to, and consistently with, the term "publication" in the *Copyright Act*, but the making and distribution of demonstration recordings should not constitute 'publishing and putting on the market';
- (b) "put into type" should be interpreted to mean any development of the musical work that has taken place, including the making of demonstration recordings;
- (c) "expenses" should be interpreted to include all advances made to songwriters and others, together with the costs of making demonstration recordings and any other costs or expenses related to the administration of the musical works under the governing agreements; and
- (d) the Trustee requests the Court's declaration that the Trustee may elect to "carry out" non-reverted copyrights by making a current assignment of those copyrights in their entirety, together with their ancillary administration rights, to the proposed purchaser, and to assign other administration rights in musical works controlled by the estates to the proposed purchaser.

[50] These requested directions overlap with the request for directions set out in the Trustee's Notice of Motion. That request is addressed at the conclusion of these reasons.

Contractual Provisions

[51] The Trustee seeks orders declaring that certain provisions in the agreements between the bankrupt companies and the authors are ineffective as against the Trustee.

[52] The Trustee submits that contractual provisions that purport to allow the termination of contracts based solely upon the bankruptcy or insolvency of a contracting party are not enforceable against the Trustee or its assignees, as they deprive the bankrupt estates of assets and violate a public policy of equitable and fair distribution amongst unsecured creditors in insolvency situations.

Canadian Imperial Bank of Commerce v. Bramalea Inc. (1995), 33 O.R. (3d) 692 (Gen.Div.), at pp.694 to 5, per Blair J.

Re Knechtel Furniture Limited (1985), 56 C.B.R. 258 (Ont.S.C.), at p.262

Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois, (1996), 133 D.L.R. (4th) 643 (S.C.C.), at p.654

[53] There were no submissions made to the contrary which would lead to the conclusion that any of the contracts in issue in this proceeding could be regarded as having been terminated by reason of the operation of provisions of the kind referred to in the preceding paragraph.

Trustee Submissions

[54] The Trustee made further submissions about the effect to be given to contractual provisions. These are set out in the paragraphs that follow. After that, there is an assessment of the issues raised by these submissions.

[55] The Trustee submits that other contractual provisions, inasmuch as they deprive creditors' interests in a bankruptcy, cause forfeiture of the bankrupt's rights, are prejudicial to creditors and give rise to an unjust preference in light of all the circumstances, or are otherwise contrary to public policy as reflected in, among other statutes, the BIA, are not enforceable against the Trustee.

Canadian Imperial Bank of Commerce v. Bramalea Inc., *supra*, at pp.694 to 5

Re Knechtel Furniture Limited, *supra*, at p.262

Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois, *supra* at p.656.

Canadian Imperial Bank of Commerce v. Bramalea Inc., (1998), 3 C.B.R. (4th) 106 (Ont.Gen.Div.), at p.110, per Cumming J.

[56] The courts, in the context of insolvencies, have recognized the need to balance the interests of creditors, contracting parties and other stakeholders, notwithstanding that this sometimes means that contractual rights are affected.

Re Royal Oak Mines Inc., (1999), 7 C.B.R. (4th) 293 (Ont.Gen.Div.), at pp.301 to 2

Generally, see Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, at pp.3-130.24 to 3-130.26

[57] The courts routinely restrict the contractual rights of secured creditors, customers, suppliers, lessors and others by way of receivership orders and vesting orders made within the context of s.47 of the *BIA*. This is a frank recognition that certain rights must yield to the orderly and equitable liquidation and distribution of an insolvent person's estate.

BIA, section 47

See, for example, orders made in *Ventures West VI Limited Partnership et al. v. Inverpower Controls Ltd.*, Ontario Superior Court of Justice, Court File No. 01-CL-4187, July 13, 2001; also, *In the Matter of the Receivership of Queensway Financial Holdings Limited and Queensway Holdings, Inc.*, Ontario Superior Court of Justice, Court File No. 01-CL-4140, May 18, 2001

[58] The Trustee submits that it ought not to be in a worse position than an interim receiver liquidating an estate that has not been adjudged bankrupt. To hold otherwise would be a triumph of procedure or form over substance.

[59] The Trustee argues that the courts should avoid inconsistencies between insolvency proceedings, where the policy rationales underlying those proceedings are the same. The Trustee says that the strict enforcement of contractual rights in this case would in many cases result in a windfall to the contracting parties who have assigned copyright interests to the bankrupts, inasmuch as they would retain all advances and other consideration paid to them, and also recover all proprietary rights which were assigned to the bankrupts on payment of that consideration. At the same time, the bankrupt estates and their other creditors will be directly prejudiced in that they will receive no benefit from these copyrights and contracts, nor any reimbursement for the consideration that was paid by the bankrupts to acquire those rights.

[60] In these circumstances it is contended that the court should balance these rights by not permitting the strict enforcement of contractual rights to prevent fair and equitable distribution among unsecured creditors, deprive the estates and their creditors of assets, cause forfeiture of the bankrupts' property, or cause an unjust preference.

[61] While the above submissions of the Trustee are noted, it is not apparent that such encompassing determinations as the preceding paragraphs contemplate are

needed in order to deal with the particular contractual issues that have been raised. These issues are dealt with below.

The Assignment Provision in s.83(2)(b) of the BIA

[62] On January 4, 2002, following up on a letter of December 21, counsel for the Trustee requested that these reasons be delivered without reference to "the provisions unique to the Tragically Hip agreement". These reasons are provided on that basis.

[63] Counsel for Tragically Hip made submissions in the course of the hearing which are or may be also applicable, to some extent or other, to the circumstances of some or all of the other respondents. Accordingly, these reasons address certain of the submissions made for Tragically Hip on the basis that the reasons apply where applicable in the case of other respondents because of similar circumstances. Tragically Hip made submissions that were special to its own circumstances relating to a "matching rights" provision and to whether its purported agreements with the bankrupt parties were invalid by reason of contravention of provisions in its agreements restricting assignments. These issues do not need to be resolved and are accordingly not given analysis below.

[64] Tragically Hip submits that s.83(2)(b) does not give the Trustee any authority to assign but rather imposes a minimum condition which must be satisfied before the Trustee may make any assignment that it would otherwise be entitled to make. On this basis, the Trustee could not make any assignment under s.83(2)(b) if it was precluded from doing so for other reasons.

[65] Tragically Hip contends that the agreement it has with the bankrupts (assuming they are otherwise valid) are personal service contracts and, as such, are not assignable, according to the common law as determined in a number of cases.

[66] The Nylons, in their agreement, have a provision which precludes assignment without their consent, which is not to be unreasonably withheld. One of the Teenage Head agreements has a provision to the same effect. Each of these provisions, it is argued, must be complied with, before there can be any assignment, despite s.83(2)(b).

[67] If s.83(2)(b) allows the Trustee to make an assignment regardless of common law limitations and contractual restrictions, it would (at least *prima facie*), accord to the bankrupt estates rights in this respect which the companies did not possess prior to bankruptcy. There is nothing before the court as to the policy considerations that may have been relevant to the original adoption of s.83(2)(b).

[68] Before pursuing such issues further, it is necessary to return to the text of s.83(2)(b) in order to determine whether the text itself makes it clear how it is to be interpreted. The following features of s.83(2) are relevant. The initial part of s.83(2)

grants an entitlement to the Trustee for certain actions including sales of copies of the work and performances of the work. The opening part concludes with the word "but". The restrictive element implicit in this conjunction may relate only to para.(a), since paras.(b) and (c), however they are to be construed, do not impose limitations on the operation of the opening part of s.83(2). Paragraphs (b) and (c) instead deal with assignment of copyright interests and (in (c)) the effect of the making of any such assignment.

[69] Section 83(2)(b) has a number of component parts. In a case where the author does not consent to an assignment of the copyright interest, what the paragraph provides by its terms is expressly as follows: "The Trustee is not ... entitled to assign the copyright ... except on terms that will guarantee" payment of royalties. These words do not expressly say "and, if the terms provide such a guarantee, then the Trustee is entitled to assign". But these words are unnecessary because they are superfluous. The ordinary meaning, as a matter of logic and usage, of the statement "There is no permission to assign except where a guarantee is given" is the same as "There is permission to assign where a guarantee is given".

[70] Section 83(2)(c) commences with the words "any ... agreement between the author ... and the bankrupt shall then terminate ...". The most obvious meaning to be given to the word "then", is "upon the making of an assignment under (b) and any other actions taken under the preceding parts of s.83(2)". Nothing here is inconsistent with the meaning of s.83(2)(b) set out above in the preceding paragraph of these reasons.

[71] For these reasons, I conclude that s.83(2)(b) grants to the Trustee an entitlement to assign on the terms referred to in that paragraph regardless of whether the agreements are personal service contracts.

[72] It is necessary to go further and ask whether, even though s.83(2)(b) grants such a positive right, the exercise of that right should be made subject to compliance with one or another of the contractual provisions referred to above.

[73] It would not be in order to make the right of assignment subject to the contractual provision for the consent of the author, because s.83(2)(b) expressly deals with the withholding of that consent by making it ineffective where the requisite guarantee of payments is proffered.

Conclusions

[74] For the reasons given above, orders are to go as follows:

declaring that s.83 of the Bankruptcy and Insolvency Act does not apply to copyrights in "sound recordings", as defined in the *Copyright Act* held by any of the bankrupt companies as the "maker" (also as defined in the *Copyright Act*) of the sound recording;

declaring that s.83 of the *BIA* applies to copyrights or copyright interests in musical works (and sound recordings, if applicable) held by any of the bankrupt companies as the assignee thereof;

The Request for Directions

[75] Submissions were made in varying detail about the matters on which the Trustee seeks direction as set out in the Notice of Motion. Some of these matters have been dealt with above. In respect of some of the other matters, the direction sought seems reasonable enough but it may be that, now that the basic issues relating to the application of s.83 are decided, there should be an opportunity for further consultation between the Trustee and the interested parties, and for submissions to the court if necessary, before the matters are determined by the court. The comments made below are made with these considerations in mind.

[76] In the Notice of Motion the Trustee asked for directions in particular terms as to the meaning to be accorded to the following phrases used in s.83: "published and put on the market", "put into type" and "expenses". The submissions of the Trustee appear reasonable enough *prima facie* as a working premise subject to any issue that may arise.

[77] The Trustee seeks directions as to how to proceed where the rights in the musical work were acquired by the bankrupts from a successor in title to the author, and in particular, declaring that any reversions provided for under s.83 of the *BIA* in such instances would result in reversion to the last person in the chain of title, and not back to the original author of the musical work.

[78] The submissions made do not address this request. Subject to submissions, it seems reasonable that if the author has fully transferred the copyright to another person, so that the author retains no interest in it, that other person should have the benefit of any rights of reversion.

[79] The Trustee seeks a declaration declaring that the Trustee may indicate its intention to carry out the contract pursuant to s.83(1)(c) of the *BIA* in advance of the expiry of the six month period by way of assignment of the copyright in the applicable musical work to a third party purchaser.

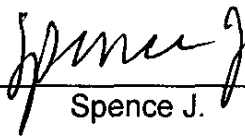
[80] The submissions made do not address the request. If direction is required on this matter, submissions will be needed.

[81] The Trustee seeks a declaration that in respect of non-reverting musical works in which the bankrupts own the copyright, the Trustee has the right to assign all rights of copyright to a third party purchaser, subject to the payment by such third party purchaser of royalties or share of the profits at a rate not less than the rate the bankrupts were liable to pay, such payment to commence within a reasonable time following such third party purchaser's purchase of the copyrights from the Trustee.

[82] It appears that this request relates to s.83(1)(b) and overlaps with the question the Trustee has raised about s.83(1)(c), above. No submissions were made on this point. If direction is needed, submissions should be made.

[83] The Trustee in the Notice of Motion asked for directions on a number of matters relating to contractual provisions and prior breaches. If the determination made above do not resolve those issues, submissions will be required.

[84] Submissions may be made on any of these outstanding matters and on costs, if necessary.



Spence J.

Released: *January 7, 2002.*

Bankruptcy Court File No.: 31-388643
DATE: 20020107

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY
COMMERCIAL LIST

B E T W E E N:

IN THE MATTER OF THE BANKRUPTCIES
OF THE SONG CORPORATION, SONG
PUBLISHING INC., SONG RECORDINGS
INC., SONG ENTERTAINMENT
DISTRIBUTION INC., ATTIC MUSIC LIMITED

REASONS FOR DECISION – ALTERNATIVE
VERSION

SPENCE J.

21P

TAB 21

2010 ONSC 1759
Ontario Superior Court of Justice

Return on Innovation Capital Ltd. v. Gandhi Innovations Ltd.

2010 CarswellOnt 2084, 2010 ONSC 1759, 187 A.C.W.S. (3d) 335, 66 C.B.R. (5th) 64

**Return on Innovation Capital Ltd. et al (Applicants / Responding Parties)
and Gandhi Innovations Limited et al. (Respondents / Moving Parties)**

Karakatsanis J.

Heard: March 19, 2010
Judgment: March 24, 2010
Docket: 09-CL-8172

Counsel: Daniel S. Murdoch, Maria Konyukhova for Applicants, Gandhi
Matthew J. Halpin, Evan Cobb for Responding Party, TA
Stephanie Grace for Responding Party, ROI
Harvey Chaiton for Monitor, BDO Canada Limited

Subject: Insolvency

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.5 Miscellaneous](#)

Headnote

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

Expenditures for defence and settlement of legal action — H was president and CEO of debtor company — Proceedings were commenced against debtor under Companies' Creditors Arrangement Act (CCAA) and monitor was appointed — Debtor and its officers, including H, were defendants in action in U.S. (action) — U.S. counsel was retained to defend action — Action was settled for payment by H of US\$1.4 million (settlement payment) — Approximately two months later, debtor's business was purchased by A Corp. (A Corp. purchase) — As result of A Corp. purchase, secured creditors were paid in full and unsecured creditors were expected to receive dividend of 20 to 40 percent — Debtor took position that it should pay US\$350,000 to H as contribution toward settlement payment and also pay U.S. counsel's legal fees — Debtor brought motion for order directing monitor to pay contribution and legal fees — Motion granted — Settlement was beneficial for debtor and creditors — Action posed significant risk to recovery of unsecured creditors — Further, settlement facilitated A Corp. purchase, which benefitted all creditors — Settlement ensured that H was focussed on debtor in weeks leading up to A Corp. purchase — Fact that monitor had agreed to support payment of contribution had resulted in H not resigning before A Corp. purchase — Payment of legal fees was fair and reasonable expenditure of debtor — H reasonably believed that monitor had agreed to assume responsibility for legal fees — This understanding formed part of basis of H's decision to remain with debtor to facilitate A Corp. purchase.

Table of Authorities

Cases considered by *Karakatsanis J.*:

Air Canada, Re (2004), 2004 CarswellOnt 469, 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 15 — referred to

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

Generally — referred to

s. 11 — considered

MOTION by debtor company for order directing monitor to pay amounts related to defence and settlement of legal action.

Karakatsanis J.:

1 This is a motion by the Gandhi debtor companies ("Gandhi") for an order: i) authorizing and directing the Monitor to pay, on behalf of Gandhi, US\$350,000 to Hary Gandy ("Hary") as a contribution to the settlement of the action by Dualite; and ii) approving the payment of U.S. legal counsel Langley & Banack Inc ("LB") for fees and disbursements of about US\$300,000 since May 2009 in relation to that lawsuit. This request is supported by the Monitor. It is unopposed by the secured creditors. It is opposed by TA Associates ("TA"), the largest unsecured creditor of Gandhi.

Background

2 These proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") were commenced by Gandhi's secured creditor, Return on Innovation Capital Ltd. ("ROI"), with the support of TA. The debtor remained in possession; however, the Monitor had some additional powers, including the approval of expenditures over \$10,000.

3 Dualite had commenced proceedings in Texas, several years earlier, against the debtor companies, certain of its officers and directors, including Hary, and other related entities. Dualite had obtained default judgment, based on breach of warranties, against an Ohio company founded by the Gandy family. That company no longer operating and US\$8 million of its assets had been traced to the debtor companies. The Dualite lawsuit alleged that the assets of the Ohio company had been fraudulently transferred to the debtor companies and other entities. U.S. counsel, LB, was retained and defended the action.

4 This CCAA proceeding was recognized under Chapter 15 of the U.S. Bankruptcy Code on June 5, 2009, which had the effect of staying the Dualite action against the debtor companies. U.S. counsel sought a stay of the entire action, on the basis that a finding against the other defendants would be prejudicial to the debtor companies and would bolster a claim by Dualite in the eventual claims process. The Texas court, however, refused to stay the entire action and severed the other defendants. Trial was set for November 2009. On October 30, 2009, the action was settled on behalf of all the defendants for a US\$1.4 million payment by Hary. On November 19, 2009 this Court authorized the debtor companies to enter into the settlement agreement with Dualite.

5 Legal fees relating to the Dualite action were presented to the Monitor for approval by Gandhi as early as June 2009 and throughout July and August. In September 2009, Gandhi asked the Monitor to discuss the issue of the legal fees and

the litigation with the major stakeholders because the trial date was approaching, litigation counsel was ill-prepared for a trial and because of the potential negative impact of judgment on the claims process and unsecured creditors if the trial were not adequately defended by the remaining defendants.

6 Following the Court approval of the Agfa sale on November 25, 2009, Hary revisited the issues of a 25% contribution to the Dualite settlement and the payment of the Dualite legal fees with the Monitor. He was considering his options, including the possibility of resigning his position. Hary believed that the Monitor advised that it would support the contribution and pay LB's legal fees (subject to reconciliation.)

7 The major stakeholders, ROI, the State Bank of India and TA, were consulted by the Monitor in December 2009 and agreed not to oppose the contribution to the settlement, provided the sale of the Gandhi business concluded on January 15, 2010. As a result, Hary agreed to stay on as President and CEO to operate the company pending the sale of the business to Agfa Corporation.

8 As a result of the sale to Agfa, the secured creditors ROI and the State Bank of India have been paid in full, and the Monitor estimates that there will be a dividend of 20% to 40% for the unsecured creditors. TA invested in both equity and debt in Gandhi and holds 68% of the unsecured debt at this time with a debt currently outstanding in the amount of \$25,000,000 plus accrued interest for a total of \$34,820,336. Clearly, the purchase by Agfa was for the benefit of both the secured and unsecured creditors. A claims process has been approved by the Court.

9 The Monitor had not consulted the major stakeholders about payment of the legal fees. When the Monitor presented his Eighth Report dated January 18, 2010 to the Court, ROI and TA realized that in addition to the contribution towards settlement, the Monitor was recommending payment of the legal fees. As a result, TA is now opposed to both the payment of the legal fees and of the contribution.

The contribution to the settlement

10 The Monitor supports approval of both the contribution and the legal fees for the reasons set out in paragraph 3.1.6 of the Eighth Report:

(a) The Gandhi companies and their creditors benefited from the settlement and release of a potential US \$8,000,000 claim against the estates:

(b) The contribution avoids the professional and legal costs which would otherwise be incurred to deal with this claim in a claims process (i.e. to effect the distribution of the net realizations to creditors);

(c) According to the Treu Affidavit, as the other defendants are impenetrable to any judgment creditor, Gandhi Canada and Gandhi San Antonio would have been the most likely source of recovery for Dualite; and

(d) The promise of a contribution enabled Hary to focus on maintaining the business operations of the Gandhi Group and work with Agfa and the Monitor to complete the transaction, rather than be distracted by a trial.

11 Under s. 11 of the CCAA, a court may make any order that it considers appropriate in the circumstances. The court may approve material agreements, including settlements, before the filing of any plan of compromise or arrangement, if it is fair and reasonable and will be beneficial to the debtor and its stakeholders generally. In *Air Canada, Re*, 2004 CarswellOnt 469 (Ont. S.C.J. [Commercial List]) at para. 9, Farley J. stated:

...I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally....[I]n considering what is fair and reasonable treatment, one must look at the creditors as a whole (ie generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of

the compromise equitably shared) as opposed to the confiscation of rights....[E]quitable treatment is not necessarily equal treatment.

12 For the following reasons, I am of the view that it is in the best interests of the debtor companies and its creditors generally and specifically that Gandhi make a 25% contribution to the settlement of Dualite lawsuit in the amount of US\$350,000.

13 Despite the stay, it is clear that U.S. litigation counsel Treu was of the view that Gandhi was the main target of the litigation and that an adverse judgment against the other defendants would have "significantly bolstered the claim Dualite would have made against the debtor companies through the eventual claims process." Dualite had traced \$8 million to the debtor companies. In his affidavit, Treu advised that "the debtor companies benefited greatly from this settlement" and the other defendant companies or entities had no assets or were impenetrable to judgment. Although the allegations were vigorously denied, and counsel may have felt they had a strong case, nonetheless counsel had not been paid to properly prepare for trial and the risk of judgment remained. Given that \$8 million had been traced to the debtor companies, the Dualite claim posed a risk of a significant impact on the recovery of the unsecured creditors. While TA argued that there was no formal legal opinion and the evidence of U.S. counsel was unreliable because it was contained in an affidavit in support of his fees, the deponent was not cross examined and there is no reason to reject his clear description of the potential impact of the litigation upon his client, the debtor companies. As well, the settlement included releases for the debtor company. Based upon this evidence, I am satisfied that the settlement by Hary and the other defendants was beneficial for the debtor companies and the stakeholders as a whole. In particular, given that the secured creditors were paid as a result of the Agfa deal, the unsecured creditors specifically benefited.

14 While the settlement on its face indicates it was made without contribution from the debtor companies, I accept the obvious explanation that Dualite required such a term to ensure no court approval of the settlement would be required. The issue of a contribution had been raised before the settlement was agreed to. I do not take the Sixth Report of the Monitor in these proceedings as anything more than a reporting of the settlement that did not impact the other creditors. I do not take from that any intention to suggest that contribution would not be sought or to misinform the Court. (In fact the issue of contribution had previously been raised by Hary.) Any contribution would obviously require further Court approval.

15 In addition to eliminating the risk of a substantial claim by Dualite against the estate, the settlement of the lawsuit clearly benefited the debtor companies as well as the secured and unsecured creditors globally by facilitating the sale of the Gandhi business to Agfa. It benefited the Gandhi companies in ensuring that Hary was focussed on the debtor companies as President and CEO during a difficult financial environment in the weeks and months leading up to the purchase of the business by Agfa. Hary deposed that Agfa was supportive of a settlement so that he would be available for the debtor companies during that critical time. Although TA suggests Hary did not bring value to that transaction, in fact the Monitor advised the stakeholders when reporting on the settlement on November 1, that he believed Hary's continued participation would facilitate the closing of the deal and that Agfa had specifically advised it did not want Hary distracted by litigation.

16 In addition, Hary's evidence is that he was considering whether to resign and that key employees were staying with him. The Monitor concluded that they needed his cooperation in order not to jeopardize the deal. While in fact his departure may well have impacted the deal, the evidence does not establish that he made any improper threats or coercion. John Sterling of ROI gave evidence about a November 24th conversation in which Hary said that he would be less cooperative and the deal would be more difficult if they did not agree to a contribution. It seems unlikely that Hary said he would refuse to sign papers given his specific evidence and Sterling's acknowledgement that his recollection was sketchy. Sterling agreed however that Hary discussed with him the option of leaving the company. This is consistent with Hary's evidence that he was considering his option of resigning and not staying to facilitate the deal. Sterling did not testify that Hary said he would "blow up the deal." Hary made no secret of the fact that a contribution would keep him motivated and with the company. While his departure may have had the *effect* of "blowing up the deal," there is

no suggestion that it was improper for Hary to discuss his consideration of resignation. At no time did the Monitor or anyone else suggest to Hary that he was acting in breach of his fiduciary duty. In all these circumstances, I find that the settlement and the promise of a contribution resulted in Hary facilitating the Agfa deal.

17 TA also submits that this contribution is sought after the fact, is for the benefit only of Hary, is not part of a restructuring and does not benefit the creditors. Counsel for TA suggested that considerations would have differed if this request had been made in September or November. However, the potential prejudice of the Dualite litigation to the debtor company was identified to the Monitor and major stakeholders in October before the settlement, and again in November, and they agreed in December 2009, following the Court approval of the Agfa purchase, while Hary was considering whether to stay with the company, well before the Agfa deal closed on January 15th. It is clear that this was a very busy sensitive period with significant conflict. Clearly the processes undertaken were not ideal. However, Agfa considered Hary's continued presence to be beneficial and Hary reasonably believed that he had agreement to the contribution in early and mid December. All creditors benefited from the Agfa sale. The closing of the Agfa deal was a condition imposed by the major stakeholders and this motion was brought within days of that closing. I do not consider the timing of this motion to be a negative consideration in these circumstances; nor does the timing remove the benefits of that sale as a consideration in favour of a contribution to the settlement. Although this motion is being heard after the closing of the Agfa purchase and TA has now changed its position to actively oppose the contribution, it would be unjust in these circumstances to discount the very real benefit to the company of having Hary continue his role as it benefited the Agfa closing on January 15, 2010. In fact, it was based upon ROI's recognition that the contribution would benefit both the secured and unsecured creditors that it agreed to fund half of the ultimate impact on TA.

18 Finally, the debtor company will also obtain releases from the other defendants in return for the contribution. The potential claim by Hary against the company for the full amount of the settlement and its costs in relation to the lawsuit is based both upon the assertion that foreign law may require indemnification and also upon the indemnification agreement with the company. The foreign law has not been proved. While there is no formal legal opinion, I am satisfied that there is a real risk that indemnification will be required under the agreement. I am not satisfied that the exceptions carved out of the indemnification agreement identified by TA would apply to disqualify a claim. As part of the threshold analysis for interlocutory injunctive relief there have been preliminary judicial findings of fraud or misrepresentations in proceedings between Hary and his ex-wife relating to some of the transactions referenced in the Dualite claim; however these are not final findings of fraud. As well, the interests of Hary and the Gandhi companies do not appear adverse, given that the assets were traced into the companies. I am not persuaded that the allegations by Dualite (or the findings in the injunction) create a conflict in their interests; it was in all their interests to take the position that the transfer was a legitimate transfer. Any claim for indemnity by Hary or any other director would normally go through the claims process; however, in these circumstances, the settlement of the Dualite litigation was part of the larger plan to sell the business to Agfa for the benefit of both the secured and unsecured creditors. The avoidance of the time and costs of the claims process is an additional consideration in favour of the contribution.

19 This motion is brought forward by the companies, as debtors in possession with the support of the Monitor. A board resolution is not a pre-requisite. There were divisions on the board, and it is clear from the emails that there was considerable animosity. The process of consultation by the Monitor with the major stakeholders was a reasonable process during this difficult period.

20 In conclusion, I find that the contribution is fair and reasonable, and beneficial to the interests of the debtor companies, the creditors as a whole, as well as TA. Not only did the settlement permit Hary to devote his 'undistracted' attention to the company, the settlement resulted in a release by Dualite with respect to an \$8 million claim that would have been significantly bolstered by judgment against the other defendants. As well, the Monitor's agreement to support and the major stakeholders' agreement not to oppose a contribution resulted in Hary choosing to remain with the debtor companies until the sale of the business to Agfa; both the Monitor and Agfa considered that his cooperation would facilitate the deal. I do not find that Hary acted improperly. Once the Agfa deal was approved by the Court, it was clear that there would be recovery for unsecured creditors. It would be unfair that the individual defendants bear the entire

expense of the settlement, although the estate would be enriched. The settlement and the release of Dualite claim on behalf of the creditors also avoided the time and expense of dealing with the Dualite claim, as well as the risk of significant exposure to be ultimately borne by the unsecured creditors. In this case the secured creditor ROI has agreed to pay half of TA's contribution to the settlement, so that to that extent the risk has been shared with the secured creditors. This is not an appropriate case in which to make a direct comparison between what Hary might recover in the claims process, the impact of the Dualite release on the claim process and the net impact on TA. This clearly but one consideration; the settlement and contribution played an important role in the larger plan for the sale of the business and the ensuing recovery for directors.

The legal fees

21 Prior to the commencement of the CCAA proceedings, U.S. counsel was paid directly by the Gandhi companies for the Dualite litigation. The CCAA order permitted the debtor companies to retain counsel but required the Monitor's approval of expenditures over \$10,000. The legal fees were presented to the Monitor for approval by Gandhi as early as June 2009 and throughout the summer and fall. A payment of \$50,000 was authorized by the Monitor in August, although the Monitor subsequently clarified the monies were in relation to the Chapter 11 proceedings. In September 2009, Gandhi asked the Monitor to discuss the issue of the legal fees with the major stakeholders because of the potential negative impact of judgment on the claims process and unsecured creditors if the trial was not adequately defended by the remaining defendants.

22 Although approval is being sought late in the day, Gandhi actively sought payment of the legal fees throughout. This was a busy time with strained relations and the Monitor indicated that he did not have time to consult with the major stakeholders. There are numerous emails in which the Monitor was raising issues as to the nature of the litigation, as to whether the debtor companies should bear full responsibility, as well as questions about the accounts themselves and in which Gandhi raised concerns that the non-payment would impact on counsel's readiness for trial and thus adversely on the company and claims process.

23 I find that Hary reasonably believed that the Monitor had agreed to assume responsibility for the legal fees in November; he sent an email dated November 30th "to confirm our conversation concerning the LB outstanding bills and settling the Dualite lawsuit." He advised that they would get the Monitor "the LB bills so you can make that payment as they are going to help us to finish the bankruptcy work needed to close the sale." While the reply is not necessarily conclusive, it did not contradict Hary's understanding of the conversation. The Monitor advised: "we have the Langley fee reconciliation and will review and get back to you to confirm our position within the next day or two." The Monitor began negotiating directly with LB in December. Accordingly, although the Monitor did not actually clearly advise that it would support payment until after it met with U.S. litigation counsel Treu in January, Hary reasonably believed that the Monitor had agreed in November to assume responsibility for the fees. Given that Gandhi had raised the issue of the legal fees and requested that the Monitor raise the issues with the major stakeholders, I also find that Hary reasonably assumed that the major stakeholders had been consulted about the legal fees.

24 I also find that the legal fees were not raised by the Monitor as part of the December discussions with the major stakeholders. While the issue of the legal fees had been raised by email from the Monitor to the stakeholders in October 13, together with details of the action and the potential impact on the debtor companies, Sterling and Johnston deposed, on behalf of ROI and TA, that the legal fees were never discussed as part of the arrangement. They first learned of the legal fees from the Eighth Report dated January 18, 2010, which states that the Monitor "has not had an opportunity to consult with key stakeholders in regard to the LB professional fees."

25 I am not prepared to find that any of the parties were unreasonable or insincere in their belief. It was a busy difficult time and there was an unfortunate breakdown in communications.

26 The Monitor supports the payment of the legal fees for the same reason it supports the contribution to the Dualite settlement.

27 The fees were incurred after the stay. TA takes the position that fees should not be paid at all because the Dualite action was stayed against the debtor companies. However, for the reasons already outlined, I accept that it was in the best interests of the debtor companies to defend the litigation as it continued against the other defendants and notwithstanding the stay. I have also found that settlement greatly benefited the company as well as the creditors generally.

28 Approval after the fact is unfortunate; however, the Monitor appears to have been busy dealing with important events between October and the closing of the Agfa deal on January 15, 2010. Furthermore, Hary reasonably believed that the major stakeholders were not opposed to either the contribution or the legal fees and based his decision to stay and facilitate the deal in part upon that understanding.

29 TA also takes the position that if I find payment of legal fees to be appropriate notwithstanding the stay, then there should be shared responsibility with the other defendants. It is tempting to draw the analogy to the contribution and find that the debtor companies' share should mirror the contribution for 25% of the legal fees. Clearly the other individual defendants retained some benefit from counsel, although the other entities appear to be judgment-proof.

30 However, a direct parallel is overly simplistic. The logic for payment of the fees does not precisely parallel the proportion of the contribution. Gandhi had always paid the legal fees before the CCAA proceedings. This was a company expenditure post-stay that would have been paid but for the specific requirement for Monitor approval. Hary's request for 25% contribution was a compromise and is not necessarily a reflection of the relative risk or responsibility of the defendants. The 25% contribution, or compromise, was premised upon full payment of the legal fees. As well, the other defendants will provide a release to the debtor company to avoid a claim for indemnification. For the reasons already indicated above, I find that such a release would have value to the company and to the unsecured creditors. I appreciate that payment of the legal fees as an expense, rather than as part of the claims process, will if viewed in isolation result in some financial loss to TA as the largest unsecured creditor. However, on the whole of the record, I find that Hary treated the legal fees and settlement as a package and Hary's reasonable understanding that they would be paid formed the basis of his decision to remain with the company to facilitate the Agfa purchase, a circumstance that clearly benefited the debtor companies, the secured and unsecured companies. In these circumstances, it is artificial to view these proposals separately, as part of the claims process, and as benefiting only Hary. It is more appropriate to view the proposals as a whole given the fluid events of the months leading up to the Agfa purchase and Hary's role in supporting the sale that benefited the company, the secured and unsecured creditors. I have found this to be a close call. In such circumstances, the Monitor's recommendation as a neutral party in possession of the broader context is also persuasive. For all these reasons, I am satisfied that the payment of legal fees is a fair and reasonable expenditure of the debtor companies.

31 In conclusion, an order shall issue i) authorizing and directing the Monitor to pay, on behalf of Gandhi, US\$350,000 to Hary Gandy as a contribution to the settlement of the action by Dualite; and ii) approving the payment of U.S. legal counsel Langley & Banack Inc. for fees and disbursements in relation to that lawsuit for the period from May 8, 2009 to January 6, 2010.

Motion granted.

TAB 22

2004 CarswellOnt 469
Ontario Superior Court of Justice [Commercial List]

Air Canada, Re

2004 CarswellOnt 469, [2004] O.J. No. 303, 128 A.C.W.S. (3d) 1067, 47 C.B.R. (4th) 169

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

AND IN THE MATTER OF SECTION 191 OF THE CANADA
BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF AIR CANADA AND THOSE SUBSIDIARIES LISTED ON SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Farley J.

Heard: January 16, 2004
Judgment: January 16, 2004
Docket: 03-CL-4932

Counsel: Sean F. Dunphy, Ashley John Taylor for Air Canada
Peter J. Osborne, Peter H. Griffin for Monitor
Howard Gorman for Ad Hoc Unsecured Creditors Committee
Aubrey Kauffman for Ad Hoc Committee of Various Creditors
Jay Swartz for Deutsche Bank
Mark Gelowitz for Trinity Time Investments
Robert Thornton, Gregory Azeff for GE Capital Aviation Services Inc.
J. Porter for Cerberus
Kevin McElcheran for CIBC
Murray Gold for CUPE
Ian Dick for AG Canada
James Tory for Air Canada Board
Joseph J. Bellissimo for Aircraft Lessor/Lender Group
Terri Hilborn for Unionized Retiree Committee
William Sasso, Sharon Strosberg for Mizuho International, PLC
Jim Dube for Deutsche Lufthansa A.G.

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.3 Arrangements](#)

[XIX.3.b Approval by court](#)

XIX.3.b.i "Fair and reasonable"

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

Debtor applied for approval of indemnity, amendments to equity plan, and global restructuring agreements — Application granted — Indemnity was customary and not opposed — Amendments were recommended by monitor and opposed by only one interested party — Board, in exercising its fiduciary duties, properly considered alternative proposal before choosing equity programme sponsor — Restructuring agreement was fair and reasonable and on balance beneficial to debtor and interested parties generally — Court must look at interests of creditors generally and objecting creditors specifically — Rights may be compromised but not confiscated in attempt to balance interests — Agreement had to be either taken as package or rejected — Delay and uncertainty resulting from rejection of agreement would likely be devastating for debtor.

Table of Authorities**Cases considered by *Farley J.*:**

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

Northland Properties Ltd., Re (1989), (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*) 34 B.C.L.R. (2d) 122, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*) 73 C.B.R. (N.S.) 195, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*) [1989] 3 W.W.R. 363, 1989 CarswellBC 334 (B.C. C.A.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to

Sammi Atlas Inc., Re (1998), 1998 CarswellOnt 1145, 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) — followed

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 123, 1991 CarswellOnt 142 (Ont. Gen. Div.) — referred to

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113, 1991 CarswellOnt 141 (Ont. Div. Ct.) — referred to

Statutes considered:

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

APPLICATION for approval of various agreements under *Companies' Creditors Arrangement Act*.

***Farley J.*:**

1 These reasons deal with three matters which the court was asked to approve Air Canada (AC) entering into various agreements; simply put they were as follows:

- (1) the Merrill Lynch (ML) indemnity;
- (2) the entering into the amendments to the Trinity Agreement; and
- (3) the Global Restructuring Agreements (GRA).

ML Indemnity

2 There was no opposition to this. The court was advised that such an indemnity was customarily given and that the terms of this particular one were such as is normally given. I therefore approve AC granting such an indemnity to ML.

Trinity Amendments

3 As I understood the submissions this morning, Mizuho a member of the Unsecured Creditors Committee (UCC) was the only interested party which spoke out against the Trinity amendments. It continues to be dissatisfied with the process by which Trinity was selected as the equity plan sponsor. I merely point out, once again, that this process was not of the Court's choosing but rather one which AC commenced on notice to the service list and as to which there were no objections before Trinity was selected on November 8, 2003 (together with the "fiduciary out" provision contained in its proposal). Aside from the court approvals envisaged by that process, the court only became involved when it was appreciated that there were some difficulties with the practical implementation of the process.

4 I further understand that the Ad Hoc Committee of Various Creditors (CVC) withdrew its opposition yesterday along with its cross motion. The UCC (one assumes on some majority basis) supported the Trinity Amendments but indicated that, as a sounding board, it wished to continue sounding that it still had concerns about aspects of corporate governance and management incentives.

5 I have no doubt, if adjustments in any particular area make sense between the signatories (AC and Trinity) and to the extent that any beneficiaries are involved, that such adjustments will be made for everyone's overall benefit (everyone in the sense of AC including all of its stakeholders including creditors, labour, management, pensioners, etc.) not only for the short term interests but the long term interests of AC emerging from these CCAA proceedings as an ongoing viable enterprise on into the future, well able to serve the public (both Canadian and foreign). A harmonious relationship with trust and respect flowing in all directions amongst the stakeholders will be to everyone's long term advantage. With respect to corporate governance though, I am able to make a more direct observation. A director, no matter who nominates that person, owes duties and obligations to the corporation, not the nominator: see *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), at 123, aff'd (1991), 3 B.L.R. (2d) 123 (Ont. Gen. Div.).

6 There was no evidence to show that the Board of AC in exercising its fiduciary duties did not properly consider on a quantitative and qualitative basis the factors (on a pro and con basis) relating to whether Cerberus had provided a Superior Proposal (as that was defined in section 9 of the Trinity Agreement approved earlier by this Court). Indeed there was no complaint from Cerberus in this respect. The Board's letter to me of December 22, 2003 carefully reviewed the considerations which the Board (with the assistance of Seabury and ML, together with the general oversight and views of the Monitor) gave in their deliberations with their ultimate decision that the Cerberus December 10, 2003 proposal was not a Superior Proposal with the result that the Board has selected Trinity to be the equity program sponsor in accordance with the Trinity amended deal. I approve AC executing the Trinity amended deal and implementing same, with the recognition and proviso that there may be further amendments/adjustments which may be entered into subject to the guidelines of my discussion above. I note in particular that the UCC helpfully pointed out that section 7.3 still needs to be modified, and that is being worked on. The Air Canada Pilots Association observed that there still needed to be some fine-tuning at para. 22 of its factum noting that: "These matters of the detailed implementation of the Amended

Trinity Investment Agreement can all be resolved by good faith negotiations between Air Canada, Trinity and affected stakeholders, with the assistance and support of the Monitor"; I did not have the benefit of any submissions in this regard (para.22) nor was any expected to either be given or taken as the parties all appreciated that this was not to be an exercise in "nitpicking".

7 At paragraph 71 of its 19th report, the Monitor stated:

71. The Monitor is of the continuing view that the Equity Solicitation Process must be completed as soon as possible. The restructuring process and many other restructuring initiatives have been delayed by approximately two months as a result of the continued uncertainty concerning the selection of the equity plan sponsor. The equity solicitation process must be concluded so that the balance of the restructuring process can be completed before the expiry on April 30, 2004 of the financing commitments from each of Trinity, GECC and DB pursuant to the Standby Agreement. The Monitor recommends that this Honourable Court approve the Company's motion seeking approval of the Amended Trinity Investment Agreement.

8 I would therefore approve the Trinity amendments so that AC can proceed to enter into and implement the Amended Trinity Investment Agreement. I note that this approval is not intended to determine any rights which third parties may have.

GRA

9 As with the previous approvals, I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally: see *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), at 201. In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), Blair J. at p. 316 adopted the principles in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) as an appropriate guideline for determining when an agreement or transaction should be approved during a CCAA restructuring but prior to the actual plan of reorganization being in place. In *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), I observed at p. 173 that in considering what is fair and reasonable treatment, one must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to the confiscation of rights. I think that philosophy should be applicable to the circumstances here involving the various stakeholders. As I noted immediately above in *Sammi Atlas Inc.*, equitable treatment is not necessarily equal treatment.

10 The Monitor's 19th report at paragraphs 20-21 indicates that:

20. The GRA provides the following benefits for Air Canada:

- The retention of a significant portion of its fleet of core aircraft, spare engines and flight simulators, which are critical to its ongoing operations;
- The restructuring of obligations with respect to 106 of 107 Air Canada and Jazz air operating, parked and undelivered aircraft (effective immediately for 12 GECC-managed aircraft and upon exit from CCAA for the remaining 94 GECC-owned aircraft, except as indicated below), including lease rate reductions on 51 aircraft (of which 3 aircraft have been returned as of the current date), cash flow relief for 29 aircraft, termination of the Applicants' obligations with respect to 20 parked aircraft (effective immediately), the cancellation of 4 future aircraft lease commitments and the restructuring of the overall obligations with respect to 2 aircraft. Obligations with respect to the last remaining aircraft remain unaffected as it is management's view that this lease was already at market;

- Exit financing of approximately US\$585 million (the "Exit Facility") to be provided by GECC upon the Company's emergence from CCAA;
- Aircraft financing up to a maximum of US\$950 million (the "RJ Aircraft Financing") to be provided by GECC and to be used by Air Canada to finance the future purchase of approximately 43 regional jet aircraft; and
- The surrender of any distribution on account of any deficiency claims under the CCAA Plan with respect to GECC-owned aircraft only, without in any way affecting GECC's right to vote on the Plan in respect of any deficiency claim.

21. In return for these restructuring and financing commitments, the GRA provides for the following:

- Payment of all current aircraft rent by Air Canada to GECC, during the interim period until emergence from CCAA proceedings, at contractual lease rates for GECC-owned aircraft and at revised lease rates for GECC-managed aircraft;
- The delivery of notes refinancing existing obligations to GECC in connection with 2 B747-400 cross-collateralized leases (the "B747 Restructuring") including one note convertible into equity of the restructured Air Canada at GECC's option;
- The delivery of stock purchase warrants (the "Warrants") for the purchase of an additional 4% of the common stock of the Company at a strike price equal to the price paid by any equity plan sponsor; and
- The cross-collateralization of all GECC and affiliate obligations (the "Interfacility Collateralization Agreement") on Air Canada's emergence from CCAA proceedings for a certain period of time.

The Monitor concluded at paragraph 70:

70. The Monitor notes that, if considered on their own, the lease concessions provided to Air Canada by GECC pursuant to the GRA differ substantially from those being provided by other aircraft lessors. In addition, the Monitor notes that GECC has benefitted from the cross collateralization on 22 aircraft pursuant to the CCAA Credit Facility and Interfacility Collateralization Agreement, particularly as it relates to the settlement of Air Canada's obligations to GECC under the B747 Restructuring. However, the Monitor also notes that the substantial benefits provided to Air Canada under the GRA including the availability of US \$585 million of exit financing and US\$950 million of regional jet aircraft financing are significant and critical to the Company's emergence from CCAA proceedings in an expedited manner. In the Monitor's view the financial benefits provided to Air Canada under the GRA outweigh the costs to the Applicants' estate arising as a result of the cross collateralization benefit provided to GECC under the CCAA Credit Facility and Interfacility Collateralization Agreement. Accordingly, the Monitor recommends to this Honourable Court that the GRA be approved.

11 The GRA was opposed by the UCC (again apparently on some majority basis as one of its members, Cara, was indicated as being in favour and I also understand that Lufthansa was also supportive); the UCC's position was supplemented by separate submissions by another of its members, CIBC. I agree with the position of the UCC that the concern of the court is not with respect to the past elements of the DIP financing by GE and the cross-collateralization of 22 aircraft that agreement provided for. I also note the position of the UCC that it recognizes that the GRA is a package deal which cannot be cherry picked by any stakeholder nor modified by the Court; the UCC accepts that the GRA must be either taken as a package deal or rejected. It suggested that GE, if the court rejects the GRA as advocated by the UCC, will not abandon the field but rather it will stay and negotiate terms which the UCC feels would be more appropriate. That may be true but I would observe that in my view the delay and uncertainty involved would likely be devastating for AC. Would AC be able to meet the April 30, 2004 deadline for the Trinity deal which requires that the GRA be in place? What would the effect be upon the booking public?

12 I note that the UCC complains that other creditors are not being given equal treatment. However, counsel for another large group of aircraft lessors and financiers indicated that they had no difficulty with the GRA. Indeed, it seems to me that GE is in a somewhat significantly different position than the other creditors given the aforesaid commitment to provide an Exit Facility and an RJ facility. Trinity and Deutsche Bank (DB) with respect to their proposed inflow of \$1 billion in equity would be subordinate to GE; this new money (as opposed to sunk old money of the UCC and as well as that of the other creditors) supports the GRA. I note as well although it is "past history" that GE has compromised a significant portion of its \$2 billion claim for existing commitments down to \$1.4 billion, while at the same time committing to funding of large amounts for future purposes, all at a time when the airline industry generally does not have ready access to such.

13 With respect to the two 747 LILOs (lease in, lease out), there is the concession that AC will enjoy any upside potential in an after marketing while being shielded from any further downside. GE has also provided AC with some liquidity funding assistance by deferring some of its charges to a latter period post emergence. Further it has been calculated that as to post filing arrears, there will be a true up on emergence and assuming that would be March 31, 2004, it is expected that there would be a wash as between AC and GE, with a slight "advantage" to AC if emergence were later. I pause to note here that emergence sooner rather than later is in my view in everyone's best interests - and that everyone should focus on that and give every reasonable assistance and cooperation.

14 With respect to the snapback rights, I note that AC would be able to eliminate same by repaying the LILO notes and the Tranche Loans and AC would be legally permitted to eliminate this concern 180 days post emergence. I recognize that AC would be in a much stronger functional and psychological bargaining position to obtain replacement funding post emergence than it is now able to do while in CCAA protection proceedings. I would assume that such a project would be a financial priority for AC post emergence and that timing should not prevent AC from starting to explore that possibility in the near future (even before emergence). I also note that GE anticipates that the snapback rights would not likely come into play, given, I take it, its analysis of the present and future condition of AC and its experience and expertise in the field. I take it *as a side note* that GE from this observation by it will not have a quick trigger finger notwithstanding the specific elements in the definition of Events of Default; that of course may only be commercial reality - and that could of course change, but one would think that GE would have to be concerned about its ongoing business reputation and thus have to justify such action. Snapback rights only come into existence upon emergence, not on the entry into the GRA.

15 I conclude that on balance the GRA is beneficial to AC and its stakeholders; in my view it is fair and reasonable and in the best interests of AC. It will permit AC to get on with the remaining and significant steps its needs to accomplish before it can emerge. The same goes for the Trinity deal. I therefore approve AC's entering into and implementing the GRA, subject to the same considerations as to completing the documentation and making amendments/adjustments as I discussed above in *Trinity Amendments*.

16 Orders accordingly.

Application granted.

TAB 23

Court of Queen's Bench of Alberta

**Citation: Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act),
2007 ABQB 504**

**Date: 20070731
Docket: 0501 17864
Registry: Calgary**

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

And in the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company

Applicants

**Reasons for Judgment
of the
Honourable Madam Justice B.E. Romaine**

Introduction

[1] This application involves the most recent development in the lengthy and complicated Calpine insolvency. That insolvency has required proceedings both in this jurisdiction under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") and in the United States under Chapter 11 of the U.S. Bankruptcy Code. The matter is extremely complex, involving many related corporations and partnerships, highly intertwined legal and financial obligations and a number of cross-border issues. The resolution of these proceedings has been delayed by several difficult issues with implications for the insolvencies on both sides of the border. The above-noted applicants (collectively, the "Calpine Applicants") and the U.S. debtors applied to this Court and to the United States Bankruptcy Court of the Southern District of New York in a joint hearing for approval of a settlement of these major issues, which they say will break the deadlock.

[2] Both Courts approved the settlement. These are my reasons for that approval.

Background

[3] Given the complexity of the matter, it will be useful to set out some background. On December 20, 2005, the Calpine Applicants obtained an order of this Court granting them

protection from their creditors under the CCAA. That order appointed Ernst & Young Inc. as Monitor. It also provided for a stay of proceedings against the Calpine Applicants and against Calpine Energy Services Canada Partnership ("CESCA"), Calpine Canada Natural Gas Partnership ("CCNG") and Calpine Canadian Saltend Limited Partnership ("Saltend LP"). The Monitor's 23rd Report dated June 28, 2007 refers to the latter three parties collectively as the "CCAA Parties" and to those parties together with the Calpine Applicants as the "CCAA Debtors". Where I have quoted terms and definitions from the Report, I adopt those terms and definitions for purposes of these Reasons. On the same day, Calpine Corporation and certain of its direct and indirect U. S. subsidiaries filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code. The Monitor refers to Calpine Corporation ("CORPX"), the primary party in the U. S. insolvency proceedings, and its U.S. subsidiaries collectively as the "U.S. Debtors".

[4] During the course of the CCAA proceedings, a number of applications were made relating to the relationship of the CCAA Debtors and Calpine Power L.P. (the "Fund"), leading ultimately to the short and long-term retolling of the Calgary Energy Centre and the sale of the interest of Calpine Canada Power Ltd. ("CCPL") in the Fund to HCP Acquisition Inc. ("Harbinger") in February 2007, a sale that closed simultaneously with Harbinger's takeover of the publicly-held units in the Fund.

[5] In addition to these issues, progress in the restructuring and the realization of maximum value for assets was made more difficult by various cross-border issues. The Report sets out the following "material cross-border issues that needed to be resolved between the CCAA Debtors and the U.S. Debtors":

- a. The Hybrid Note Structure ("HNS") and whether Calpine Canada Energy Finance ULC ("ULC1"), including the holders of the 8 ½% Senior Notes due 2008 (the "ULC1 Notes") issued by ULC1 and fully and unconditionally guaranteed by CORPX, had multiple guarantee claims against CORPX;
- b. The sale by Calpine Canada Resources Company ("CCRC") of its holdings of U.S.\$359,770,000 in ULC1 Notes (the "CCRC ULC1 Notes") and the effect of the U.S. Debtors' so-called Bond Differentiation Claims ("BDCs") on such a sale;
- c. Cross-border intercompany claims between the CCAA Debtors and the U.S. Debtors;
- d. Third party claims made against certain CCAA Debtors that were guaranteed by the U.S. Debtors;
- e. The priority of the claim of Calpine Canada Energy Limited ("CCEL") against CCRC;

- f. A fraudulent conveyance action brought by the CCAA Debtors in this Court (the "Greenfield Action");
- g. Potential claims by the U.S. Debtors to the remaining proceeds repatriated from the sale of the Saltend Energy Centre;
- h. Cross-border marker claims filed by the U.S. Debtors and the CCAA Debtors and the appropriate jurisdiction in which to resolve those claims; and
- i. Marker claims filed by the ULC1 Indenture Trustee.

[6] In the Report, the Monitor describes the settlement process that led to this application as follows:

- 10. The CCAA Debtors and the U.S. Debtors concluded that the only way to resolve the issues between them was to concentrate on reaching a consensual global agreement that resolved virtually all the issues referred to above. The [CCAA Debtors and the U.S. Debtors] realized that without a global agreement, they could have faced lengthy and costly cross-border litigation.
- 11. Over the last five months, the Monitor and the CCAA Debtors held numerous discussions with the U.S. Debtors regarding a possible global settlement of the outstanding material and other issues. In addition, during various stages of discussion with the U.S. Debtors, the CCAA Debtors and the Monitor sought input from the major Canadian stakeholders as to the format and terms of a settlement.
- 12. While the settlement discussions between the U.S. Debtors and the CCAA Debtors were underway, the ad hoc committee of certain holders of ULC1 Notes reached terms of a separate settlement between the holders of the ULC1 Notes and CORPX (the "Preliminary ULC1 Settlement"). The terms of the Preliminary ULC1 Settlement were agreed to on April 13, 2007 and publicly announced by CORPX on April 18, 2007.
- 13. As a result of the above discussions and negotiations, [a settlement outline (the "Settlement Outline")] was agreed to on May 13, 2007 and publicly announced by CORPX on May 14, 2007. The Settlement Outline incorporates the terms of the Preliminary ULC1 Settlement. ...
- 14. The parties have negotiated the terms of [a global settlement agreement memorializing the terms of the Settlement Outline (the "GSA")] ...

17. The [GSA] is subject to the following conditions:

- a. The approval of both this Court and the U.S. Bankruptcy Court;
- b. The execution of the [GSA]; and
- c. The CCRC ULC1 Notes being sold.

[7] As the Monitor notes, the GSA resolves all of the material issues that exist between the Calpine Applicants and the U. S. Debtors. The Report describes the “key elements” of the GSA as follows:

- a. The [GSA] provides for the ULC1 Note Holders to effectively receive a claim of 1.65x the amount of the ULC1 Indenture Trustee’s proof of claim . . . against CORPX which results in a total claim against CORPX in the amount of US\$3.505 billion (the “ULC1 1.65x Claim”). The 1.65x factor was agreed between the U.S. Debtors and the ad hoc committee of certain holders of the ULC1 Notes. As a result of the [GSA], the terms of the HNS can be honoured with no material adverse economic impact to the U.S. Debtors, CCAA Debtors or their creditors;
- b. The withdrawal of the BDCs advanced by the U.S. Debtors. . . ;
- c. An agreement between the U.S. Debtors and the CCAA Debtors as to the cooperation in the sale of the CCRC ULC1 Notes;
- d. The priority of claims against CCRC are clarified, including the claim of CCEL against CCRC being postponed to all other claims against CCRC;
- e. The acknowledgement by the U.S. Debtors of certain guarantee claims advanced by creditors in the CCAA proceedings and the agreement by the U.S. Debtors that the quantum of these guarantee claims will be determined by the Canadian Court. The [GSA] contemplates that U.S. Debtors and their official committees will be afforded the right to fully participate in any settlement or adjudication of these guarantee claims. Pursuant to the [GSA], the U.S. Debtors acknowledge their guarantee of the following CCAA Debtors’ creditors’ claims:
 - i. The claims of Alliance Pipeline Partnership, Alliance Pipeline L.P., and Alliance Pipeline Inc. (collectively “Alliance”) for repudiation of certain long-term gas transportation contracts held by CESCA;

- ii. The claims of NOVA Gas Transmission Ltd. ("NOVA") for the repudiation of certain long-term gas transportation contracts held by CESCA;
 - iii. The claims of TransCanada Pipelines Limited ("TCPL") for the repudiation of certain long-term gas transportation contracts held by CESCA;
 - iv. The claims of Calpine Power L.P. [the "Fund"] for the repudiation of the tolling agreement between [the Fund] and CESCA (the "CLP Toll Claim");
 - v. The claims of [the Fund] and Calpine Power Income Fund ("CPIF") relating to a potential fee resulting from the alleged transfer of the Island co-generation facility (the "Island Transfer Fee Claim"); and
 - vi. The claims of [the Fund] for heat rate indemnity relating to the Island co-generation facility (the "Heat Rate Penalty Claim"); and
- f. The withdrawal of virtually all U.S. and CCAA Debtor Marker Claims;
 - g. The settlement of the Greenfield Action;
 - h. The withdrawal of the UL1 Indenture Trustee Marker Claim;
 - i. The withdrawal of the claims filed by the Indenture Trustee of the Second Lien Notes against the CCAA Debtors;
 - j. The resolution of the quantum of the cross-border intercompany claims...;
 - k. The settlement of the ULC2 Claims as against CCRC (as between the CCAA Debtors and the U.S. Debtors) and also confirmation of the ULC2 guarantee by CORPX;
 - l. The payment of all liabilities of ULC2, including the amounts due on the ULC2 Notes. For example, the ULC2 Indenture Trustee has advised that it believes a make-whole payment is applicable if ULC2 repays the holders of the ULC2 Notes prior to the final payment date as set out in the Indenture (the "ULC2 Make-Whole Premium"). The CCAA Debtors and the U.S. Debtors dispute that the ULC2 Make-Whole Premium is applicable. However, the [GSA] contemplates that if the issue is not resolved by the date of distribution to the ULC2 direct creditors, an

amount sufficient to satisfy the claim may be set aside in escrow pending the determination of the issue;

- m. An agreement on the allocation of professional fees relating to the CCAA proceedings amongst the CCAA Debtors and agreement as to the quantum of certain aspects of the Key Employee Retention Plan. . .;
- n. Resolution of all jurisdictional issues between Canada and the U.S.; and
- o. An agreement as to the allocation of the proceeds from the sale of Thomassen Turbines Systems, B.V. ("TTS").

[8] The Monitor describes and analyzes the terms and effect of the GSA in great detail in the Report. It concludes that the GSA is beneficial to the CCAA Debtors and their creditors, providing a medium for an efficient payout of many of the creditors, resolving all material disputes between the CCAA Debtors and the U.S. Debtors without costly and time-consuming cross-border litigation, settling the complex priority issues of CCRC and providing for the admission by the U.S. Debtors of the validity of guarantees provided to certain creditors of the CCAA Debtors. It is important to note that the Monitor unequivocally endorses the GSA.

The Applications

[9] The Calpine Applicants sought three orders from this Court. First, they sought an order approving the terms of the GSA and directing the various parties to execute such documents and implement such transactions as might be necessary to give effect to the GSA. Second, they sought an order permitting CCRC and ULC1 to take the necessary steps to sell the CCRC ULC1 Notes. Third, they sought an extension of the stay contemplated by the initial CCAA order to December 20, 2007.

[10] The application was made concurrently with an application by the U.S. Debtors to the U.S. Bankruptcy Court in New York state, the two applications proceeding simultaneously by videoconference. No objection was taken to the latter two orders sought from this Court and I have granted both. I also gave approval to the GSA with brief oral reasons. I indicated to counsel at the hearing that these more detailed written reasons would be forthcoming as soon as possible. The applications to the U.S. Court, including an application for approval of the GSA, were also granted.

[11] The controversial point in the applications, both to this Court and to the U.S. Court, was approval of the GSA. The parties standing in opposition to the GSA are the Fund, the ULC2 Indenture Trustee and a group referring to itself as the "*Ad Hoc* Committee of Creditors of Calpine Canada Resources Company" (the "*Ad Hoc* Committee"). (HSBC Bank USA, N.A., as ULC1 Indenture Trustee, also filed a technical objection, but it has since been withdrawn.) The bench brief of the *Ad Hoc* Committee states that it "is comprised of members of the *Ad Hoc*

Committee of Bondholders of Calpine Canada Energy Finance II ULC ... and Calpine Power, L.P.”. Thus, the Ad Hoc Committee consists of the Fund and certain unknown ULC2 noteholders. There was some objection to the status of the Ad Hoc Committee to oppose the GSA independently of the Fund, but that objection was not strenuously pursued and I do not need to address it. However, I note that the Fund thus makes its arguments through both the Ad Hoc Committee and its separate counsel, and the ULC2 noteholders make theirs through both the ULC2 Indenture Trustee and the Ad Hoc Committee. I will refer to those parties opposing the GSA collectively as the “Opposing Creditors” hereafter. The Opposing Creditors object to the GSA on a number of grounds and there is much overlap among their positions.

[12] The primary objection is that the GSA amounts to a plan of arrangement and, therefore, requires a vote by the Canadian creditors. The Opposing Creditors support their submissions by isolating particular elements of the GSA and characterizing them as either a compromise of their rights or claims or as examples of imprudent concessions made by the CCAA Debtors in the negotiation of the GSA. These specific objections will be analysed in the next part of these reasons, but, taken together, they fail to establish that the GSA is a compromise of the rights of the Opposing Creditors for two major reasons:

- a) the GSA must be reviewed as a whole, and it is misleading and inaccurate to focus on one part of the settlement without viewing the package of benefits and concessions in its overall effect. The Opposing Creditors have discounted the benefits to the Canadian estate of the resolution of \$7.4 billion in claims against the CCAA Debtors by arguing that these claims had no value. As the Report notes:

... While the Monitor believes it is unlikely that the CCAA Debtors would have been unsuccessful on all the issues [identified earlier in these Reasons as material cross-border issues], there was a real risk of one or more claims being successfully advanced against CCRC by the U. S. Debtors or the ULC1 Trustee and, had this risk materialized, the recovery to the CCRC direct creditors and CESCA creditors would have been materially reduced.

- b) the Opposing Creditors blur the distinction between compromises validly reached among the parties to the GSA and the effect of those compromises on creditors who are not parties to the GSA. The Monitor has opined that the GSA allows for the maximum recovery to all the CCAA Debtors’ creditors. According to the Monitor’s conservative calculations, virtually all the Canadian creditors, including the Opposing Creditors, likely will be paid the full amount of their claims as settled or adjudicated, either from the Canadian estate or as a U.S. guarantee claim. If claims are to be paid in full, they are not compromised. If rights to a judicial determination of an outstanding issue have not been terminated by the GSA, which instead provides a mechanism for their efficient and timely resolution, those rights are not compromised.

The Ad Hoc Committee's Objections

[13] The Ad Hoc Committee asserts that the GSA expropriates assets with a value of approximately U.S.\$650 million to the U.S. Debtors that would otherwise be available to Canadian creditors, leaving insufficient value in the Canadian estates to ensure that the Canadian creditors are paid in full. The Ad Hoc Committee argues that the Canadian creditors will receive less than full recovery and that, therefore, their claims have been compromised.

[14] This submission is misleading. The \$650 million refers to two elements of the GSA: a payout to the U.S. Debtors of \$75 million from CCRC in exchange for the withdrawal of the U.S. Debtors BDCs, settlement of the U.S. Debtors' claims against the Saltend proceeds and the postponement of CCEL's claim against CCRC and the elimination of CCRC's unlimited liability corporation claim against its member contributory, CCEL, which the Opposing Creditors complain effectively denies access to an intercompany claim of \$575 million. I do not accept that the GSA "expropriates" assets to the U.S. Debtors, who had both equity and creditor claims against the Canadian estates that they relinquished as part of the GSA. The GSA is a product of negotiation and settlement and required certain sacrifices on the part of both the U.S. Debtors and the CCAA Debtors. The Ad Hoc Committee's piecemeal analysis of the GSA ignores the other considerable benefits flowing to the Canadian estate from the GSA, including the subordination of CCEL's \$2.1 billion claim against CCRC. As recognized by the Monitor, this postponement permits the CESCA shortfall claim to participate in the anticipated CCRC net surplus, failing which the recovery by creditors of CESCA (notably including the Fund) would be materially reduced. The Ad Hoc Committee also fails to mention that an additional \$50 million of claims against CESCA advanced by the U.S. Debtors have been postponed to the claims of other CESCA creditors.

[15] The Ad Hoc Committee argues that the U.S. Debtors' claims that have been withdrawn are "untested" and "unmeritorious". Certainly, the claims have not been tested through litigation. However, it is the very nature of settlement to withdraw claims in order to avoid protracted and costly litigation. While the Ad Hoc Committee may consider the U.S. Debtors' claims unmeritorious, their saying so does not make it so. The fact remains that the U.S. Debtors have agreed, as part of the GSA, to withdraw claims that would otherwise have to be adjudicated, likely at considerable time and expense.

[16] As part of the GSA, the U.S. Debtors agree to cooperate in the sale of the CCRC ULC1 Notes. The Ad Hoc Committee is of the view that that cooperation "should have been forthcoming in any event". Nevertheless, the U.S. Debtors previously have not been prepared to accede to such a sale, insisting instead on asserting their BDCs. The sale is acknowledged to be critical to resolution of this insolvency and the present willingness of the U.S. Debtors to cooperate therein is of great value.

[17] The Ad Hoc Committee also takes issue with the recovery available under the GSA to the creditors of CESCA, arguing that those creditors face a potential shortfall of at least \$175 million. The cited shortfall of \$175 million is again misleading, failing to take into account that

the Fund, to the extent that its claims are adjudicated to be valid and there is a shortfall in CESCO, will now have the benefit of acknowledged guarantees of these claims by the U.S. Debtors as a term of the GSA. The Monitor thus reports its expectation that the Fund's claims will be paid in full. There exists, therefore, only the potential, under the Monitor's "low" recovery scenario, of a shortfall in CESCO of \$25.1 million. Those creditors who may be at risk of such a shortfall are not the Opposing Creditors, but certain trade creditors to the extent of approximately \$2 million, who are not objecting to the GSA, and certain gas transportation claimants to the extent of approximately \$23 million, who appeared before the Court at the hearing to support the approval of the GSA on the basis that it improves their chances of recovery.

[18] The shortfall, if any, to which the creditors of CESCO will be exposed will depend upon the quantum of the CLP Toll Claim. As yet, this claim remains, to use the Ad Hoc Committee's word, untested. Assessments of its value range from \$142 million to \$378 million. The Monitor's analysis, taking into account the guarantees by the U.S. Debtors contemplated by the GSA, indicates that if this claim is adjudged to be worth \$200 million or less, all of the CESCO creditors will be assured of full payment whether under the "high" or "low" scenarios. Alternatively, under the Monitor's "high" recovery scenario, all creditors of CESCO will receive full payment even if the CLP Toll Claim is worth as much as \$300 million.

[19] Further, as I indicated in my oral reasons, even if the Fund does not receive full payment of the CLP Toll Claim through the Canadian estate, the GSA cannot be said to be a compromise of that claim. The GSA contemplates adjudication of the CLP Toll Claim rather than foreclosing it. While settlements made in the course of insolvency proceedings may, in practical terms, result in a diminution of the pool of assets remaining for division, this is not equivalent to a compromise of substantive rights. This point is discussed further later in these Reasons.

[20] The Ad Hoc Committee points out that, according to the Report, the GSA results in recovery for CCPL of only 39% to 65%. As the Fund is CCPL's major creditor, the Ad Hoc Committee argues that this level of anticipated recovery constitutes a compromise of the Fund's claim in this respect.

[21] The response to this argument is two-fold. First, the Report indicates that the CCPL recovery range is largely dependent upon the quantum of the Fund's Heat Rate Penalty Claim. The Monitor has taken the conservative approach of estimating the amount of this claim at the amount asserted by the Fund; the actual amount adjudicated may be less, resulting in greater recovery for CCPL. Further, the Monitor notes that, as part of the GSA, CORPX acknowledges its guarantee of the Heat Rate Penalty Claim. Therefore, the Monitor concludes that "[t]o the extent there is a shortfall in CCPL, based again upon the Monitor's expectation that CORPX's creditors should be paid 100% of filed and accepted claims, [the Fund] should be paid in full for the Heat Rate Penalty Claim regardless of whether a shortfall resulted in CCPL". As discussed above, the possibility of a shortfall in the asset pool against which claims may be made is not equivalent to a compromise of those claims. The Monitor reports that only \$25,000 of CCPL's creditors may face a risk of less than 100% recovery after consideration of the CORPX

guarantees under the "low" scenario, and those only to the extent of a \$15,000 shortfall and that the CCAA Debtors are considering options to pay out these nominal creditors in any event.

[22] The Ad Hoc Committee argues that CORPX's guarantees are not a satisfactory solution to potential shortfalls because resort to the guarantees may result in the issuance of equity rather than the payment of cash. This, however, is by no means certain at this point. Parties who must avail themselves of CORPX's guarantees will participate in the U.S. bankruptcy proceedings and will be entitled to a say in the ultimate distribution that results from those proceedings. The Opposing Creditors complain that recovery under the guarantees is uncertain as to timing and amount of consideration. However, the GSA removes any hurdle these creditors may have in establishing their rights to guarantees. Without the acknowledgment of guarantees that forms part of the GSA, those creditors who sought to rely on the guarantees faced an inefficient and expensive process to establish their rights in the face of the stay of proceedings in place in the U.S. proceedings. While it is true that the expectation of full payment under the GSA with respect to guarantee claims rests on the Monitor's expectation that these claims will be paid in full, the U. S. Debtors in a disclosure statement released on June 20, 2007 announced their expectation that their plan of reorganization in the U.S. proceedings would provide for the distribution of sufficient value to pay all creditors in full and to make some payment to existing shareholders.

[23] The Ad Hoc Committee also argues that the GSA purports to dismiss claims filed by the ULC2 Indenture Trustee on behalf of the ULC2 noteholders without consent or adjudication. They further take the position that this alleged dismissal is to occur prior to any payment of the claims of the ULC2 noteholders, such payment being subject to further Court order and to a reserved ability on the part of the CCAA Debtors to seek to compromise certain of the ULC2 noteholders' claims.

[24] Again, this is an inaccurate characterization of the effect of the GSA. First, as noted above, the GSA contemplates setting aside in escrow sufficient funds to satisfy the claims of the ULC2 noteholders pending adjudication. Thus, there is no compromise. With respect to the timing issue, it is important to remember that these claims are not being dismissed as part of the GSA. They remain extant pending adjudication and, if appropriate, payment from the funds held in escrow.

[25] Finally, while the Ad Hoc Committee does not object to the sale of the CCRC ULC1 Notes, it argues that there is no urgency to such sale and that it should not occur until after there has been a determination of the various claims. As counsel for the Calpine Applicants pointed out, this is a somewhat disingenuous position for the Ad Hoc Committee to take, given its previous expressions of impatience in respect of the sale.

[26] I am satisfied that the potential market for the CCRC ULC1 Notes is volatile and that, now that the impediments to the sale have been removed, it is prudent and indeed necessary for the CCRC ULC1 Notes to be sold as soon as possible. The present state of the market has created an opportunity for a happy resolution of this CCAA filing that should not be allowed to be lost.

In addition to alleviating market risk, the GSA will ensure that interest accruing on outstanding claims will be terminated by their earlier payment.. This is not a small benefit. As an example, interest accrues on the ULC2 Notes at a rate of approximately \$3 million per month plus costs. The earlier payment of these notes that would result from the operation of the GSA thus increases the probability of recovery to the remaining creditors of CCRC.

[27] As the Ad Hoc Committee made clear during the hearing, it wants the right to vote on the GSA but wants to retain the benefit of the GSA terms that it finds advantageous. It suggests that the implementation of the GSA be delayed "briefly" for the calling of a vote and the determination of the ULC2 entitlements and the Fund's claims with certainty, in accordance with a litigation timetable that has been proposed as part of the application. The "brief" adjournment thus suggested amounts to a delay of roughly 3 ½ months, without regard to allowing this Court a reasonable time to consider the claims after a hearing or the timing considerations of the U. S. Court.

The Fund's Objections

[28] As noted in its brief, the Fund "fully supports" the position of the Ad Hoc Committee. However, it says it has additional objections.

[29] The Fund objects particularly to the settlement of the Greenfield Action. It argues that the GSA contemplates settlement of the Greenfield Action without payment to CESCA and that, as CESCA's major creditor, the Fund is thereby prejudiced.

[30] Firstly, the settlement of this claim under the GSA was between the proper claimant, CCNG and the U.S. Debtors. It was not without consideration as alleged. The GSA provides that \$15 million of the possible \$90 million priority claim to be paid to the U. S. Debtors out of the Canadian estate will be netted off in consideration for the Greenfield settlement.

[31] The Fund submits that there are conflict of interest considerations arising from the settlement of the Greenfield matter between the CCAA Debtors and the U.S. Debtors. This argument might have greater force if the Fund were actually compromised or prejudiced in the GSA. However, as I have already noted, the Fund and the remaining creditors of CESCA benefit from the GSA when it is considered on a global basis. It may be that there is a risk that the Fund will be unable to secure complete recovery. However, as discussed above, this does not represent a compromise of the Fund's claims. Further, as I indicated in my oral reasons, the fact that the Fund may bear some greater risk than other creditors does not, in itself, make the GSA unfair.

[32] The Fund also complains of a potential shortfall in respect of its claims against CCPL. They argue that, even if they are able to have recourse to CORPX's guarantee in respect of any shortfall in the Canadian estate, they are prejudiced because they may receive equity rather than cash. I have previously addressed some of the issues relating to the possibility that the Fund may have to have recourse to the now-acknowledged guarantees of their disputed claims as part of the U.S. process to obtain full payment. This possibility existed prior to the negotiation of the GSA

and in fact, the possibility of resort to the guarantees may have been of greater likelihood if the \$7.4 billion of claims against the Canadian estate that the GSA eliminates had been established as valid to any significant degree. Without the provision of the GSA that enables the claims of the Fund that give rise to the guarantees being resolved in this Court, the Fund would have faced the possibility of adjudication of those claims in the U.S. proceedings. The Fund now will be entitled to participate with other guarantee claimants in the U.S. and will be entitled to a vote on the proposal of the U.S. Debtors to address those claims. I am not satisfied that the Fund is any worse off in its position as a result of the GSA in this regard.

[33] The Fund further argues that it is not aware of any CORPX guarantee in respect of its most recent claim. A claim was filed against the Fund in Ontario on May 23, 2007 relating to CCPL's management of the Fund. The Fund made application before me on July 24, 2007 for leave to file a further proof of claim against CCPL. I have reserved my decision on that application. The Fund asserts that since there is no CORPX guarantee in respect of this claim, they face a shortfall of \$10.5 million on the "high" scenario basis or \$19.5 million on the "low" scenario basis on this claim. This claim has not yet been accepted as a late claim. It arose after the GSA was negotiated and, therefore, could not have been addressed by the negotiating parties in any event. It is highly contingent, opposed by both the Fund and the CCAA Debtors, and raises issues of whether the indemnity between CCPL and the Fund is even applicable. Even if accepted as a late claim, it would not likely be valued by the CCAA Debtors and the Monitor at anything near its face value. This currently unaccepted late claim is not properly a factor in the consideration of the GSA.

The ULC2 Trustee's Objections

[34] The ULC2 Trustee objects, first, to its exclusion from the negotiation process leading up to the GSA. It states in its brief that "[a]s the ULC2 Trustee was not provided with the ability to participate or seek approval of the proposed resolution of the ULC2 Claims, it cannot support the [GSA] unless and until it is clear that the terms thereof ensure that the ULC2 Claims are provided for in full and the [GSA] does not result in a compromise of any of the ULC2 Claims". Although the ULC2 Trustee may not have participated in the negotiation or drafting of the GSA, it did comment on the issues addressed in the settlement. The problem is that these issues have not been resolved to the satisfaction of the ULC 2 Trustee.

[35] The ULC2 Trustee argues that the GSA provides it with one general unsecured claim in the CCAA Proceedings against ULC2 in an amount alleged to satisfy the outstanding principal amount of the ULC 2 Notes, accrued and unpaid interest and professional fees, costs and expenses of both the Ad Hoc ULC2 Noteholders Committee and the ULC2 Trustee and one guarantee claim against CORPX. It argues that the quantum contemplated by the GSA is insufficient to satisfy the amounts owing under the ULC2 Indenture because it does not take proper account of interest on the ULC2 Notes.

[36] In addition, the ULC2 Trustee takes the position that the GSA fails to provide for the ULC2 Make-Whole Premium. It objects to being required, under the terms of the GSA, to take this matter to the U.S. Bankruptcy Court rather than to this Court.

[37] I am unable to conclude that the GSA compromises the rights of the ULC2 noteholders in the manner complained of by the UCL2 Trustee. First, the GSA contemplates that the ULC2 Trustee will be paid in full, whatever its entitlement is. If the quantum of that entitlement cannot be resolved consensually, the CCAA Debtors have committed to reserve sufficient funds to pay out the claims once they have been resolved.

[38] While the GSA reorganizes the formal claims made by the ULC2 Trustee, the reorganization does not prejudice the ULC2 noteholders financially, as the effect of the reorganized claims is the same and the ULC2 Trustee's right to assert the full amount of its claims remains.

[39] With respect to the requirement that the ULC2 Trustee take the matter of the ULC2 Make-Whole Premium to the U.S. Court, I am satisfied that the United States Bankruptcy Court of the Southern District of New York is an appropriate forum in which to address that and its related issues, given that New York law governs the Trust Indenture and the Trust Indenture provides that ULC II agrees that it will submit to the non-exclusive jurisdiction of the New York Court in any suit, action or proceedings. Granted, there may be arguments that could be made that this Court has jurisdiction over these issues under CCAA proceedings, but s. 18.6 of the CCAA recognizes that flexibility and comity are important to facilitate the efficient, economical and appropriate resolution of cross-border issues in insolvencies such as this one. I note that the GSA assigns responsibility for a number of unresolved claims which could be argued to have aspects that are within the jurisdiction of the U.S. Court to this Court for resolution. I am satisfied that I have the authority under s. 18.6 of the CCAA to approve the assignment of these issues to the U.S. Court even over the objections of the ULC2 Trustee.

[40] The ULC2 Trustee also objects to the timing of the payment of \$75 million to the U.S. Debtors and to the withdrawal of certain oppression claims relating to the sale of the Saltend facility, submitting that the payment and withdrawal should not occur prior to the payment of the claims of the ULC2 noteholders. There was some confusion over an apparent disparity between the Canadian form of order and the U.S. form with respect to the order of distributions of claims. The Canadian order, to which the U.S. order has now been conformed, provides that the \$75 million payment will not occur until the CCRC ULC1 Notes are sold and a certificate is filed with both Courts advising that all conditions of the GSA have been waived or satisfied. While this does not satisfy the ULC2 Trustee's objection under this heading in full, I accept the submission of the CCAA Applicants that the GSA requires certain matters to take effect prior to others in order to allow the orderly flow of funds as set out in the GSA and that the arrangement relating to the escrow of funds protects the ULC2 noteholders in any event.

Analysis of Law re: Plan of Arrangement

[41] It is clear that, if the GSA were a plan of arrangement or compromise, a vote by creditors would be necessary. The Court has no discretion to sanction a plan of arrangement unless it has been approved by a vote conducted in accordance with s. 6 of the CCAA: *Royal Bank v. Fracmaster* (1999), 244 A.R. 93 (C.A.) at para. 13.

[42] The Ad Hoc Committee, the Fund and the ULC2 Trustee rely heavily on *Menegon v. Philip Services Corp.* (1999), 11 C.B.R. (4th) 262 (Ont. S.C.J.) to support their submissions. As noted by Blair, J. in *Philip* at para. 42, in the context of reviewing a plan of arrangement filed in CCAA proceedings involving Philip Services and its Canadian subsidiaries in Canada where the primary debtor, Philip Services, and its United States subsidiaries had also filed for Chapter 11 protection under U.S. law and had filed a separate U.S. plan, the rights of creditors under a plan filed in CCAA proceedings in Canada cannot be compromised without a vote of creditors followed by Court sanction.

[43] The comments made by the Court in *Philip* must be viewed against the context of the specific facts of that case. Philip Services was heavily indebted and had raised equity through public offerings in Canada and the United States. These public offerings led to a series of class actions in both jurisdictions, which, together with Philip Services' debt load and the bad publicity caused by the class actions, led to the CCAA and Chapter 11 filings. At about the same time that plans of arrangement were filed in Canada and the U.S., Philip Services entered into a settlement agreement with the Canadian and U.S. class action plaintiffs that Philip Services sought to have approved by the Canadian Court. The auditors (who were co-defendants with Philip Services in the class action proceedings), former officers and directors of Philip Services who had not been released from liability in the class action proceedings and other interested parties brought motions for relief which included an attack on the Canadian plan of arrangement on the basis that it was not fair and reasonable as it did not allow them their right as creditors to vote on the Canadian plan.

[44] The effect of the plans filed in both jurisdictions was that the claims of Philip Services' creditors, whether Canadian or American, were to be dealt with under the U.S. plan, and only claims against Philip Services' Canadian subsidiaries were to be dealt with under the Canadian plan.

[45] The Court found that if the settlement and the Canadian and U.S. plans were approved, the auditors and the underwriters who were co-defendants in the class action proceedings would lose their rights to claim contribution and indemnity in the class action. The Court held at para. 35 that this was not a reason to impugn the fairness of the plans, since the ability to compromise claims under a plan of arrangement is essential to the ability of a debtor to restructure. The plans as structured deprived these creditors of the ability to pursue their contribution claims in the CCAA proceedings by carving out the claims from the Canadian proceedings and providing that they be dealt with under the U.S. plan in the U.S. Bankruptcy Court. The Court noted that this was so despite the fact that Philip Services had set in motion CCAA proceedings in Canada in

the first place and, by virtue of obtaining a stay, had prevented these creditors from pursuing their claims in Canada. The Canadian plan was stated to be binding upon all holders of claims against Philip Services, including Canadian claimants, without according those Canadian claimants a right to vote on the Canadian plan.

[46] In Blair J.'s opinion, it was this loss of the right of Philip Services' Canadian creditors to vote on the Canadian plan that caused the problem. He found at para. 38 that Philip Services, having initiated and taken the benefits of CCAA proceedings in Canada, could not carve out "certain pesky . . . contingent claimants, and... require them to be dealt with under a foreign regime (where they will be treated less favourably) while at the same time purporting to bind them to the provisions of the Canadian Plan...without the right to vote on the proposal."

[47] The Court took into account that the auditors, underwriters and former directors and officers of Philip Services would be downgraded to the same status as equity holders under the U.S. plan, rather than having their claims considered as debt claims as they would be in Canada.

[48] These facts are not analogous to the facts of the Calpine restructuring. The CCAA Debtors and the U.S. Debtors are separate entities who have filed separate proceedings in Canada and the United States. No plan of arrangement has been filed or proposed in Canada and no attempt has been made to have a Canadian creditor's claims dealt with in another jurisdiction, except to the extent of continuing to require certain guarantee claims that the Fund has against CORPX dealt with as part of the U.S. proceeding, where the guarantee claims properly have been made and the reference of the ULC2 Trustee's issues to the U. S. Court, which I have found acceptable under s. 18.6 of the CCAA. No Canadian creditor has been denied a vote on a filed Canadian plan of arrangement. To the extent that *Philip* repeats the basic proposition that a plan of arrangement that compromises rights of creditors requires a vote by creditors before it is sanctioned by the Court, this principle has been applied to a situation where there were in existence clearly identified formal plans of arrangement.

[49] Blair J. had different comments to make about the settlement agreement in *Philip*. The settlement agreement was conditional not only upon court approval, but also the successful implementation of both the Canadian and U.S. plans. Philip Services linked the settlement and the plans together and the Court found that the settlement agreement could not be viewed in isolation. Blair J. found that it was premature to approve the settlement which he noted would immunize the class action plaintiffs and Philip Services from the need to have regard to the co-defendants in those actions. He was concerned, for example, that the settlement agreement would deprive the underwriters of certain of their rights under an underwriting agreement. It is interesting that Blair J. commented at para. 31 that what was significant to him in deciding that approval of the settlement was premature was "not the attempt to compromise the claims", but the underwriters' loss of a "bargaining chip" in the restructuring process if the settlement was approved at that point. He also noted at para. 33 that he was not suggesting that the proposed settlement ultimately would not be approved, but only that it was premature at that stage and should be considered at a time more contemporaneous with a sanctioning hearing.

[50] It is noteworthy that Blair J. did not characterize the settlement agreement as a plan of arrangement requiring a vote, even though it was clear that it deprived other creditors of rights, thus compromising those rights. Nor did he question the jurisdiction of the Court to approve such a settlement. He merely postponed approval in light of the inter-relationship of the settlement agreement and the plans.

[51] The GSA is not linked to or subject to a plan of arrangement. I have found that it does not compromise the rights of creditors that are not parties to it or have not consented to it, and it certainly does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA. The *Philip* case does not aid the creditors who are opposed to the GSA in any suggestion that a Court lacks jurisdiction under the CCAA to approve agreements that may involve resolution of the claims of some but not all of the creditors of a CCAA debtor prior to a vote on a plan of arrangement.

[52] The Opposing Creditors rely on *Cable Satisfaction International, Inc. v. Richter Associés Inc.* (2004), 48 C.B.R. (4th) 205 (Que. S.C.) at para. 46 for the proposition that a court cannot force on creditors a plan which they have not voted to accept. This comment was made by Chaput, J. in the context of a very different fact situation than the one involved in this application. In *Cable Satisfaction*, creditors voting on a plan of arrangement proposed by the CCAA debtor had rejected the plan and approved instead an amended plan proposed at the creditors' meeting by one of the creditors. The Court's comment was made in response to the CCAA debtor's suggestion that the plan it had tabled should be approved because a majority of proxies filed prior to the amendment of the plan approved the original plan.

[53] There is no definition of "arrangement" or "compromise" under the CCAA. In *Cable Satisfaction*, Chaput, J. suggested at para. 35 that, in the context of s. 4 of the CCAA, an arrangement or compromise is not a contract but a proposal, a plan of terms and conditions to be presented to creditors for their consideration. He comments at para. 36 that the binding force of an arrangement or compromise arises from Court sanction, and not from its status as a contract.

[54] It is surely not the case that an arrangement or compromise need be labeled as such or formally proposed as such to creditors in order to require a vote of creditors. The issue is whether the GSA is, by its terms and in its effect, such an arrangement or compromise.

[55] I am satisfied that the GSA is not a plan of compromise or arrangement with creditors. Under its terms, as agreed among the CCAA Debtors, the U.S. Debtors and the ULC1 Trustee, certain claims of those participating parties are compromised and settled by agreement. Claims of creditors who are not parties to the GSA either will be paid in full (and thus not compromised) as a result of the operation of the GSA, or will continue as claims against the same CCAA Debtor entity as had been claimed previously. Those claims will be adjudicated either under the CCAA proceeding or in the U.S. Chapter 11 proceeding and, to the extent they are determined to be valid, the GSA provides a mechanism and a financial framework for their full payment or satisfaction, other than for the possibility of a relatively small deficiency for some creditors of CESCA whose claims are not guaranteed by the U.S. Debtors and an even smaller deficiency of

\$25,000 in CCPL. The creditors of CESCO who are at real risk of suffering a deficiency have not objected to the approval of the GSA. In fact, counsel for TCPL and Alliance, two of the CESCO gas transportation claimants, and Westcoast, a major creditor of CCRC, appeared at the hearing to support approval of the GSA (or, at least in TCPL's case, not to object to it) on the basis that it improves their chances of recovery, resolving as it does all the major cross-border issues that have impeded the progress of this CCAA proceeding.

[56] The Calpine Applicants submit that the GSA can be reviewed and approved by the Court pursuant to its jurisdiction to approve transactions and settlement agreements during the CCAA stay period. They cite *Re Playdium Entertainment Corp.* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Comm. List]) at paras. 11 and 23 and *Re Air Canada* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Comm. List]) at para. 9 in support of their submission that the Court must consider whether such an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally.

[57] In *Playdium*, a CCAA restructuring in which no viable plan had been arrived at, Spence J. found that the Court could approve the transfer of substantially all of the assets of the CCAA debtor to a new corporation in satisfaction of the claims of the primary secured creditors. Against the objection of a party that had the right under certain critical contracts to withhold consent to such a transfer, the Court found that it had the jurisdiction to approve such a transfer of assets over the objection of creditors or other affected parties, citing *Re Lehendorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Comm. List]) and *Re T. Eaton Co.* (1999), 14 C.B.R. (4th) 289 (Ont. S.C.J. [Comm. List]). Spence J. found at para. 23 that for such an order to be appropriate, it must be in keeping with the purpose and spirit of the regime created by the CCAA. In determining whether to approve the transfer of assets, he considered the factors enumerated in *Red Cross*.

[58] Whether the transfer constituted a compromise of creditors' rights was not in issue in *Playdium* and the comment was made that the transferees were the only creditors with an economic interest in the CCAA debtor. The case, however, is authority for the proposition that the powers of a supervisory court under the CCAA extend beyond the mere maintenance of the *status quo*, and may be exercised where necessary to achieve the objectives of the statute.

[59] In *Air Canada*, Farley J., in the course of the restructuring, was asked to approve Global Restructuring Agreements ("GRAs"). He cited *Red Cross* as setting out the appropriate guidelines for determining when an agreement should be approved during a CCAA restructuring prior to a plan of arrangement. He commented at para. 9 that:

... I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally: see *Northland Properties Ltd.* . . . In *Sammi Atlas Inc.*, *Re* (1998), 3 C.B.R. (4th) 171

(Ont. Gen. Div. [Commercial List]), I observed at p. 173 that in considering what is fair and reasonable treatment, one must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to the confiscation of rights. I think that philosophy should be applicable to the circumstances here involving the various stakeholders. As I noted immediately above in *Sammi Atlas Inc.*, equitable treatment is not necessarily equal treatment.

[60] The GRA between Air Canada and a creditor, GECC, provided, among other things, for the restructuring of various leasing obligations and provided Air Canada with commitments for financing in return for interim payments on current aircraft rent and specific consideration in a restructured Air Canada. The Monitor noted that the financial benefits provided to Air Canada under the GRA outweighed the costs to Air Canada's estate arising from cross-collateralization benefits provided to GECC under the CCAA Credit Facility and Interfacility Collateralization Agreement. The Monitor therefore recommended approval of the GRA.

[61] Another creditor complained at the approval hearing that other creditors were not being given treatment equal to that given to GECC. It appears that part of that unequal treatment was obtained by GECC as part of an earlier DIP financing that was not at issue before Farley J. at the time, but the Court engaged in an analysis of the benefits and costs to Air Canada of the GRA on the basis described above. It is noteworthy that Farley J. considered the suggestion of the objecting creditor that, if the GRA was not approved, GECC would not "abandon the field", but would negotiate terms with Air Canada that the objecting creditor felt would be more appropriate. The Court observed that the delay and uncertainty inherent in such an approach likely would be devastating to Air Canada.

[62] This decision illustrates, in addition to the appropriate test to be applied to a settlement agreement, that such agreements almost inevitably will have the effect of changing the financial landscape of the CCAA debtor to some extent. This is so whether the settlement involves the resolution of a simple claim by a single debtor or the kind of complicated claim illustrated in a complex restructuring such as Air Canada (or Calpine). Settling with one or two claimants will invariably have an effect on the size of the estate available for other claimants. The test of whether such an adjustment results in fair and reasonable treatment requires the Court to look to the benefits of the settlement to the creditors as a whole, to consider the prejudice, if any, to the objecting creditors specifically and to ensure that rights are not unilaterally terminated or unjustly confiscated without the agreement or approval of the affected creditor.

[63] I am satisfied that no rights are being confiscated under the GSA. Some claims are eliminated, but only with the full consent of the parties directly involved in those specific claims. The existing claims of the ULC2 Trustee are replaced with redesignated claims. However, the financial effect of the redesignated claims is the same, the ULC2 Trustee's right to assert the full amount of its claims remains and the CCAA Debtors and U.S. Debtors have agreed to hold funds in escrow sufficient to satisfy the entirety of those claims, once settled or judicially determined.

[64] The fact that this is a cross-border insolvency does not change the essential nature of the test which a settlement must meet, but consideration of the implications of the cross-border aspects of the situation is necessary and appropriate when weighing the benefits of the settlement for the debtors and their stakeholders generally. It cannot be ignored that the cross-border aspects of the insolvency of this inter-related corporate group have created daunting issues which have stymied progress on both sides of the border for many months. The GSA resolves most of those issues in a reasonably equitable and rational manner, provides a mechanism by which a number of the remaining issues may be resolved in the court of one jurisdiction or the other, and, by reason of the release for sale of the CCRC ULC1 Notes and the fortuity of the market, provides the likelihood of greatly enhanced recoveries and the expectation, supported by the Monitor's careful analysis, that an overwhelming majority of the Canadian stakeholders will be paid in full, either from the Canadian estate or through the U.S. Debtor guarantee process.

[65] In *Red Cross*, the Red Cross, under the Court's supervision in CCAA proceedings, applied to approve the sale of its blood supply assets and operations to two new agencies. One of the groups of blood transfusion claimants objected and called for a meeting of creditors to consider a counterproposal.

[66] Blair J. commented that the assets sought to be transferred were the source of the main value of the Red Cross's assets which might be available to satisfy the claims of creditors. He noted that the pool of funds resulting from the sale would not be sufficient to satisfy all claims, but that the Red Cross and the government were of the opinion that the transfer represented the best hope of maximizing distributions to the claimants. The Court characterized the central question on the motion as being whether the proposed purchase price for the assets was fair and reasonable in the circumstances and as close to maximum as reasonably likely, commenting at para. 16 that "(w)hat is important is that the value of that recovery pool is as high as possible."

[67] The objecting claimants in *Red Cross* asked the Court to order a vote on a proposed plan of arrangement rather than approving the sale. Those supporting the plan argued that approval of the sale transaction in advance of a creditors' vote on a plan of arrangement would deprive the creditors of their statutory right to put forward a plan and vote upon it.

[68] Blair J. declined to order a vote on the proposed plan, exercising his jurisdiction under ss. 4 and 5 of the CCAA to refuse to order a vote because of his finding that the proposed plan was unworkable and unrealistic in the circumstances.

[69] He then proceeded to consider whether the Court had jurisdiction to make an order approving the sale of substantial assets of a debtor company before a plan has been placed before the creditors for approval.

[70] Some of the objecting claimants submitted that the authority under s. 11 of the CCAA was narrow and would not permit such a sale. Others suggested that the sale should be permitted

to proceed, but the transaction should be part of the plan of arrangement eventually put forth by the Red Cross, with the question of whether it was appropriate and supportable determined in that context by way of vote. The latter argument is similar in effect to that made by the Opposing Creditors in this case.

[71] Blair J. rejected these submissions, finding that, realistically, the sale could not go forward on a conditional basis. He found that he had jurisdiction to make the order sought, noting at para. 43 that the source of his authority was found in the powers allocated to the Court to impose terms and conditions on the granting of a stay under s. 11 of the CCAA and may also be “grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to ‘fill in the gaps in legislation so as to give effect to the objects of the CCAA’.”

[72] At para. 45, Blair J. made the following comments, which resonate in this application:

It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan is formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton’s restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J said in *Dylex Ltd.* supra (p. 111), “the history of CCAA law has been an evolution of judicial interpretation”. 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 made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise*

deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted) [Emphasis in *Red Cross*.]

[73] Blair J. then stated that he was satisfied that the Court not only had jurisdiction to make the order sought, but should do so, noting the benefits of the sale and concluding at para. 46 that to forego the favourable purchase price “would in the circumstances be folly”.

[74] While there are clear differences between the *Red Cross* sale transaction and the GSA in this case, what the *Red Cross* transaction did was quantify with finality the pool of funds available for distribution to creditors. The GSA does not go that far but, in its adjustments and allocations of inter-corporate debt and settlement of outstanding inter-corporate claims, it has implications for the value of the Canadian estate on an overall basis and implications for the funds available to creditors on an entity-by-entity basis. As recognized in *Red Cross*, *Air Canada* and *Playdium*, transactions that occur during the process of a restructuring and before a plan is formally tendered and voted upon often do affect the size of the estate of the debtor available for distribution.

[75] That is why settlements and major transactions require Court approval and a consideration of whether they are fair, reasonable and beneficial to creditors as a whole. It is clear from the case law that Court approval of settlements and major transactions can and often is given over the objections of one or more parties. The Court’s ability to do this is a recognition of its authority to act in the greater good consistent with the purpose and spirit and within the confines of the legislation.

[76] In this case, as in *Red Cross*, the Opposing Creditors have suggested that approval of the GSA sets a dangerous precedent. The precedential implications of this approval must be viewed in the context of the unique circumstances that have presented a situation in which all valid claims of Canadian creditors likely will be paid in full. This outcome, particularly with respect to a cross-border insolvency of exceptional complexity, is unlikely to be matched in other insolvencies, and therefore, a decision to approve this settlement agreement will not open any floodgates.

[77] The issue of the jurisdiction of supervising judges in CCAA proceedings to make orders that do not merely preserve the *status quo* was considered by the Ontario Court of Appeal in *Re Stelco Inc.* (2005), 78 O.R. (3d) 254 at para. 18. This was an appeal of an order made by Farley J. approving agreements made by the debtor with two of its stakeholders and a finance provider. One of the agreements provided for a break fee if the plan of arrangement proposed by Stelco failed to be approved by the creditors. The Court noted at para. 20 that the break fee could deplete Stelco’s assets. However, Rosenberg, J.A., for the Court, also noted at para. 3 that the Stelco CCAA process had been going on for 20 months, longer than anyone had expected, and that the supervising judge had been managing the process throughout. He then reviewed some of

the many obstacles to a successful restructuring and found that the agreements resolved at least a few of the paramount problems.

[78] At para. 16, the Court stated that the objecting creditors argued, as they have in this case, that the orders sought would have the effect of substituting the Court's judgment for that of the creditors who have the right under s. 6 of the CCAA to approve a plan. Nevertheless, the Court of Appeal held that Farley J. had the jurisdiction to approve the agreements under s. 11 of the CCAA, which provides a broad jurisdiction to impose terms and conditions on the granting of a stay. The Court commented as follows at paras. 18-9:

In my view, s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the *status quo*. The point of the CCAA process is not simply to preserve the *status quo* but to facilitate restructuring so that the company can successfully emerge from the process. ...

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

[79] The CCAA Debtors in this case were faced with challenges similar to those faced by Stelco in its restructuring. This CCAA proceeding is in its nineteenth month. As set out earlier, the process had encountered considerable hurdles relating to the nature of the ULC1 noteholder claims, the inter-corporate debt claims and the BDCs. The same creditors who object to this application were, in previous applications, clamouring for the resolution of the ULC1 noteholder issue and for the sale of the CCRC ULC1 Notes. The GSA resolves these issues and allows the process to move forward with a view to dealing with the remainder of the issues in an orderly and efficient way and with the expectation that this insolvency can be concluded with the determination and payment of virtually all claims by year-end.

Conclusion

[80] Viewed against the test of whether the GSA is fair, reasonable and beneficial to creditors as a whole, the GSA is a remarkable step forward in resolving this CCAA filing. It eliminates approximately \$7.5 billion in claims against the CCAA Debtors. It resolves the major issues between the CCAA Debtors and the U.S. Debtors that had stalled meaningful progress in asset realization and claims resolution. Most significantly, it unlocks the Canadian proceeding and provides the mechanism for the resolution by adjudication or settlement of the remaining issues and significant creditor claims and the clarification of priorities. The Monitor has concluded through careful and thorough analysis that the likely outcome of the implementation of the GSA

is payment in full of all Canadian creditors. As the Ad Hoc Committee concedes, the GSA removes the issues that the members of the Committee have recognized for many months as the major impediments to progress. The sale of the CCRC ULC1 Notes is a necessary precondition to resolution of this matter but, contrary to the Ad Hoc Committee's submissions, that sale cannot occur otherwise than in the context of a settlement with those parties whose claims directly affect the Notes themselves. I am satisfied that the GSA is a reasonable, and indeed necessary, path out of the deadlock.

[81] I am also persuaded that the GSA provides clear benefits to the Canadian creditors of the CCAA Debtors and that, on an individual basis, no creditor is worse off as a result of the GSA considered as a whole. While it does not guarantee full payment of claims, the GSA substantially reduces the risk that this goal will not be achieved. Crucially, the GSA is supported and recommended unequivocally by the Monitor, who was involved in the negotiations and who has analysed its terms thoroughly. I am mindful that the GSA is not without risk to the Fund. However, that some risk falls upon the Fund does not make the GSA unfair. As the Calpine Applicants point out, particularly in the insolvency context, equity is not always equality. Given the Monitor's assessment that the risk of less than full payment to the CESCA creditors is relatively remote, I am satisfied that such risk does not obviate the fairness of the GSA.

[82] The settlement of issues represented by the GSA is without precedent in its breadth and scope. That is perhaps appropriate given the enormous complexity and the highly intertwined nature of the issues in this proceeding. The cross-border nature of many of the issues adds to the delicacy of the matter. Given that complexity, it behooves all parties and this Court to proceed cautiously and with careful consideration. Nevertheless, we must proceed toward the ultimate goal of achieving resolution of the issues. Without that resolution, the Canadian creditors face protracted litigation in both jurisdictions, uncertain outcomes and continued frustration in unravelling the Gordian knot of intercorporate and interjurisdictional complexities that have plagued these proceedings on both sides of the border. In my view, the GSA represents enormous progress, and I approve it.

Heard on the 24th day of July, 2007.

Dated at the City of Calgary, Alberta this 31st day of July, 2007.

B.E. Romaine
J.C.Q.B.A.

Major Canadian Appearances:

Larry B. Robinson, Q.C. and Sean F. Collins of McCarthy Tetrault LLP

Jay A. Carfagnini, Fred Myers, Brian Empey and Joseph Pasquariello of Goodmans LLP
for the CCAA Debtors

Patrick McCarthy, Q.C. and Josef A. Krueger of Borden Ladner Gervais LLP
for the Monitor

Robert I. Thornton, John L. Finnigan and Rachelle F. Moncur of ThorntonGroutFinnigan LLP
for the Ad Hoc Committee

Sean F. Dunphy and Elizabeth Pillon of Stikeman Elliott LLP
for the ULC2 Trustee

Howard A. Gorman of Macleod Dixon LLP
for the ULC1 Noteholders Committee

Peter H. Griffin and Peter J. Osborne of Lenczner Slaght Royce Smith Griffin LLP
for the U.S. Debtors

Peter T. Linder, Q.C. and Emi R. Bossio of Peacock Linder & Halt LLP
for the Fund

Ken Lenz of Bennett Jones LLP
for the HSBC Bank USA, N.A., as ULC1 Indenture Trustee

Jay A. Swartz of Davies Ward Phillips & Vineberg LLP
for Lehman Brothers

Rinus De Waal of Fasken Martineau DuMoulin LLP
for the Unsecured Creditors' Committee

Neil Rabinovitch of Fraser Milner Casgrain LLP
for the Unofficial Committee of 2nd Lien Debtholders

B. A. R. Smith, Q.C. of Fraser Milner Casgrain LLP
for Alliance Pipelines

Douglas I. McLean
for TransCanada Pipelines Limited

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TAB 24

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: DECEMBER 1, 2009

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.

And

ABITIBI-CONSOLIDATED INC.

And

BOWATER CANADIAN HOLDINGS INC.

And

The other Petitioners listed on Schedules "A", "B" and "C"

Debtors

And

ERNST & YOUNG INC.

Monitor

**JUDGMENT
ON MOTION FOR THE ISSUANCE
OF AN ORDER AUTHORIZING PETITIONERS
TO IMPLEMENT CERTAIN RESTRUCTURING STEPS (#337)**

THE MOTION AT ISSUE

[1] In the context of the restructuring process undertaken by the Petitioners under the protection of the CCAA¹, Abitibi-Consolidated Inc. ("**ACI**") and Abitibi-Consolidated

¹ *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "**CCAA**").

Company of Canada ("**ACCC**") present a Note Restructuring Motion² whereby they seek authorization:

- a) to implement a series of intercompany transactions (the "**Repayment Steps**") involving ACI, ACCC, AbitibiBowater Inc. ("**ABH**"), AbitibiBowater U.S. Holding LLC ("**ABH LLC**"), AbitibiBowater Canada Inc. ("**ExchangeCo**") and three newly-created limited liability companies ("**LLC Holdco**", "**LLC 1**" and "**LLC 2**", respectively) in order to repay a promissory note issued by ABH LLC to ACCC on April 1, 2008 (the "**ABH LLC Note**") and, ultimately, issue a new promissory note (the "**LLC 2 Note**") with terms and conditions substantially identical to that of the ABH LLC Note;
- b) to execute in that regard a support agreement (the "**Support Agreement**") among LLC Holdco, ABH LLC, LLC 1 and ACCC; and
- c) to make as a result amendments to existing pre-filing financing arrangements (the "**Pre-filing Financing Amendments**").

[2] The Repayment Steps involve the participation of ABH, ABH LLC, LLC Holdco, LLC 1 and LLC 2, all debtors in the U.S. Chapter 11 proceedings. That being so, the completion of these steps requires the authorization of the U.S. Bankruptcy Court for the District of Delaware as well.

[3] Accordingly, on November 4, 2009, a corresponding *Debtors' Motion for an order pursuant to sections 105 (a), 363 (b) and 364 of the Bankruptcy Code authorizing the debtors to implement certain tax repayment transactions* was served and filed in the U.S. Chapter 11 proceedings. It was heard and granted on November 24, 2009.

[4] Albeit not contested by any of the Petitioners' stakeholders, the Note Restructuring Motion raises issues that remain unusual and uncommon. Hence, the necessity for this Court to provide brief reasons in support of this Order.

[5] The following background is relevant for a proper understanding of the issues.

THE RELEVANT BACKGROUND

[6] On April 1, 2008, namely at the time of the merger of ACI and Bowater Inc. ("**BI**"), ABH LLC issued the ABH LLC Note whereby it promised to pay to ACCC the sum of US \$201,614,222.50, together with any principal increase and all accrued and unpaid interest³.

² *Motion for the Issuance of an Order Authorizing Petitioners Abitibi-Consolidated Inc. and Abitibi-Consolidated Company of Canada to Implement Certain Restructuring Steps* dated November 17, 2009 (the "**Note Restructuring Motion**").

³ Exhibit R-1.

[7] On April 17, 2009, when the Court issued the Initial Order granting the protection of the CCAA to the Petitioners, an amount of some US \$250 million was then outstanding under the ABH LLC Note.

[8] Pursuant to Canadian tax laws, more particularly Subsection 15(2) of the *ITA*⁴, a non-resident person (such as ABH LLC), who is a shareholder of a particular corporation or connected with a shareholder of a particular corporation (such as ACCC), may, in a taxation year, receive a loan from or become indebted to the particular corporation without triggering adverse Canadian tax consequences if the loan or the indebtedness is repaid within one year after the end of the taxation year of the lender or creditor in which the loan was made or the indebtedness arose.

[9] If the loan or the indebtedness is not repaid within this grace period, it is then re-characterized as a dividend as of the date of incurrence.

[10] In such a situation, the dividend payer (ACCC, the Canadian corporation) must first withhold, as withholding agent for the non-resident person (ABH LLC, the U.S. corporation), a withholding tax of 25%. Second, it must remit that amount to the Canadian tax authorities on or before the 15th day of the 13th month following the end of the taxation year in which the indebtedness arose.

[11] The taxation year of ACCC corresponds to the calendar year. Therefore, the indebtedness represented by the ABH LLC Note must be repaid on or before December 31, 2009, failing which this withholding tax liability will be triggered.

[12] However, ABH LLC has no operations, no assets other than its equity investment in the DCorp Group and receivables from other companies in the CCAA and the U.S. Chapter 11 proceedings, and no known liabilities other than the ABH LLC Note and other intercompany payables.

[13] In other words, ABH LLC does not have sufficient funds to repay to ACCC the amounts outstanding under the ABH LLC Note prior to December 31, 2009.

[14] If the ABH LLC Note is not repaid by the end of this calendar year, a withholding tax of approximately US \$55.25 million, being 25% of the outstanding principal amount of the ABH LLC Note, would have to be remitted by ACCC to the Canadian tax authorities by January 15, 2010.

[15] If ACCC were not to make such remittance, even if the withholding tax would be pre-filing liability as it relates to the 2008 taxation year, the Canada Revenue Agency ("CRA") would have the right to collect the amount by way of set-off against GST refunds that ACCC would otherwise receive.

⁴ *Income Tax Act*, 1985, c. 1 (5th Supp.), (the "*ITA*").

[16] In that regard, ACCC receives approximately \$3.5 million to \$7.0 million per month on account of post-filing GST refunds. Of course, these amounts are factored into account in assessing its monthly liquidity levels.

[17] As a result, given ACCC's current financial situation, this liability in the amount of US \$55.25 million as of January 15, 2010 would adversely and immediately impact its liquidity position and, therefore, the Petitioners' ability to reorganize their affairs in Canada and in the United States.

THE TAX RESTRUCTURING TRANSACTION

[18] In order to avoid the potential consequences associated with a failure to repay the ABH LLC Note before year end, the Petitioners want to implement a tax restructuring transaction that would ultimately resolve the tax issues pertaining to the ABH LLC Note, while replacing ACCC's economic interests therein with an interest of equivalent value.

[19] In this respect, the transactions contemplated in the Note Restructuring Motion are intended to result in a deemed repayment of the ABH LLC Note through the merger of the issuer and holder thereof. The tax restructuring involves the implementation of the Repayment Steps, the execution of the Support Agreement and the signing of Pre-filing Financing Amendments.

a) The Repayment Steps

[20] To begin with, the Petitioners want to implement the Repayment Steps. These steps will ultimately permit the repayment of the ABH LLC Note without altering ACCC's rights under it.

[21] The Repayment Steps are reflected graphically in the step plan (the "**Step Plan**")⁵. They are explained in details in the Note Restructuring Motion (paragraph 16) and in the Monitor's Twenty-Second Report of November 19, 2009 (paragraphs 27 to 30).

[22] Suffice it to note here that the Repayment Steps consist in the eight (8) following steps:

- a) Creation of LLC Holdco, LLC 1 and LLC 2;
- b) Transfer of the ABH LLC Note;
- c) ACCC reduction of capital. To that end, ACCC will reduce the share capital maintained in respect of its class D preferred shares by US \$250 million and distribute to ACI, subject to the security interest of the ACCC Term Lenders, the LLC 2 Preferred Units and other units of LLC 2 issued upon its creation;

⁵ Exhibit R-2.

- d) ACI reduction of capital. To that end, ACI will in turn reduce the stated capital maintained in respect of its common shares by US \$305 million and distribute US \$250 million, being 82 % of US \$305 million, to ABH through the transfer, subject to the security interest of the ACCC Term Lenders, of the LLC 2 Preferred Units and other units of LLC 2 issued upon its creation. Concurrently, ExchangeCo will renounce to its share of the distribution, being US \$55 million (18 % of US \$305 million);
- e) Transfer of LLC 2 Preferred Units;
- f) Transfer of LLC 1 Units;
- g) Conversion of LLC 2 Preferred Units into the LLC 2 Note; and
- h) Merger of LLC 2 and ABH LLC.

b) The Support Agreement

[23] Second, in order to protect ACCC's interest in the residual value of the LLC 2 Note, LLC Holdco, ABH LLC, LLC 1, and ACCC intend, as part of the Repayment Steps, to execute the Support Agreement⁶.

[24] Pursuant to that Support Agreement, LLC Holdco and LLC 1 will, among other things and unless otherwise provided in the CCAA Plan and the U.S. Bankruptcy Plan, be required to transfer to ACCC the LLC 2 Note, the LLC 1 Units or assets of equivalent value in case of certain triggering events.

[25] The Support Agreement will also include a covenant by each of ABH LLC and LLC 1 not to make any payment or otherwise reduce any amount owing under the LLC2 Note without an order from the Court and the U.S. Bankruptcy Court.

c) the Pre-Filing Financing Amendments

[26] Third and last, following the completion of the Repayments Steps, it is contemplated by the Petitioners that LLC 1 will become a guarantor under:

- the Term Loan Facility;
- the Senior Notes; and
- the US\$293M 15.5% Exchange Notes due July 15, 2010 (the "**Exchange Notes**").

[27] In addition to these new guarantees (collectively, the "**New Guarantees**"), LLC 1 will grant a first priority security interest in all of its assets and pledge the LLC 2 Note, while LLC Holdco will grant a first priority security interest in the LLC 1 Units, in each case in favour of the ACCC Term Lenders (the "**New Security**").

⁶ Exhibit R-3.

[28] Consequently, amendments to the Term Loan Facility, the Senior Notes and the Exchange Notes will be required in order to take into account the New Guarantees and the New Security.

ANALYSIS AND DISCUSSION

[29] In light of this background, the Court considers that it is appropriate to grant the authorization sought for the implementation of this tax restructuring transaction.

[30] The economic reasons for the tax restructuring at issue are well articulated. The justifications for the restructuring from a tax standpoint appear reasonable and legitimate. The legality of the various corporate steps contemplated is properly supported.

[31] The Court is satisfied that a requirement to pay the withholding tax and the potential ability of CRA to effect collection by setting off post-filing GST refunds otherwise payable to ACCC would adversely affect ACCC's liquidity and negatively impact its creditors and other stakeholders.

[32] A potential monthly reduction of between \$3.5 to \$7.0 million in liquidity is certainly quite serious in the actual context of this CCAA process. Any legitimate steps to prevent this from happening would be welcomed by most.

[33] As a result of the merger between LLC 2 and ABH LLC, the ABH LLC Note will be deemed, for the purposes of the *ITA*, to have been settled by a payment made by ABH LLC to LLC 2 equal to LLC 2's cost amount of the ABH LLC Note, being equal to the principal amount outstanding under the ABH LLC Note.

[34] From that perspective, it appears that the Repayment Steps and the Support Agreement permit the satisfaction, for tax purposes, of the ABH LLC Note in a manner that could prevent the payment of the withholding tax by ACCC, while replacing the Petitioners' interest in the ABH LLC Note with a residual interest in the LLC 2 Note through the Support Agreement.

[35] As such, the Support Agreement preserves the economic benefit currently attributable to the ABH LLC Note for the good of ACCC and its stakeholders.

[36] As a matter of fact, none of the Petitioners' stakeholders oppose the Note Restructuring Motion. In addition, the Court notes that the Monitor is of the view that the Repayment Steps and the Support Agreement are reasonable in the circumstances⁷.

[37] On the other hand, even if the Repayment Steps consist, amongst others, in a reduction of capital for ACI and ACCC, the Court is satisfied that this remains acceptable under the circumstances.

⁷ Monitor's Twenty-Second Report of November 19, 2009.

[38] It is true that ACI and ACCC are currently, and will at the time of these reductions continue to be, insolvent. Both are Petitioners in the CCAA proceedings.

[39] As ACI is a federal corporation incorporated under the CBCA⁸ and ACCC a provincial company incorporated under Part 1A of the QCA⁹, this state of insolvency may, at first sight, create a problem in terms of capital reduction.

[40] However, the Court accepts Counsel's arguments that this situation can be properly dealt with under the terms of both acts.

[41] The CBCA and the QCA contain express provisions (Sections 38(1) CBCA and 123.62 QCA) authorizing a corporation or a company to reduce the amount of its stated capital ("issued share capital" pursuant to the QCA), including for the distribution of an amount to its shareholders:

➤ Section 38(1) CBCA :

"Subject to subsection (3), a corporation may by special resolution reduce its stated capital for any purpose including, without limiting the generality of the foregoing, for the purpose of (a) extinguishing or reducing a liability in respect of an amount unpaid on any share; (b) distributing to the holder of an issued share of any class or series of shares an amount not exceeding the stated capital of the class or series; and (c) declaring its stated capital to be reduced by an amount that is not represented by realizable assets."

➤ Section 123.62 QCA:

"A company may also reduce the amount of its issued share capital, in particular to limit or remove the shareholder's obligation to pay for the shares issued, or to reimburse any portion of the share capital exceeding its needs to the shareholders, if a by-law to that effect is adopted by the company."

[42] In the case of ACI, an exception to the authority of a CBCA corporation to reduce its stated capital is set out in Section 38(3):

➤ Section 38(3) CBCA:

"A corporation shall not reduce its stated capital for any purpose [...] if there are reasonable grounds for believing that (a) the corporation is, or would after the reduction be, unable to pay its liabilities as they become due, or (b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities" [Emphasis added].

⁸ Canada Business Corporation Act, R.S.C. c. C-44, (the "**CBCA**").

⁹ Companies Act, R.S.Q. c. C-38 (Québec), (the "**QCA**").

[43] This notwithstanding, Subsections 191(1)(c) and 191(2) *CBCA* still permit the Court to authorize a reorganization effecting amendments to the articles of the corporation, including amendments providing for a reduction of capital under Subsection 173(1)(f), without reference to the limits in Subsection 38(3):

Definition of reorganization

191. (1) In this section, “reorganization” means a court order made under
(...)

(c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

Power of the Court

(2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might lawfully be made by an amendment under section 173.

Amendment of articles

173. (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to

(...)

(f) reduce or increase its stated capital, if its stated capital is set out in the articles;

[44] Insolvent corporations pursuing a restructuring process under the *CCAA* can use the Section 191 reorganization provisions to amend their articles¹⁰, provided that the statutory requirements are met, the debtors are acting in good faith and the capital restructuring remains fair and reasonable¹¹.

[45] While Section 191 reorganizations are normally carried out in conjunction with a *CCAA* plan of arrangement at the final approval stage, nothing in the *CBCA* prevents such a reorganization to take place at an earlier stage, like here where the tax restructuring is required immediately before year end.

[46] Petitioners' Counsel suggests that Subsection 38(3) and Section 191 are, in fact, complementary pieces of a comprehensive legislative scheme. Pursuant to both, shareholders are given the power to effect capital reductions except where insolvency either exists or would ensue. At that point, Parliament recognizes that other interests – those of creditors – come into play.

¹⁰ By virtue of Section 20 (now 42) of the applicable *CCAA* and Subsection 191(1)(c) of the *CBCA*.

¹¹ See, in this respect, *Cable Satisfaction International Inc. vs Richter & Associates Inc.*, [2004] Q.J. No. 5461 (Que. S.C.), AZ-50226599, and *Doman Industries Ltd. (Re)*, [2003] B.C.J. No. 561 (B.C.S.C.).

[47] Under Section 191, where creditor rights have been recognized and placed under court supervision in formal proceedings such as those under the CCAA, the Court is granted the power to authorize the steps that the shareholders alone are no longer enabled to do.

[48] The transaction brought for authorization before the Court, and in particular the reorganization provisions sought to be approved pursuant to Section 191 *CBCA*, are necessary in order to prevent the creation of an unnecessary new claim (the withholding tax claim) and the prospect of off-sets being asserted in the future, both of which would challenge the Debtors' liquidity in a manner not currently provided for in their cash flows.

[49] While the transaction, viewed as a whole, is neutral to the estate of ACI since its patrimony remains effectively unchanged before and after the intended transaction on a net basis, the potential liability, if no timely repayment were to occur, would be material.

[50] The benefit to ACI's creditors thus seems obvious. Without surprise, none of the creditors raises issue with the tax restructuring that, in the end, serves their interests.

[51] As for the CRA, the scheme of the applicable tax provisions is to provide a period of time during which certain types of loans must be repaid. As such, the tax authorities are deprived of no tax revenue and have no right to the tax revenue provided that the repayment transaction proceeds and occurs on time.

[52] In other words, the CRA is not a creditor with an expectation that is being likely defeated in this instance. Indeed, even though the Attorney-General of Canada Counsel are on the Service List, they raised no opposition to the authorization sought, similarly to what all the other stakeholders did.

[53] All in all, through the ACI's reorganization under Section 191 *CBCA*, the Court is merely asked to assist the Debtor in choosing the option least harmful to its creditors (using a small portion of its tax shelter versus potentially paying significant cash taxes) by exempting ACI from provisions¹² designed to protect its creditors in the first place.

[54] To that end, no creditor disputes that the conclusions sought and granted in this regard to ACI (namely, conclusions [5], [8] and [9] of this Order) are improper, to the contrary.

[55] That said, as regards ACCC now, the situation is slightly different.

[56] As a QCA company, ACCC is subject to a regime that, while different in form from the combination of Sections 38, 173 and 191 *CBCA*, nevertheless pursues the same general policy goals.

[57] The exception to the authority of a QCA company to reduce its issued share capital is set out in Section 123.63, which reads as follows:

¹² Such as Subsection 38(4) *CBCA* in terms of recourses of the creditors.

"A company may in no case reduce the amount of its issued share capital if there is reasonable ground to believe that, <u>as a consequence</u>, (1) it could not discharge its liabilities when due, or (2) the book value of its assets would, after the reduction, be less than the sum of its liabilities and its issued and paid-up share capital account" [Emphasis added.].	"Une compagnie ne peut toutefois réduire le montant de son capital-actions émis s'il y a des motifs raisonnables de croire <u>qu'en raison de ce fait</u>: (1) elle ne pourrait acquitter son passif à échéance; ou (2) la valeur comptable de son actif serait inférieure au total de son passif et de son compte de capital-actions émis et payé après cette réduction." [Emphasis added.].
--	--

[58] This Section does not apply in the present circumstances.

[59] As noted above, ACCC is currently, and will at the time of the ACCC reduction of capital continue to be, insolvent. As such, it is not "*as a consequence/en raison de ce fait*" [i.e. the ACCC reduction of capital], that ACCC will not meet the financial tests provided for in Section 123.63.

[60] Section 123.63 is designed to prohibit a reduction in share capital that causes the tests not to be met, as opposed to a reduction in capital that occurs at a time where the tests are not met at the outset. The transaction is not, in this case, "*la goutte qui fait déborder la vase*"; the company is already insolvent and has placed itself under the protection and supervision of the Court.

[61] The QCA restricts its solvency limitation to transactions that cause insolvency. Where insolvency already exists, there is no need for the QCA to stipulate how to protect creditor interests. The Court exercising insolvency jurisdiction (in this case, under the CCAA) can consider all the facts and circumstances and make an appropriate order taking creditor interests into account.

[62] The insolvency test in Section 123.63 QCA is materially different from that found in Section 38(3) CBCA. The latter applies where the corporation is or would be rendered insolvent. This bar is more stringent than Section 123.63, which applies a causation test.

[63] That said however, contrary to the CBCA, the QCA does not have a built in mitigation feature (a court order under Section 191) to ensure creditor interests are not damaged in the interest of better protecting them.

[64] As a result, conclusions [5], [8] and [9] of this Order will be limited to ACI only since ACCC is not a CBCA corporation to whom Section 191 applies. No provision of the QCA as it stands now allows the Court to grant these kinds of orders for the benefit of ACCC.

[65] When a capital reduction occurs, the QCA provides for mechanisms in terms of ratification and calling of meetings (Section 123.65). The potential creditors' recourses,

if any are applicable, are dealt with as well in Section 123.64. No provision of the QCA allows the Court to set these sections aside.

[66] Petitioners' Counsel recognizes this reality and concedes that from that standpoint, the conclusions of the Order must differ between ACI and ACCC.

[67] Lastly, two other conclusions sought require comments.

[68] The initial conclusion [10] of the Note Restructuring Motion is not necessary as redundant with the initial conclusion [3]. The reserve of the initial conclusion [12] is not needed either as useless. Neither one will be included in the Court's Order.

FOR THESE REASONS, THE COURT:

[1] **AUTHORIZES** the Petitioners to implement and complete the transactions and steps (collectively, the "**Repayment Steps**") contemplated in the Step Plan (the "**Step Plan**") communicated as **Exhibit R-2** in support of the Motion in order to permit the repayment of the promissory note (the "**ABH LLC Note**") issued by AbitibiBowater U.S. Holding LLC ("**ABH LLC**") to Abitibi-Consolidated Company of Canada ("**ACCC**") on April 1, 2008;

[2] **AUTHORIZES** ACCC, in completing the Repayment Steps, to execute the support agreement ("**Support Agreement**"), a draft of which is communicated as **Exhibit R-3** to the Motion (upon such non-material amended terms and conditions as may be approved by the Monitor) and further **DECLARES** that, upon execution of the Support Agreement, no amendment thereto shall become effective without prior leave of the Court;

[3] **AUTHORIZES** ACCC, in completing the Repayment Steps, to enter into non-material amendments to the Term Loan Facility, the Senior Notes and the \$293M Exchange Notes due July 15, 2010 (collectively, the "**Pre-filing Financing Agreements**") pursuant to which (a) LLC 1 (as defined in the Motion) will become a guarantor under the Pre-Filing Financing Agreements, and (b) LLC 1 will grant a first priority security interest in all of its assets and pledge that certain promissory note created as part of the Repayment Steps (being the LLC 2 Note), and LLC Holdco will grant a first priority security interest in the units held in LLC 1, in each case to the ACCC's Term Lenders (collectively, the "**Pre-filing Financing Amendments**");

[4] **AUTHORIZES** ACCC, in completing the Repayment Steps contemplated in the Step Plan:

- a) to execute the agreements and to execute and deliver any documents and assurances governing or giving effect to the Repayment Steps as the Petitioners, in their discretion, may deem to be reasonably necessary or advisable to conclude the Repayment Steps, including the execution of such deeds, contracts or documents, as may be contemplated in the Step Plan; and

- b) to take such steps as are, in the opinion of the Petitioners, necessary or incidental to the implementation of the Repayment Steps provided, however, that ABH LLC and LLC 1 shall not make any payment or otherwise reduce any amount owing under the LLC 2 Note (as defined in the Support Agreement) without obtaining a prior order from the Court;

[5] **DECLARES** that this Order shall constitute the only authorization required by Petitioner Abitibi-Consolidated Inc. ("**ACI**") to proceed with the Repayment Steps and that no board of directors, shareholder or regulatory approval shall be required by ACI in connection with the Repayment Steps save and for those contemplated in the Step Plan;

[6] **ORDERS AND DECLARES** that if all the steps of the Repayment Steps are not completed in their entirety and in the order provided in the Step Plan on or before December 31, 2009, each and every completed steps will be automatically deemed null and void *ab initio*, thereby leaving the ABH LLC Note and capital structure of each of the parties to the Repayment Steps unchanged;

[7] **ORDERS AND DECLARES** that the transfers of the ABH LLC Note in the context of the implementation of the Repayment Steps shall be made free and clear of any charges, liens or encumbrance including without limitation, (i) the CCAA charges and any and all other encumbrances, liens, assignments, charges, hypothecs, pledges, security interests of any nature, adverse claims, exceptions, reservations, options, privileges or any contract to create any of the foregoing, or (ii) any liability or obligation of any kind, character or description, whether known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, secured or unsecured, joint or several, solidary or not solidary, due or to become due, vested or unvested, executory, determined, determinable or otherwise and whether or not the same is required to be accrued on any financial statements, the whole save and except for the rights to be granted under and pursuant to the Pre-filing Financing Amendments and the security interest in the ABH LLC Note in favour of the ACCC Term Lenders;

[8] **AUTHORIZES** ACI to file Articles of Reorganization substantially in the form of the draft attached as **Schedule "D"** to this Order;

[9] **ORDERS**, only insofar as ACI is concerned, that notwithstanding:

- a) the proceedings under the CCAA;
- b) any petitions for a receiving order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* ("**BIA**") and any received order issued pursuant to any such petition; or
- c) the provision of any federal or provincial statute;

the Pre-Filing Financing Amendments, the vesting of the ABH LLC Note, the execution of the Repayment Steps pursuant to this Order and the security

interest to be created in favour of the ACCC Term Lenders are to be binding on any trustee in bankruptcy that may be appointed, and shall not be void or voidable nor deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction under the *BIA* or any other applicable federal or provincial legislation, nor shall it give rise to an oppression remedy;

[10] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

[11] **WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C.

Me Sean Dunphy and Me Joseph Reynaud
STIKEMAN, ELLIOTT
Attorneys for the Petitioners

Me Avram Fishman
FLANZ FISHMAN MELAND PAQUIN
Attorneys for the Monitor

Me Robert I. Thornton
THORNTON GROUT FINNIGAN
Attorneys for the Monitor

Me Dominique Gibbens
FASKEN, MARTINEAU, DuMOULIN
Attorneys for Wells Fargo Bank, N.A., Administrative Agent under the Credit and Guarantee Agreement Dated April 1, 2008

Me Marc Duchesne
BORDEN, LADNER, GERVAIS
Attorneys for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders

Me Jean-Yves Simard
LAVERY, DE BILLY
Co-Counsel for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc. and certain of its Affiliates

Date of hearing: November 23, 2009

SCHEDULE "A"
ABITIBI PETITIONERS

1. ABITIBI-CONSOLIDATED INC.
2. ABITIBI-CONSOLIDATED COMPANY OF CANADA
3. 3224112 NOVA SCOTIA LIMITED
4. MARKETING DONOHUE INC.
5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.
11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.
16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
18. SCRAMBLE MINING LTD.
19. 9150-3383 QUÉBEC INC.
20. ABITIBI-CONSOLIDATED (U.K.) INC.

SCHEDULE "B"
BOWATER PETITIONERS

1. BOWATER CANADIAN HOLDINGS INC.
2. BOWATER CANADA FINANCE CORPORATION
3. BOWATER CANADIAN LIMITED
4. 3231378 NOVA SCOTIA COMPANY
5. ABITIBIBOWATER CANADA INC.
6. BOWATER CANADA TREASURY CORPORATION
7. BOWATER CANADIAN FOREST PRODUCTS INC.
8. BOWATER SHELBURNE CORPORATION
9. BOWATER LAHAVE CORPORATION
10. ST-MAURICE RIVER DRIVE COMPANY LIMITED
11. BOWATER TREATED WOOD INC.
12. CANEXEL HARDBOARD INC.
13. 9068-9050 QUÉBEC INC.
14. ALLIANCE FOREST PRODUCTS (2001) INC.
15. BOWATER BELLEDUNE SAWMILL INC.
16. BOWATER MARITIMES INC.
17. BOWATER MITIS INC.
18. BOWATER GUÉRETTE INC.
19. BOWATER COUTURIER INC.

SCHEDULE "C"

18.6 CCAA PETITIONERS

1. ABITIBIBOWATER INC.
2. ABITIBIBOWATER US HOLDING 1 CORP.
3. BOWATER VENTURES INC.
4. BOWATER INCORPORATED
5. BOWATER NUWAY INC.
6. BOWATER NUWAY MID-STATES INC.
7. CATAWBA PROPERTY HOLDINGS LLC
8. BOWATER FINANCE COMPANY INC.
9. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
10. BOWATER AMERICA INC.
11. LAKE SUPERIOR FOREST PRODUCTS INC.
12. BOWATER NEWSPRINT SOUTH LLC
13. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
14. BOWATER FINANCE II, LLC
15. BOWATER ALABAMA LLC
16. COOSA PINES GOLF CLUB HOLDINGS LLC

SCHEDULE "D"

Industry Canada

Industrie Canada

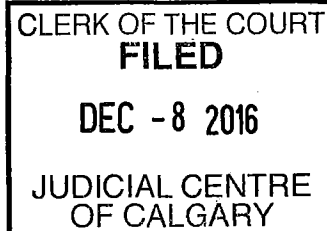
Canada Business
Corporations ActLoi canadienne sur les
sociétés par actions**FORM 14
ARTICLES OF REORGANIZATION
(SECTION 191)****FORMULAIRE 14
CLAUSES DE RÉORGANISATION
(ARTICLE 191)**1 -- Name of Corporation - Dénomination sociale de la société
ABITIBI-CONSOLIDATED INC.2 -- Corporation No. - N° de la société
337578-13 -- In accordance with the order for reorganization, the articles of
incorporation are amended as follows:Conformément à l'ordonnance de réorganisation, les statuts constitutifs
sont modifiés comme suit :

1. The outstanding balance in the stated capital account maintained by the Corporation for the common shares is \$5,574,441,705.
2. The stated capital maintained by the Corporation for its common shares is hereby reduced by an amount of \$250,000,000, such amount to be distributed to the holders of the common shares of the Corporation in accordance with that certain order issued by the Superior Court of Québec (commercial division) on November 23, 2009 in file n° 500-11-036133-094.

Signature	Printed Name - Nom en lettres moulées	4 -- Capacity of - En qualité de	5 -- Tel. No. - N° de tél.
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FOR DEPARTMENTAL USE ONLY - À L'USAGE DU MINISTÈRE SEULEMENT

TAB 25



Clerk's stamp:

COURT FILE NUMBER:

1601-12571

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

I hereby certify this to be a true copy of
the original Order

Dated this 8 day of Dec 16
[Signature]
for Clerk of the Court

IN THE MATTER OF THE COMPANIES'
CREDITORS ARRANGEMENT ACT, RSC 1985, c C-
36, as amended

AND IN THE MATTER OF A PLAN OF
COMPROMISE OR ARRANGEMENT OF
LIGHTSTREAM RESOURCES LTD, 1863359
ALBERTA LTD, LTS RESOURCES PARTNERSHIP,
1863360 ALBERTA LTD AND BAKKEN
RESOURCES PARTNERSHIP

APPLICANTS:

LIGHTSTREAM RESOURCES LTD, 1863359
ALBERTA LTD AND 1863360 ALBERTA LTD

PARTIES IN INTEREST:

LTS RESOURCES PARTNERSHIP AND BAKKEN
RESOURCES PARTNERSHIP

DOCUMENT:

APPROVAL AND VESTING ORDER

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF PARTY
FILING THIS DOCUMENT

BLAKE, CASSELS & GRAYDON LLP
Barristers and Solicitors
3500 Bankers Hall East
855 - 2nd Street SW
Solicitor: Kelly Bourassa / Milly Chow
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milly.chow@blakes.com
File Number: 89691/8

DATE ON WHICH ORDER WAS PRONOUNCED: December 8, 2016

LOCATION OF HEARING:

Calgary Courts Centre, Justice Chambers

NAME OF JUDGE WHO MADE THIS ORDER:

The Honourable Justice S.J. LoVecchio

UPON THE APPLICATION by Lightstream Resources Ltd. ("**LTS**"), 1863359 Alberta Ltd. and 1863360 Alberta Ltd., as applicants (collectively with LTS, the "**Applicants**"), in conjunction with LTS Resources Partnership and Bakken Resources Partnership (collectively, the "**Partnerships**" and together with the Applicants, the "**CCAA Parties**") for, *inter alia*, an Order (i) approving the sale transaction (the "**Transaction**") contemplated by the Asset Purchase Agreement (the "**Purchase Agreement**") dated as of November 29, 2016 by and between the Applicants, LTS Resources Partnership and Bakken Resources Partnership, as sellers (collectively, the "**Sellers**") and 1090247 B.C. Ltd., as buyer (the "**Buyer**"), and attached as Exhibit "C" to the Affidavit of Peter D. Scott, sworn November 29, 2016, filed (the "**Scott Affidavit**"), (ii) vesting in the Buyer all of the Sellers' right, title, interest and estate, whether absolute or contingent, legal or beneficial in and to the Purchased Assets, free and clear of all encumbrances other than the Permitted Encumbrances (as defined below), and (iii) granting related relief;

AND UPON having read the Application, the Scott Affidavit, the Third Report of FTI Consulting Canada Inc., in its capacity as the Court-appointed Monitor of the Applicants (in such capacity, and not in its personal or corporate capacity, the "**Monitor**"), filed, the Confidential Supplement thereto, and the Affidavit of Service of Lindsay Farr, sworn December 6, 2016;

AND UPON hearing counsel for the Applicants, counsel for the administration agent (the "**Agent**") under a third amended and restated credit agreement as between the Applicants and their existing lenders (the "**Existing Lenders**"), as amended from time to time, dated as of May 29, 2015, counsel for the Buyer, counsel for the Monitor, and counsel for certain holders of 8.625% senior unsecured notes due February 1, 2020 pursuant to a note indenture dated January 30, 2012, and counsel for other interested parties present;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. Service of notice of this Application and supporting materials is hereby declared to be good and sufficient, and no other Person is required to have been served with notice of

this Application, and time for service of this Application is abridged to that actually given.

DEFINED TERMS

2. All capitalized terms not defined herein shall have the respective meanings ascribed to them in the Purchase Agreement.

APPROVAL OF TRANSACTION

3. The Purchase Agreement is hereby approved in its entirety. The Transaction is hereby approved and the execution of the Purchase Agreement by the Sellers is hereby authorized, ratified, confirmed and approved, with such minor amendments as the Sellers may deem necessary with the consent of the Monitor. The Sellers are hereby authorized and directed to complete the Transaction subject to the terms of the Purchase Agreement, to perform their obligations under the Purchase Agreement and any ancillary documents related thereto, and to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction or for the conveyance of the Purchased Assets to the Buyer.

VESTING OF THE PURCHASED ASSETS

4. Upon delivery of a Monitor's certificate to the Buyer substantially in the form set out in Schedule "A" hereto (the "**Monitor's Certificate**"), subject only to approval of the transfer of applicable licences, permits, and approvals by the Alberta Energy Regulator or the British Columbia Oil and Gas Commission, as applicable, pursuant to legislation administered by the Alberta Energy Regulator or the British Columbia Oil and Gas Commission, as applicable, and upon the Existing Lenders being repaid in full prior to or concurrently with Closing, all of the Sellers' right, title, interest and estate, whether absolute or contingent, legal or beneficial in and to the Purchased Assets described in the Purchase Agreement shall vest absolutely, exclusively, entirely and forever in the Buyer, free and clear of any and all rights, titles, benefits, priorities, claims (including claims provable in bankruptcy in the event that any of the Sellers should be adjudged bankrupt), liabilities (direct, indirect, absolute or contingent), obligations, interests, prior claims,

security interests (whether contractual, statutory or otherwise), liens, charges, hypothecs, caveats, mortgages, pledges, trusts, deemed trusts (whether contractual, statutory, or otherwise), assignments, judgments, executions, writs of seizure or execution, notices of sale, options, agreements, rights of distress, legal, equitable or contractual setoff, adverse claims, levies, taxes, disputes, debts, charges, options to purchase, rights of first refusal or other pre-emptive rights in favour of third parties, restrictions on transfer of title, or other claims or encumbrances, whether or not they have attached or been perfected, registered, published or filed and whether secured, unsecured or otherwise (collectively, the "**Encumbrances**"), including, without limiting the generality of the foregoing:

- (a) any encumbrances or Charges as created by and/or defined in (i) the Initial Order of the Honourable Mr. Justice A.D. Macleod dated September 26, 2016 (as may be amended, restated or supplemented from time to time, the "**Initial Order**"), and (ii) any other Orders granted in this Action;
- (b) all charges, security interests or claims evidenced by registration, filing or publication pursuant to (i) the *Personal Property Security Act*, RSA 2000, c P-7, (ii) *The Personal Property Security Act, 1993*, RSS 1993, c P-6.2, (iii) the *Personal Property Security Act*, RSBC 1996, c 359, (iv) the *Personal Property Security Act*, CCSM, c P35; (v) the *Personal Property Security Act*, SNWT 1994, c 8, (vi) the *Land Titles Act*, RSA 2000, c L-7 (the "**Land Titles Act (Alberta)**"), (vii) *The Land Titles Act, 2000*, RSS, 2000, c L-5.1 (the "**Land Titles Act (Saskatchewan)**"), (viii) the *Land Title Act*, RSBC 1996, c 250 (the "**Land Title Act (BC)**"), (ix) *The Real Property Act*, CCSM, c R30 (the "**Real Property Act (Manitoba)**"); (x) the *Land Titles Act*, RSNWT (Nu) 1988, c 8 (the "**Land Titles Act (NWT)**"); and (xi) any other personal or real property registration system; and
- (c) those Encumbrances listed in **Schedule "B-1"**, **Schedule "B-2"**, **Schedule "B-3"**, **Schedule "B-4"** and **Schedule "B-5"** hereto,

but in each case, excluding the permitted encumbrances listed in **Schedule "D"** hereto (collectively, the "**Permitted Encumbrances**"), and this Court orders that all of the

Encumbrances affecting or relating to the Purchased Assets, other than the Permitted Encumbrances, are hereby expunged and discharged as against the Purchased Assets.

5. The Sellers, to the extent able and necessary, are each authorized and directed to take all necessary steps within their power and execute all documents to effect any and all discharges relating to the Encumbrances (except for Permitted Encumbrances) and the registrars and all other Persons in control or otherwise supervising such offices of the registration or recording shall forthwith remove and discharge all such registrations.
6. The Buyer shall, by virtue of the completion of the Transaction, have no liability of any kind whatsoever in respect of any Encumbrances against the Sellers, other than the Permitted Encumbrances.
7. The Monitor is to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof to the Buyer.
8. No further authorization or approval or any other action by any authority or regulatory body exercising jurisdiction over the Purchased Assets shall be required for the closing and post-Closing implementation of the Transaction contemplated in the Purchase Agreement.
9. The Buyer shall be entitled to enter into and upon, hold and enjoy the Purchased Assets for its own use and benefit without any interference of or by any Person claiming by or through or against the Sellers.
10. The Sellers and all Persons who claim by, through or under the Sellers in respect of the Purchased Assets, save and except for the Persons entitled to the benefit of the Permitted Encumbrances, shall stand absolutely and forever barred, estopped, and foreclosed from and permanently enjoined from pursuing, asserting, or claiming any and all estate, right, title, interest, royalty, rental, equity of redemption, or Encumbrance in respect of or to the Purchased Assets and, to the extent that any such Persons remain in possession or control of any of the Purchased Assets, or any artifacts or any certificates, instruments or other indicia of title representing or evidencing any right, title, estate or interest in and to the Purchased Assets, they shall forthwith deliver possession thereof to the Buyer.

11. Immediately after the Closing of the Transaction, the holders of the Permitted Encumbrances shall have no claim whatsoever against the Monitor or the Sellers.

12. Notwithstanding:

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "BIA") in respect of the Sellers and any bankruptcy order issued pursuant to any such applications;
- (c) any assignment in bankruptcy made in respect of the Sellers; or
- (d) the provisions of any federal or provincial legislation,

the vesting of the Purchased Assets in and to the Buyer pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Sellers and shall not be void or voidable by creditors of the Sellers, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transactions under the BIA or any other applicable federal or provincial legislation, nor shall it constitute conduct oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

CREDIT BID AND CANCELLATION OF SECOND LIEN NOTES AND RELEASE OF TRUSTEE

13. The Parties are hereby authorized and directed to take such actions as they deem necessary or desirable, and the Majority Noteholders are hereby authorized and directed to cause Buyer and the Trustee, as applicable and necessary (and, with respect to the Trustee, pursuant to the Bid Direction Letter or another letter of direction delivered by the Majority Noteholders to the Trustee and satisfactory to the Trustee in accordance with the Second Lien Note Indenture), to take such other actions, on behalf of the Second Lien Noteholders, as reasonably agreed between the Sellers and Buyer to give effect under Applicable Law or otherwise, to the Second Lien Credit Bid. On the Closing Date, the Second Lien Noteholders shall be deemed to have acknowledged (i) the full repayment

and satisfaction of the principal amount owing under the Second Lien Note Indenture by virtue of the transfer of the Purchased Assets to the Buyer; and (ii) the waiver, settlement and cancellation of all other obligations owing under the Second Lien Note Indenture for purposes of satisfying the Credit Bid Amount in accordance with Section 3.2(a)(iii) of the Purchase Agreement.

14. Immediately upon the delivery of the Monitor's Certificate to the Buyer,
 - (a) all Second Lien Notes and the Second Lien Note Indenture shall be deemed to be automatically cancelled and discharged, and the Trustee shall be fully released and discharged from any and all obligations under the Second Lien Note Indenture and applicable law, provided, however, that the Second Lien Notes and the Second Lien Note Indenture shall continue in effect solely for the purposes of:
 - (i) allowing the Second Lien Noteholders to receive their distribution of common shares from the Buyer;
 - (ii) allowing the Trustee to make the distribution to be made on account of the Second Lien Notes, if necessary;
 - (iii) enforcing the Trustee's right to receive payment of any outstanding and reasonable compensation, fees, expenses, disbursements and indemnity claims, including, without limitation, attorneys' and agents' fees, expenses and disbursements, incurred or to be incurred by the Trustee; and
 - (iv) permitting the Trustee to assert any lien or other priority in payment to which the Trustee is entitled, pursuant to the Second Lien Note Indenture, against distributions to be made to Second Lien Noteholders, for payment of any outstanding and reasonable compensation, fees, expenses, disbursements and indemnity claims, including, without limitation, attorneys' and agents' fees, expenses and disbursements, incurred by the Trustee, whether prior to or after the commencement of these proceedings and whether prior to or after the termination of these proceedings;

- (b) the Trustee shall be exculpated by all Persons, including, without limitation, all Second Lien Noteholders and other parties in interest, from any and all claims, causes of action and other assertions of liability arising out of the discharge of the powers and duties conferred upon the Trustee, or applicable law, except for actions or omissions to act arising out of the gross negligence or willful misconduct (each as determined by a final non-appealable judgment of a court of competent jurisdiction) of the Trustee. None of the Second Lien Noteholders or any other party in interest shall have or pursue any claim or cause of action against the Trustee for making a distribution in accordance with the Transaction or any Order of the Court, including, without limitation, from common shares received from the Buyer;
- (c) each of the Second Lien Noteholders to the fullest extent permissible under applicable law, as such law may be extended or interpreted at any time, shall be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action and liabilities, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, or then existing or thereafter arising in law, equity or otherwise, that are based in whole or in part on any act, omission, transaction or other occurrence taking place at any time, or from time to time, in any way relating to the Trustee that such entity has, had or may have, against the Trustee, its estate, all Persons claiming through it, and any of its present or former directors, officers, employees, agents, representatives, attorneys, accountants, underwriters, investment bankers or financial advisors and any of its successors or assigns. This release, waiver and discharge will be in addition to the discharge of claims and termination of interests provided herein and under any other Order of the Court and/or any applicable bankruptcy, rehabilitation or liquidation laws; and
- (d) the Sellers, their estates, all Persons claiming through them, all Persons who have held, hold or may hold claims against the Sellers, and any of their successors, assigns or representatives, shall be deemed to have waived, released and

discharged all rights or claims, whether based upon tort, fraud, contract or otherwise, and whether arising out of the Sellers' restructuring, rehabilitation, liquidation, or otherwise, which they possessed or may possess at any time or from time to time against the Trustee, and its present or former directors, officers, employees, agents, representatives, attorneys, accountants, underwriters, investment bankers or financial advisors, and any of its successors or assigns. This release, waiver and discharge will be in addition to the discharge of claims and termination of interests provided herein and under any Order of the Court and/or any applicable bankruptcy, rehabilitation or liquidation laws.

DISTRIBUTION OF SHARES OF BUYER

15. The Trustee shall instruct DTC to, and DTC shall: (i) establish an escrow position at 5:00 p.m. (Toronto time) on the date hereof (the "**Distribution Record Time**") representing the respective positions of the Second Lien Noteholders as of the Distribution Record Time for the purposes of making distributions to Second Lien Noteholders on and after the Closing Date based on their holdings of the Second Lien Notes as at the Distribution Record Time; and (ii) block any further trading in the Second Lien Notes, effective as of the Distribution Record Time, all in accordance with the customary practices and procedures of DTC. The Sellers and the Trustee will have the right but not the obligation to recognize any transfer of the Second Lien Notes after the Distribution Record Time and will be entitled instead to recognize and deal for all purposes with only those holders of record of the Second Lien Notes at the Distribution Record Time (the "**Second Lien Noteholders of Record**").
16. On the first Business Day following the Distribution Record Time, the Buyer, with the assistance of the Trustee, shall distribute to the Second Lien Noteholders of Record documentation reasonably satisfactory to the Trustee for the purposes of obtaining delivery and registration instructions for the issuance of the Buyer Common Shares (defined below) to the Second Lien Noteholders of Record (the "**Registration and Delivery Instructions**"). Second Lien Noteholders of Record must complete the Registration and Delivery Instructions and deliver them to the Buyer by no later than

12:00 p.m. (Toronto time) on December 20, 2016 (the "**Registration and Delivery Instruction Deadline**") in order to receive their Buyer Common Shares on the Closing Date.

17. On the Closing Date, as consideration for the acknowledgement by the Second Lien Noteholders of the full repayment and satisfaction of the principal amount owing under the Second Lien Note Indenture and in order to complete the reorganization contemplated by the Transaction, the Buyer shall cause to be issued, in a manner reasonably satisfactory to the Trustee, and in accordance with this Order, to the Second Lien Noteholders of Record common shares of the Buyer (having a fair market value equal to the fair market value of the Purchased Assets less the aggregate of the following amounts: the Credit Facility Payment Amount, the Assumed Liabilities and the Deficiency Payment) (the "**Buyer Common Shares**") on a pro rata basis (determined based on the outstanding principal amount of Second Lien Notes held by such Second Lien Noteholder of Record divided by the principal amount of all Second Lien Notes). The delivery of the Buyer Common Shares in accordance with this paragraph 17 shall be made by share certificate or through the facilities of a direct registration system operated by the Buyer or a transfer agent appointed by the Buyer, in the Buyer's sole discretion.
18. In the event that a Second Lien Noteholder of Record fails to deliver its Registration and Delivery Instructions by the Registration and Delivery Instruction Deadline, the Buyer Common Shares in respect of such Second Lien Noteholder of Record shall not be delivered to such Second Lien Noteholder of Record on the Closing Date; however, if such Second Lien Noteholder of Record provides its Registration and Delivery Instructions within 30 days following the Closing Date (the "**Grace Period**") the Buyer shall issue and deliver to such Second Lien Noteholder of Record its Buyer Common Shares as soon as practicable following receipt of its Registration and Delivery Instructions. Following the expiration of the Grace Period, the Buyer shall be entitled to cancel, and shall have no further obligation to issue or deliver, any Buyer Common Shares in respect of which Registration and Delivery Instructions were not received.

CANCELLATION OF PERSONAL PROPERTY SECURITY REGISTRATIONS

19. Upon (i) receipt of the Monitor's Certificate and any applicable registration fees by the applicable PPR Registrar (as defined below) and (ii) the filing of a certified copy of this Order with such PPR Registrar:
- (a) the Registrar of the Personal Property Registry (Alberta) (the "**Alberta PPR Registrar**") is hereby authorized and directed to cancel and discharge those Encumbrances listed in **Schedule "B-1"** hereto, if any, registered against the estate or interest of Sellers in and to the Purchased Assets;
 - (b) the Registrar of the Personal Property Registry (Saskatchewan) (the "**Saskatchewan PPR Registrar**") is hereby authorized and directed to cancel and discharge those Encumbrances listed in **Schedule "B-2"** hereto, if any, registered against the estate or interest of Sellers in and to the Purchased Assets;
 - (c) the Registrar of the Personal Property Registry (British Columbia) (the "**BC PPR Registrar**") is hereby authorized and directed to cancel and discharge those Encumbrances listed in **Schedule "B-3"** hereto, if any, registered against the estate or interest of Sellers in and to the Purchased Assets;
 - (d) the Registrar of the Personal Property Registry (Manitoba) (the "**Manitoba PPR Registrar**") is hereby authorized and directed to cancel and discharge those Encumbrances listed in **Schedule "B-4"** hereto, if any, registered against the estate or interest of Sellers in and to the Purchased Assets; and
 - (e) the Registrar of the Personal Property Registry (Northwest Territories) (the "**Northwest Territories PPR Registrar**") and, together with the Alberta PPR Registrar, the Saskatchewan PPR Registrar, the BC PPR Registrar and the Manitoba PPR Registrar, the "**PPR Registrars**" and each a "**PPR Registrar**") is hereby authorized and directed to cancel and discharge those Encumbrances listed in **Schedule "B-5"** hereto, if any, registered against the estate or interest of Sellers in and to the Purchased Assets.

REAL PROPERTY AND MINERAL RIGHTS IN ALBERTA

20. Upon (i) receipt of the Monitor's Certificate and any applicable registration fees by the applicable Alberta Governmental Authority (as defined below), and (ii) the filing of a certified copy of this Order with such Alberta Governmental Authority:
- (a) notwithstanding Section 191(1) of the *Land Titles Act* (Alberta), the Registrar of Land Titles of Alberta (the "**Alberta Land Registrar**") is hereby authorized, requested, and directed to:
 - (i) cancel the existing Certificates of Title for the Alberta Lands (as defined and set out in **Schedule "C-1"** hereto);
 - (ii) enter the Buyer as the owner and/or lessee of the mines and minerals comprising the Purchased Assets (as defined in the Purchase Agreement) (the "**Alberta Real or Mineral Property**");
 - (iii) delete and expunge from title to the Alberta Real or Mineral Property all of the Encumbrances listed in **Schedule "B-1"** hereto;
 - (iv) issue new Certificates of Title for the Alberta Lands in the name of the Buyer (or its nominee); and
 - (v) register such transfers, discharges, discharge statements or conveyances, as may be required to convey clear title to the Alberta Lands to the Buyer (or its nominee), which Certificates of Title shall be subject only to the Permitted Encumbrances; and
 - (b) the Department of Energy and the Minister of Energy (the "**Alberta Department and Minister of Energy**") and together with the Alberta Land Registrar and the Alberta PPR Registrar, the "**Alberta Governmental Authorities**" and each an "**Alberta Governmental Authority**") are hereby authorized, requested, and directed to:

- (i) enter the Buyer as the owner and/or lessee of the mines and minerals comprising the Alberta Real or Mineral Property subject only to the Permitted Encumbrances; and
- (ii) delete and expunge from title to the Alberta Real or Mineral Property all of the Encumbrances listed in **Schedule "B-1"** hereto,

in each case, in order to convey clear title to such mines and minerals comprising the Alberta Real or Mineral Property to the Buyer subject only to Permitted Encumbrances. For further certainty, the Alberta Department and Minister of Energy shall not cancel or discharge the registration of any builders' liens or security notices registered against estates or interests other than the estate or interest of the Sellers.

REAL PROPERTY AND MINERAL RIGHTS IN SASKATCHEWAN

21. Upon (i) receipt of the Monitor's Certificate and any applicable registration fees by the applicable Saskatchewan Governmental Authority (as defined below) and (ii) the filing of a certified copy of this Order with such Saskatchewan Governmental Authority:

(a) the Registrar of Titles under the *Land Titles Act* (Saskatchewan) (the "**Saskatchewan Land Registrar**") shall and is hereby authorized, requested and directed to:

- (i) cancel and discharge all Encumbrances listed in **Schedule "B-2"** hereto, if any, registered against the estate and interest of Sellers in and to the Purchased Assets located in the Province of Saskatchewan;
- (ii) transfer the interests in the name of any one or more of the Sellers listed in **Schedule "C-2"** into the name of the Buyer (or its nominee) free and clear of all Encumbrances other than the Permitted Encumbrances that are registered against the said interests,

in order to convey clear title to such Purchased Assets to the Buyer, subject only to Permitted Encumbrances.

- (b) the Ministry of the Economy for the Province of Saskatchewan (the "**Saskatchewan Ministry of Economy**") and together with the Saskatchewan Land Registrar and the Saskatchewan PPR Registrar, the "**Saskatchewan Governmental Authorities**" and each a "**Saskatchewan Governmental Authority**") is hereby authorized, requested, and directed to:
- (i) cancel and discharge those Encumbrances listed in **Schedule "B-2"** hereto, if any, registered against the estate or interest of Sellers in and to the Purchased Assets located in the Province of Saskatchewan; and
 - (ii) transfer the Crown leases, well licences and facility licences in the name of any one or more the Sellers listed in **Schedule "C-2"** into the name of the Buyer (or its nominee), free and clear of all Encumbrances, subject only to Permitted Encumbrances,

in each case, in order to convey clear title to such Purchased Assets to the Buyer, subject only to Permitted Encumbrances. For further certainty, the Saskatchewan Governmental Authorities shall not cancel or discharge the registration of any builders' liens or security notices registered against estates or interests other than the estate or interest of the Sellers.

REAL PROPERTY AND MINERAL RIGHTS IN BRITISH COLUMBIA

22. Upon (i) receipt of delivery of the Monitor's Certificate and any applicable registration fees by the applicable BC Governmental Authority, and (ii) the filing of a certified copy of this Order with such BC Governmental Authority,
- (a) a Registrar or Registrars under the (i) *Land Title Act* (BC), (ii) British Columbia Ministry of Natural Gas Development, Upstream Development Division, Tenure and Geoscience Branch, (iii) the British Columbia Ministry of Agriculture and Lands, (iv) FrontCounterBC, (v) British Columbia Oil and Gas Commission, and (vi) all other government ministries and authorities in British Columbia exercising jurisdiction with respect to the Purchased Assets (collectively, and together with the BC PPR Registrar, the "**BC Governmental Authorities**" and each a "**BC**

Governmental Authority") are hereby authorized, requested and directed to (in each case, as applicable):

- (i) enter the Buyer as the owner and/or lessee and/or licensee of the Purchased Assets (including the Crown mineral leases listed in **Schedule "C-3"** hereto);
- (ii) delete and expunge from the existing title documents respecting the Purchased Assets, all Encumbrances listed in **Schedule "B-3"** hereto; and
- (iii) register such transfers, discharges, discharge statements or conveyances, as may be required to convey clear title to the Purchased Assets, subject only to Permitted Encumbrances.

in each case, in order to convey clear title to such Purchased Assets to the Buyer, subject only to Permitted Encumbrances. For further certainty, the BC Governmental Authorities shall not cancel or discharge the registration of any builders' liens or security notices registered against estates or interests other than the estate or interest of the Sellers.

REAL PROPERTY AND MINERAL RIGHTS IN MANITOBA

23. Upon (i) receipt of delivery of the Monitor's Certificate and any applicable registration fees by the applicable Manitoba Governmental Authority (defined below), and (ii) the filing of a certified copy of this Order with such Manitoba Governmental Authority,
- (a) the Registrar under the *Real Property Act* (Manitoba) (the "**Manitoba Land Registrar**") shall and is hereby authorized, requested and directed to:
 - (i) cancel and discharge all Encumbrances listed in **Schedule "B-4"** hereto, if any, registered against the estate and interest of Sellers in and to the Purchased Assets located in the Province of Manitoba;
 - (ii) transfer the interests in the name of any one or more of the Sellers listed in **Schedule "C-4"** into the name of the Buyer (or its nominee) free and

clear of all Encumbrances other than the Permitted Encumbrances that are registered against the said interests,

in order to convey clear title to such Purchased Assets to the Buyer, subject only to Permitted Encumbrances.

- (b) the Ministry for Growth, Enterprise and Trade (Petroleum Branch and Mines Branch) for the Province of Manitoba (the "**Manitoba Ministry of Economy**") and together with the Manitoba Land Registrar and the Manitoba PPR Registrar, the "**Manitoba Governmental Authorities**" and each a "**Manitoba Governmental Authority**") is hereby authorized, requested, and directed to:
 - (i) cancel and discharge those Encumbrances listed in **Schedule "B-4"** hereto, if any, registered against the estate or interest of Sellers in and to the Purchased Assets located in the Province of Manitoba; and
 - (ii) transfer the Crown leases, well licences and facility licences in the name of any one or more of the Sellers listed in **Schedule "C-4"** into the name of the Buyer (or its nominee), free and clear of all Encumbrances, subject only to Permitted Encumbrances,

in each case, in order to convey clear title to such Purchased Assets to the Buyer, subject only to Permitted Encumbrances. For further certainty, the Manitoba Governmental Authorities shall not cancel or discharge the registration of any builders' liens or security notices registered against estates or interests other than the estate or interest of the Sellers.

REAL PROPERTY AND MINERAL RIGHTS IN NORTHWEST TERRITORIES

- 24. Upon (i) receipt of delivery of the Monitor's Certificate and any applicable registration fees by the applicable NWT Governmental Authority (defined below), and (ii) the filing of a certified copy of this Order with such NWT Governmental Authority,
 - (a) the Registrar under the *Land Titles Act* (NWT) (the "**NWT Land Registrar**") shall and is hereby authorized, requested and directed to:

- (i) cancel and discharge all Encumbrances listed in **Schedule "B-5"** hereto, if any, registered against the estate and interest of Sellers in and to the Purchased Assets located in the Northwest Territories;
- (ii) transfer the interests in the name of any one or more of the Sellers listed in **Schedule "C-5"** into the name of the Buyer (or its nominee) free and clear of all Encumbrances other than the Permitted Encumbrances that are registered against the said interests,

in order to convey clear title to such Purchased Assets to the Buyer, subject only to Permitted Encumbrances.

- (b) the Department of Industry, Tourism and Investment for the Northwest Territories (the "**NWT Ministry of Economy**") and together with the NWT Land Registrar and the NWT PPR Registrar, the "**NWT Governmental Authorities**" and each a "**NWT Governmental Authority**") is hereby authorized, requested, and directed to:

- (i) cancel and discharge those Encumbrances listed in **Schedule "B-5"** hereto, if any, registered against the estate or interest of Sellers in and to the Purchased Assets located in the Northwest Territories; and
- (ii) transfer the Crown leases, well licences and facility licences in the name of any one or more of the Sellers listed in **Schedule "C-5"** into the name of the Buyer (or its nominee), free and clear of all Encumbrances, subject only to Permitted Encumbrances,

in each case, in order to convey clear title to such Purchased Assets to the Buyer, subject only to Permitted Encumbrances. For further certainty, the NWT Governmental Authorities shall not cancel or discharge the registration of any builders' liens or security notices registered against estates or interests other than the estate or interest of the Sellers.

WIND-DOWN AMOUNT

25. The Wind-Down Amount shall not be considered to be proceeds of sale of the Purchased Assets and no Encumbrances shall attach to the Wind-Down Amount, other than the Administration Charge, Directors' Charge, KERP Charge and KEIP Charge (each as created by and defined in the Initial Order and as may be amended by subsequent Order of the Court, including herein), which shall each attach to the Wind-Down Amount with the same terms and priority they had with respect to the Purchased Assets immediately prior to the sale.
26. The Monitor is hereby authorized and directed to disburse payments from the Wind-Down Amount in accordance with the provisions of the Purchase Agreement, including, without limitation, Section 2.9 thereof.
27. All right, title and interest in and to any portion of the Wind-Down Amount that is no longer required to be held by the Monitor, as determined in accordance with the provisions of the Purchase Agreement, including, without limitation, Section 2.9 thereof, shall be released by the Monitor and promptly be delivered to the Buyer as a Purchased Asset.

RESERVE PAYMENT AMOUNT

28. The Reserve Payment Amount shall not be considered to be proceeds of sale of the Purchased Assets and no Encumbrances shall attach to the Reserve Payment Amount, other than the Financial Advisors' Charge (as created by and defined in the Initial Order and as may be amended by subsequent Order of the Court, including herein) which shall attach to the Reserve Payment Amount with the same terms and priority it had with respect to the Purchased Assets immediately prior to the sale.
29. The Monitor is hereby authorized and directed to administer the Reserve Payment Amount in accordance with the provisions of the Purchase Agreement, including, without limitation, Section 2.10 thereof.

30. All right, title and interest in and to any portion of the Reserve Payment Amount that is no longer required to be held in the Reserve Payment Amount as determined by the Monitor in accordance with the provisions of the Purchase Agreement, including, without limitation, Section 2.10 thereof, shall be released by the Monitor and promptly be distributed to the Buyer as a Purchased Asset.

CASH COLLATERAL AMOUNT

31. The Applicants are authorized and directed to open a segregated bank account with the Agent (the "**Existing Lenders' Cash Collateral Account**") forthwith and in any event prior to or concurrently with Closing, into which the Applicants shall deposit \$11,455,000.00 or such other amount as the Applicants, the Agent and the Monitor may agree (the "**Cash Collateral Funds**"), which Cash Collateral Funds shall be cash collateral held by the Agent on its behalf and on behalf of the Existing Lenders to secure and, if necessary, to pay any and all obligations of the Applicants owing to the Agent or the Existing Lenders that arise or come due after Closing on account of: (i) any outstanding letters of credit provided by the Existing Lenders that remain in place for some period of time following Closing until replaced or amended by the Applicants or the Buyer; and (ii) any fees or disbursements of the Agent, including in connection with the continued use following Closing (whether by the Applicants or the Monitor) of the Applicants' existing bank accounts and cash management system (collectively, the "**Post-Closing Obligations**").
32. The Agent and the Existing Lenders shall be entitled to the benefits of and are hereby granted a charge (the "**Cash Collateral Charge**") on the Cash Collateral Funds to secure the Post-Closing Obligations. The Cash Collateral Charge shall have priority over any and all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise, in favour of any person, including, without limitation, priority over any priority charge previously granted by this Honourable Court in these proceedings. For greater certainty, and notwithstanding anything to the contrary herein, the Cash Collateral Charge shall survive Closing and the vesting of the Purchased Assets in the Buyer pursuant to paragraph 4 of this Order.

33. Upon satisfaction of any Post-Closing Obligations, including on the replacement or amendment of any letter of credit, the balance of the Cash Collateral Funds or the applicable portion thereof, if any, shall be delivered by the Agent to the Buyer, and such residual amounts shall at all times be property of the Buyer and not property of the Applicants or their estates, and upon receipt of such funds by Buyer, the residual funds shall be vested in the Buyer free and clear of all claims and encumbrances in accordance with paragraph 4 of this Order.
34. The Cash Collateral Charge shall not be rendered invalid or unenforceable and the rights and remedies of the Agent and the Existing Lenders to the benefit of the Cash Collateral Charge shall not otherwise be limited or impaired in any way by:
- (a) the pendency of these proceedings and the declarations of insolvency made by the Applicants;
 - (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications;
 - (c) the filing of any assignment(s) for the general benefit of creditors made pursuant to the BIA;
 - (d) the provisions of any federal or provincial statutes; or
 - (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of encumbrances, contained in any existing agreement that binds the Applicants or any of them;

and the rights of the Agent and the Existing Lenders in and to the Cash Collateral Funds pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Applicants and shall not be void or voidable by creditors of the Applicants, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transactions under the BIA or any other applicable federal or provincial

legislation, nor shall it constitute conduct oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

35. The filing, registration or perfection of the Cash Collateral Charge shall not be required, and the Cash Collateral Charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Cash Collateral Charge coming into existence, notwithstanding any such failure to file, register, record or perfect..

RELEASE AND REDUCTION OF CHARGES

36. Upon delivery of the Monitor's Certificate to the Buyer:
- (a) The Credit Card Charge (as created by and defined in the Initial Order) is hereby released, expunged and discharged;
 - (b) The Administration Charge (as created by and defined in the Initial Order) shall be reduced to the maximum aggregate amount of \$500,000;
 - (c) The KERP Charge be released, expunged and discharged; and
 - (d) The KEIP Charge be released, expunged and discharged.

OCCUPANCY AGREEMENT

37. LTS is hereby authorized to enter into an Occupancy Agreement with the Buyer with respect to the premises subject to the Office Lease, in substantially the form attached as Exhibit "D" to the Scott Affidavit and by entering into such Occupancy Agreement, the Buyer shall not be deemed to have acquired any interest in the Office Lease pursuant to the Occupancy Agreement, whether as a lessee, sub-lessee or assignee of the lease or otherwise.

REORGANIZATION OF THE CCAA PARTIES

38. Nothing in the CCAA or the Initial Order shall prohibit or be deemed to prohibit the Sellers, in consultation with the Monitor, and as may be directed by the Buyer under

Section 3.5 of the Purchase Agreement and permitted under Applicable Law, from taking such corporate actions and steps as are deemed necessary or desirable by the Buyer to maximize the Tax Pools that may be utilized by the Buyer (including as may be required to transfer legal and beneficial title to all of the Purchased Assets to LTS prior to Closing), including, without limitation, some or all of the following:

- (a) the amendment of the partnership agreements for LTS Resources Partnership and Bakken Resources Partnership;
- (b) the assignment and transfer of the partnership interests from 1863359 Alberta Ltd. and 1863360 Alberta Ltd. to LTS;
- (c) the dissolution of one or more of the Sellers on or prior to the Closing Date; and
- (d) any such actions or corporate steps that are necessary or incidental to any of the foregoing;

provided that nothing in this paragraph shall constitute a determination by this Court as to the appropriateness of any such action.

AID AND RECOGNITION

- 39. The Alberta Governmental Authorities, Saskatchewan Governmental Authorities, BC Governmental Authorities, and any other applicable registrar or government ministries or authorities exercising jurisdiction with respect to the Purchased Assets (collectively, the "**Governmental Authorities**") are expressly authorized and directed to include in the discharges of the Encumbrances described above all Encumbrances registered after the date the Initial Order was granted, other than the Permitted Encumbrances.
- 40. In order to affect the discharges and transfers described above, this Court requests that the Governmental Authorities each take such steps as are necessary to give effect to the terms of this Order, and the Purchase Agreement authorized herein. Presentment of this Order and a copy of the Monitor's Certificate shall be the sole and sufficient authority of the Governmental Authorities to make and register the said transfers and cancel and

discharge the registrations of any Encumbrances on the Purchased Assets other than the Permitted Encumbrances.

41. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in the United States of America, Canada or in any of its provinces or territories, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order and to assist the Monitor, the Sellers and their agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies of all such jurisdictions are hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of the Court, and the Sellers, as may be necessary or desirable to give effect to this Order or to assist the Monitor, the Sellers and their agents in carrying out the terms of this Order.

MISCELLANEOUS MATTERS

42. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, or any similar provision of any applicable provincial legislation, Sellers are authorized and permitted to disclose and transfer to the Buyer all human resources and payroll information in the Sellers' records pertaining to the Sellers' past and current employees. The Buyer (or its nominee) shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Sellers.
43. The Sellers, Buyer and Monitor may pursue the provisional execution of this Order, including without limiting the general application of the foregoing, notwithstanding any appeal and without requirement to provide any security or provision for costs whatsoever. Without limiting the generality of the foregoing, this Order shall be registered by the Alberta Land Registrar notwithstanding the requirements of section 191(1) of the *Land Titles Act* (Alberta) and notwithstanding that the appeal period in respect of this Order has not elapsed, which appeal period is expressly waived.

44. Leave is granted to the Monitor, the Buyer and any other interested party, and such parties shall be at liberty to apply for further advice, assistance and directions as may be necessary in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing the Transaction.
45. This Order must be served only upon those interested parties attending or represented at the within Application and service may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following the transmission or delivery of such documents. Service of this Order on any party not attending this Application is hereby dispensed with.

"S.J. LoVecchio"
J.C.Q.B.A.

SCHEDULE "A" TO APPROVAL AND VESTING ORDER

FORM OF MONITOR'S CERTIFICATE

Clerk's stamp:

COURT FILE NUMBER: 1601-12571

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE *COMPANIES'*
CREDITORS ARRANGEMENT ACT, RSC 1985, c
C-36, as amended

AND IN THE MATTER OF A PLAN OF
COMPROMISE OR ARRANGEMENT OF
LIGHTSTREAM RESOURCES LTD, 1863359
ALBERTA LTD, LTS RESOURCES
PARTNERSHIP, 1863360 ALBERTA LTD AND
BAKKEN RESOURCES PARTNERSHIP

APPLICANTS: LIGHTSTREAM RESOURCES LTD, 1863359
ALBERTA LTD AND 1863360 ALBERTA LTD

PARTIES IN INTEREST: LTS RESOURCES PARTNERSHIP AND
BAKKEN RESOURCES PARTNERSHIP

DOCUMENT: **MONITOR'S CERTIFICATE**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF PARTY
FILING THIS DOCUMENT MCCARTHY TETREAULT LLP
421 7 Ave SW #4000,
Calgary, AB T2P 4K9
Att: Sean Collins
Telephone: 403-260-3531
Facsimile: 403-260-3501
Email: scollins@mccarthy.ca

RECITALS

- A. Pursuant to an Order of the Honourable Mr. Justice A.D. Macleod of the Court of Queen's Bench of Alberta, Judicial District of Calgary (the "**Court**") dated September 26, 2016, FTI Consulting Canada Inc. was appointed as the monitor (in such capacity, and not in its personal or corporate capacity, the "**Monitor**") of the undertaking, property

and assets of the applicants and parties in interest in this Action, including Lightstream Resources Ltd. (the latter of which is hereinafter referred to as "**LTS**").

- B. Pursuant to an Order of the Court dated December [8], 2016, the Court approved the Asset Purchase Agreement made as of November 29, 2016 (the "**Purchase Agreement**") by and between LTS, 1863359 Alberta Ltd., 1863360 Alberta Ltd. LTS Resources Partnership and Bakken Resources Partnership, as sellers (collectively, the "**Sellers**") and Lightstream Resources Acquisition Corp, as buyer (the "**Buyer**") and provided for the vesting in the Buyer all of the Sellers' right, title, interest and estate, whether absolute or contingent, legal or beneficial in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Monitor to the Buyer of a certificate confirming (i) receipt of payment in full of the Transfer Taxes payable to Monitor in trust for Sellers pursuant to Section 3.6 and 11.2(b) of the Purchase Agreement (if any are payable on Closing), (ii) receipt of payment in full of the Wind-Down Amount and the Reserve Payment Amount, subject only to deduction, if any, for any Deficiency Amount which is to be paid by the Buyer to the Monitor, after Closing in accordance with the Purchase Agreement, and (iii) receipt of each of the Conditions Certificates confirming that each of the conditions to Closing as set out in Article 9 and Article 10 of the Purchase Agreement have been satisfied or waived by the Sellers and the Buyer.
- C. All capitalized terms not defined herein shall have the respective meanings ascribed to them in the Purchase Agreement.

THE MONITOR CERTIFIES the following:

1. The Monitor has received payment in full of (i) the Transfer Taxes payable to Monitor in trust for Sellers pursuant to Section 3.6 and 11.2(b) of the Purchase Agreement (if any are payable on Closing), (ii) receipt of payment in full of the Wind-Down Amount and the Reserve Payment Amount, subject only to deduction, if any, for any Deficiency Amount which is to be paid by the Buyer to the Monitor, after Closing in accordance with the Purchase Agreement.

2. The Sellers and the Buyer have each delivered to the Monitor the Conditions Certificates evidencing that all applicable conditions to Closing as set out in Article 9 and Article 10 of the Purchase Agreement have been satisfied or waived, as applicable.

3. This Certificate was delivered by the Monitor at Calgary, Alberta on _____,
2016, at _____ [a.m./p.m.]

**FTI Consulting Canada Inc., in its
capacity as Monitor and not in its
personal or corporate capacity**

Per: _____

Name:

TAB 26



SUPREME COURT OF CANADA

CITATION: Century Services Inc. v. Canada (Attorney General),
2010 SCC 60

DATE: 20101216
DOCKET: 33239

BETWEEN:

Century Services Inc.

Appellant

and

**Attorney General of Canada on behalf of
Her Majesty The Queen in Right of Canada**

Respondent

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron,
Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 89)

Deschamps J. (McLachlin C.J. and Binnie, LeBel, Charron,
Rothstein and Cromwell JJ. concurring)

CONCURRING REASONS:
(paras. 90 to 113?)

Fish J.

DISSENTING REASONS:
(paras. 114 to 136)

Abella J.

NOTE: This document is subject to editorial revision before its reproduction in final
form in the *Canada Supreme Court Reports*.

CENTURY SERVICES v. CANADA (A.G.)

Century Services Inc.

Appellant

v.

**Attorney General of Canada
on behalf of Her Majesty The Queen in Right of Canada**

Respondent

Indexed as: Century Services Inc. v. Canada (Attorney General)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron,
Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Bankruptcy and Insolvency — Priorities — Crown applying on eve of
bankruptcy of debtor company to have GST monies held in trust paid to Receiver*

General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("ETA") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("BIA"). However, s. 18.3(1) of the CCAA provided that any statutory deemed trusts in favour

of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding \$5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J., Binnie, LeBel, **Deschamps**, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. 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. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp.(Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. 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 expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event, recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. 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 *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA*

is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, 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.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision *creating* the trust and a *CCAA* or *BIA* provision explicitly

confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan Act* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created 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 did not *confirm* the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

Per Abella J (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this 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). By operation of s. 44(f) of the *Interpretation Act*, the transformation of s. 18(3) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the “later in time” provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, 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.

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By Deschamps J.

Overruled: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737; **distinguished:** *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; **referred to:** *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192; *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII); *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134; *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9; *Air Canada, Re* (2003), 42 C.B.R. (4th) 173; *Air Canada, Re*, 2003 CanLII 49366; *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'd (1999), 12 C.B.R. (4th) 144; *Skeena Cellulose Inc., Re*,

2003 BCCA 344, 13 B.C.L.R. (4th) 236; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108.

By Fish J.

Referred to: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737.

By Abella J. (dissenting)

Ottawa Senators Hockey Club Corp. (Re) (2005), 73 O.R. (3d) 737; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663.

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Bank Act, S.C. 1991, c. 46.

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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Mary I. A. Buttery, Owen J. James and Matthew J. G. Curtis, for the appellant.

Gordon Bourgard, David Jacyk and Michael J. Lema, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

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.

[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).

[6] The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). 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), 73 O.R. (3d) 737 (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.

[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 invariably resulted in

liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659, 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*:

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 *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *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, 30 Alta. L.R. (4th) 192, 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. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). 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 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 of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, 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. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, 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

[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.

[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 (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 v. Verdun (City)*, [1997] 2 S.C.R. 862, 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 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 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” (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92

O.R. (3d) 513, 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. Ct. (Gen. Div.)), 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).

[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.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, 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., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, 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, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), 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. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); 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 *Metcalf & 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?

[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, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (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 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 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, 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 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.

The following are the reasons delivered by

FISH J. —

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).

[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 (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.

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:

(4) 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) 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*:

(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.

(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) 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) 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* 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, 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.

The following are the reasons delivered by

ABELLA J. —

[114] The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (“*ETA*”), 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 11¹ 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:

(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

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.

(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 (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 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 *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, 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 derogant*).

[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 v. Verdun (City)*, [1997] 2 S.C.R. 862).

[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 *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, 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,

...

² The amendments did not come into force until September 18, 2009.

(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.

[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 re-order 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.

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 (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.

(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

(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

(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.

...

(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

(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

(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.

(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)

222. (1) [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 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 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.

Appeal allowed with costs, ABELLA J. dissenting.

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Department of Justice, Vancouver.

TAB 27

2012 ONSC 6087
Ontario Superior Court of Justice [Commercial List]

Dondeb Inc., Re

2012 CarswellOnt 15528, 2012 ONSC 6087, 223 A.C.W.S. (3d) 772, 97 C.B.R. (5th) 264

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

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect to Dondeb Inc. and
the Additional Applicants Listed on Schedule "A" Hereto (collectively, the "Applicants"), Applicants

C. Campbell J.

Heard: October 11, 15, 17, 18 2012

Judgment: November 22, 2012

Docket: CV-12-00009865-00CL

Counsel: David P. Preger, Lisa S. Corne, Michael Weinczok for Applicants

Jeffrey J. Simpson, A. Ronson for Pace Savings & Credit Union Limited

Gary Sugar for David Sugar, et al

D.R. Rothwell for RMG Mortgage/MCAP Financial Corporation

Harry Fogul for Regional Financial

Robin Dodokin for Empire Life Insurance Co.

Beverly Jusko, M.R. Kestenberg for TD Bank Canada Trust

Roger Jaipargas for Faithlife Financial

R.B. Bissell for Vector Financial Services Limited

Jeffrey Larry for First Source Mortgage Corporation

Douglas Langley for Virgin Venture Capital Corporation

David Mende for Addenda Capital Inc.

J. Dietrich, W. Rabinovitch for A. Farber & Partners Inc.

M. Church for SEIU (Union)

Subject: Insolvency; Property

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.2 Initial application](#)

[XIX.2.c Dismissal of application](#)

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Dismissal of application

Debtors were group of companies which owned and managed properties — Debtors brought application for initial order under Companies' Creditors Arrangement Act — Application dismissed — Unlikely that plan could be developed that sufficient number of creditors would agree to — Application was opposed by approximately 75 per cent of creditors, who had concerns about principal of group of companies' plan to transfer certain properties to

secure additional funding, and did not wish debtor-in-possession financing to occur — Principal had not engaged with creditors from early date and was to some extent author of own misfortune — Goal of protection under Act was liquidation, which could be achieved by appointing receiver.

Table of Authorities

Cases considered by C. Campbell J.:

Azure Dynamics Corp., Re (2012), 91 C.B.R. (5th) 310, 2012 CarswellBC 1545, 2012 BCSC 781 (B.C. S.C. [In Chambers]) — referred to

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — considered

First Leaside Wealth Management Inc., Re (2012), 2012 CarswellOnt 2559, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) — referred to

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

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — referred to

Octagon Properties Group Ltd., Re (2009), 58 C.B.R. (5th) 276, 2009 CarswellAlta 1325, 2009 ABQB 500, 486 A.R. 296 (Alta. Q.B.) — considered

Shire International Real Estate Investments Ltd., Re (2010), 64 C.B.R. (5th) 92, 2010 CarswellAlta 234, 2010 ABQB 84 (Alta. Q.B.) — considered

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

Timminco Ltd., Re (2012), 2012 ONSC 506, 95 C.C.P.B. 48, 2012 CarswellOnt 1263, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — referred to

Timminco Ltd., Re (2012), 2012 CarswellOnt 9633, 2012 ONCA 552 (Ont. C.A.) — 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. 11.02 [en. 2005, c. 47, s. 128] — referred to

APPLICATION by debtors for protection under *Companies Creditors Arrangement Act*.

C. Campbell J.:

1 The applicants seeking an Initial Order under the *Companies Creditors Arrangement Act* are a group of companies owned and controlled by or through the main holding company Dondeb Inc. The proposed relief would include a stay of proceedings in respect of the various companies which own and or operate businesses and real property in Ontario.

2 The application is vigorously opposed by numerous secured creditors which have mortgage or other security on property beneficially owned by one or more of the companies in the Dondeb "group".

3 The applicants seek the protection of the *CCAA* to enable an orderly liquidation of the assets and property of the various companies to enable what is asserted to be the remaining equity after sale and expenses to accrue to the benefit of the Dondeb Group.

4 It is urged that the flexible mechanism of the *CCAA* is appropriate as there are common expenses across some of the companies', common security across others and that any order in liquidation would prevent the incurrence of added cost should individual properties and companies placed in liquidation with the loss of remaining equity.

5 The applications propose a Debtor in Possession (DIP) financing and administrative charge to secure the fees of professionals and expenses associated with *CCAA* administration. The application is opposed by approximately 75% in value of the secured creditors.

6 The basis of the opposition can be summarized as follows:

i) That in many instances the properties over which security is held is sufficiently discrete with specific remedies including sale being more appropriate than the "enterprise" approach posed by the applicants.

ii) That the proposed DIP/financial and administration changes are an unwarranted burden to the equity of specific properties are evidence of the inappropriate application of the *CCAA*.

iii) That in the circumstances individual receivership orders for many of the properties is a more appropriate remedy where the creditors and not the debtor would have control of the process.

iv) That the creditors have lost confidence in the Dondeb family owners of the Dondeb group for a variety of reasons including for breach of promise and representation.

v) That it is now evident that the applicants will be unable to propose a realistic plan that is capable of being accepted by creditors given a difference in position with respect to value of various properties.

7 Those who support the applicants in the main wish to see those businesses that are operating on some of the properties such as in one instance, a school, and others like retirement homes continue in a way that may not be possible in a bankruptcy.

8 During the course of the submissions on the first return date an alternative was proposed by a number of secured creditors, namely a joint or consolidated receivership of the various entities to maximizing creditor control of the process and ensure that costs of administration be allocated to each individual property and company.

9 The application was adjourned to be returnable October 15, 2012 to allow both the applicants and the opposing creditors to consider their positions hopefully achieve some compromise. In the meantime 4 notices of intention under the BIA were stayed.

10 The return of the application on October 15, 2012 did produce some modification of position on both sides but not sufficient to permit a CCAA order to be agreed to.

11 The applicants revised the proposed form of Initial Order to allow for segregation of accounts on the individual properties an entitlement.

12 The rationale of the applicants for the original Initial Order sought was that if liquidated or otherwise operated in an orderly way by the debtor and a "super" monitor, greater value could be achieved than the secured debt owing in respect to at least a number of the properties which could be available (a) to other creditors in respect of which guarantees or multiple property security could enhance recovery and or (b) the equity holders.

13 The second major reason advanced by a significant number of creditors appearing through counsel was that they no longer had any confidence in Mr. Dandy, the principal of Dondeb Inc. Significant examples of alleged misleading supported the positions taken.

14 I accept the general propositions of law advanced on behalf of the applicants that pursuant to s.11.02 of the CCAA the court has wide discretion "on any terms it may impose" to make an Initial Order provided the stay does not exceed 30 days [see *Nortel Networks Corp., Re* [2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List])], 2009, CanLII 39492 at para 35 and *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) CF 33.

15 The more recent decision of the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 15 confirms the breadth and flexibility of the CCAA to not only preserve and allow for restructuring of the business as a going concern but also to permit a sale process or orderly liquidation to achieve maximum value and achieve the highest price for the benefit of all stakeholders. See also *Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List]) at para 49-50 (leave to appeal denied 2012 ONCA 552 (Ont. C.A.)).

16 I also accept the general proposition that given the flexibility inherent in the CCAA process and the discretion available that that an Initial Order may be made in the situation of "enterprise" insolvency where as a result of a liquidation crisis not all of the individual entities comprising the "enterprise" may be themselves insolvent but a number are and to propose of the restructuring is to restore financial health or maximize benefit to all stakeholders by permitting further financing. Such process can include liquidation. See *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) and also *Edgeworth Properties Inc. (Re)* CV-11-9409-CL [Commercial List].

17 I also accept that while each situation must be looked at on its individual facts the court should not easily conclude that a plan is likely to fail. See *Azure Dynamics Corp., Re*, 2012 BCSC 781 (B.C. S.C. [In Chambers]) at paras 7-10.

18 In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 CarswellBC 1758 (B.C. C.A.), the British Columbia Court of Appeal overturned the decision of the chambers' judge extending a stay of proceedings and authorizing DIP financing under the CCAA in the case of a debtor company in the business of land development because:

Although the CCAA can apply to companies whose sole business is a single land development as long as the requirements set out in the CCAA are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding,

the secured creditors may feel that they will be in a better position by exerting their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

19 Similarly, in *Octagon Properties Group Ltd., Re*, 2009 CarswellAlta 1325 (Alta. Q.B.) paragraph 17, Kent, J. made the following comments:

This is not a case where it is appropriate to grant relief under the CCAA. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

20 A similar result occurred in *Shire International Real Estate Investments Ltd., Re*, 2010 CarswellAlta 234 (Alta. Q.B.) even after an initial order had been granted.

21 In Edgeworth, dealing with the specifics of that case I noted:

Were it not for the numerous individual investors (UDIs, MICs) and others who claim to have any interest in various of the lands as opposed to being general creditors of the Edgeworth companies, I doubt I could have been persuaded to grant the Initial CCAA Order.

22 At the conclusion of oral submissions which followed on a hearing of the application which commenced on Friday October 11, 2012 continued on October 15 with additional written material and concluded on Wednesday October 17, 2012 again with additional written material and oral submissions the following conclusions were reached.

(i) The application for an Initial Order under the CCAA based on the material filed be dismissed.

(ii) The issue of costs incurred by the proposed Monitor Farber and of counsel to the debtor be reserved for further consideration (if not resolved) basis on material to be provided to counsel for the creditors and their submissions.

(iii) The request for a more limited CCAA Initial Order which like the Original Application is opposed by a significant body of creditors is also rejected.

(iv) A Global Receivership Order which is supported by most of the creditors appearing to oppose the application and which has the support of Farber which will become Receiver of those companies and properties covered by the application will issue in a format to be approved by counsel and the court.

23 For ease of administration the Global Receivership Order will issue in Court File No. CV-12-9794-CL and make reference to the various companies and properties to be covered by the Order.

24 In order to further facilitate administration the following proceedings, each being Notices of Intention to make a proposal

Dondeb Inc.
Ace Sel/Storage & Business Centre

31-1664344
31-1664774

1711060 Ontario Ltd.	31-1664775
2338067 Ontario Ltd.	31-1664772
King City Holdings Ltd.	31-1671612
1182689 Ontario Inc.	31-1671611
2198392 Ontario Inc.	31-1673260

hereby stayed and suspended pending further order of the court.

25 The request for an Initial Order under the *CCAA* was dismissed for the simple reason that I was not satisfied that a successful plan could be developed that would receive approval in any meaningful fashion from the creditors. To a large extent, Mr. Dandy is the author of his own misfortune not just for the liquidity crisis in the first place but also for a failure to engage with creditors as a whole at an early date.

26 In his last affidavit filed Mr. Dandy explained why certain properties were transferred into individual corporations to allow additional financing that would permit the new creditors access to those properties in the event of default. To a certain extent this was perceived by creditors as "robbing Peter to pay Paul" and led to the distrust and lack of confidence the vast majority of creditors exhibit. Had there been full and timely communication both the creditors and the court may have concluded that a *CCAA* plan could be developed.

27 Under the proposed Initial Order the fees of the proposed monitor and of counsel to the debtor were an issue as well as leaving the debtor in possession with the cost that would entail.

28 Counsel for each of the various creditors represented urged that their client's individual property should not be burdened with administrative expenses and professional fees not associated with that property.

29 Counsel for the debtor advised that to the extent possible his client and the monitor would keep individual accounts. This proposal did not appease the opposing creditors who did agree that their clients could accept what was described as a "global" receiver and that the Farber firm would be acceptable as long as the receiver's charge was allocated on an individual property basis. In other words, the opposing creditors are prepared to accept the work of the professionals of the receiver but not fund the debtor or its counsel.

30 The issue of the fees of Farber incurred to date in respect of preparation of the *CCAA* application was agreed between the opposing creditors, Farber and its counsel and are not an issue. Counsel for the debtor requested that the court consider a request for fees and costs on the part of the debtor. In order to give an opportunity for the parties to consider the details of such request and possible resolution the issue was deferred to a later date.

31 Following further submissions on behalf of the debtor I advised the parties that in my view the conditions necessary for approval of an Initial *CCAA* Order were not met but that a comprehensive Receivership Order should achieve an orderly liquidation of most of the properties and protect the revenue from the operating properties with the hope of potential of some recovery of the debtor's equity.

32 Counsel are to be commended for the effort and success in reaching agreement on the form of order acceptable to the court.

33 The *CCAA* is a flexible instrument, which with judicial discretion, is capable of permitting restructuring, including in appropriate situations, liquidation.

34 In my view the use of the *CCAA* for the purpose of liquidation must be used with caution when liquidation is the end goal, particularly when there are alternatives such as an overall less costly receivership that can accomplish the same overall goal.

Schedule "A"

1. Dondeb Inc.
2. Ace Self Storage and Business Centre Inc.
3. 1182689 Ontario Inc.
4. King City Holdings Inc.
5. 1267818 Ontario Ltd.
6. 1281515 Ontario Inc.
7. 1711060 Ontario Ltd.
8. 2009031 Ontario Inc.
9. 2198392 Ontario Ltd.
10. 2338067 Ontario Inc.
11. Briarbrook Apartments Inc.
12. Guelph Financial Corporation

Application dismissed.

TAB 28

Citation: In the Matter of Doman
Industries et al
2003 BCSC 376

Date: 20030307
Docket: L023489
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
The Honourable Mr. Justice Tysoe
Pronounced in Chambers
March 7, 2003

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

AND

IN THE MATTER OF THE COMPANY ACT
R.S.B.C. 1996, c. 62

AND

IN THE MATTER OF THE CANADA BUSINESS CORPORATIONS ACT
R.S.C. 1985, c. C-44

AND

IN THE MATTER OF THE PARTNERSHIP ACT
R.S.B.C. 1996, c. 348

AND

IN THE MATTER OF DOMAN INDUSTRIES LIMITED,
ALPINE PROJECTS LIMITED
DIAMOND LUMBER SALES LIMITED, DOMAN FOREST PRODUCTS LIMITED
DOMAN'S FREIGHTWAYS LTD., DOMAN HOLDINGS LIMITED, DOMAN
INVESTMENTS LIMITED, DOMAN LOG SUPPLY LTD., DOMAN – WESTERN
LUMBER LTD., EACOM TIMBER SALES LTD.,
WESTERN FOREST PRODUCTS LIMITED
WESTERN PULP INC., WESTERN PULP LIMITED PARTNERSHIP, and
QUATSINO NAVIGATION COMPANY LIMITED

PETITIONERS

Counsel for the Petitioners:	M.A. Fitch, Q.C., S. Martin and R. Millar
Counsel for the Ad Hoc Committee of Senior Secured Noteholders:	G. Morawetz, R. Chadwick and J.J.L. Hunter, Q.C.
Counsel for Wells Fargo, National Association:	J.F. Dixon
Counsel for Herb Doman:	G.K. Macintosh, Q.C. and R.P. Sloman
Counsel for Her Majesty the Queen in Right of British Columbia:	D.J. Hatter and R. Butler
Counsel for Attorney General of Canada:	R.D. Leong
Counsel for CIT Business Credit Canada Inc.:	W.C. Kaplan, Q.C. and P.L. Rubin
Counsel for the Monitor, KMPG Inc.:	J.I. McLean
Counsel for Brascan Financial, Merrill Lynch and Oppenheimer Funds:	D.I. Knowles, Q.C., M. Buttery and I. Nordholm
Counsel for Toronto Dominion Asset Management Inc., TD Securities Inc. and Tordom Company:	P. Macdonald and G. Gehlen
Counsel for Petro-Canada:	K. Zimmer
Counsel for Pulp, Paper & Woodworkers of Canada, Locals 3 and 8:	W. Skelly

[1] There are two competing motions before the Court in these proceedings under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). The first is a motion of the Petitioners (the "Doman Group") for an order authorizing the calling of creditor meetings to consider a plan of compromise or arrangement prepared by the Doman Group (the "Reorganization Plan" or the "Plan"). The second motion is an application by a group of secured creditors called the Ad Hoc Committee of Senior Secured Noteholders (the "Senior Secured Noteholders Committee") for numerous orders, including orders relating to the invalidity of the Reorganization Plan, allowing the Senior Secured Noteholders to vote on the Plan and authorizing the Senior Secured Noteholders Committee to file its own secured creditor Plan.

[2] One of the arguments which the Senior Secured Noteholders Committee wished to advance related to the constitutionality of the Court varying the terms of a contract in the absence of enabling provincial legislation. The Senior Secured Noteholders Committee applied to adjourn all of the applications so that the necessary notice for constitutional questions to the Attorneys General of British Columbia and Canada could expire. I refused the adjournment on the basis that the constitutional question can be argued upon the expiry

of the notice periods if it is still necessary to do so. Accordingly, my rulings at this stage are subject to the constitutional challenge by the Senior Secured Noteholders Committee and nothing I say in these Reasons for Judgment should be construed as a determination of the constitutional validity of such rulings.

[3] The Doman Group has the following four principal types of creditors:

- (a) the Senior Secured Noteholders which are owed US\$160 million and who hold security over most, but not all, of the fixed assets of the Doman Group;
- (b) the Unsecured Noteholders which are owed US\$513 million;
- (c) the lender which provides the Doman Group with an operating line of credit and which holds security against its current assets; and
- (d) unsecured trade creditors which are owed in the range of \$20 to \$25 million.

[4] The Reorganization Plan seeks to compromise only the indebtedness of the Unsecured Noteholders and the unsecured trade creditors. It is proposed that the unsecured trade

creditors will be paid in full up to an aggregate ceiling or cap amount of \$23.5 million. The Reorganization Plan provides that the Unsecured Noteholders are to receive US\$112,860,000 Junior Secured Notes plus 85% of the shares in the Doman Group (with the existing shareholders retaining the remaining 15% of the shares). The Junior Secured Notes are to be secured in second position against the assets subject to the security of the Senior Secured Noteholders.

[5] The Senior Secured Notes were issued pursuant to a Trust Indenture dated as of June 18, 1999 (the "Trust Indenture"). The principal amount of the Senior Secured Notes is due on July 1, 2004. The Doman Group is in default of the payment of the interest due on the Senior Secured Notes but it is intended that the overdue interest be paid upon implementation of the Reorganization Plan. The Trust Indenture has the usual types of events of default, including the commencement of proceedings under the **CCAA**, non-payment of principal or interest on indebtedness owed by the Doman Group to the Senior Secured Noteholders or to other parties and the failure to remedy a breach of any of the provisions of the Trust Indenture within 30 days after notice of the breach has been given to the Doman Group. It also has the usual provision enabling the Trustee under the Trust Indenture or a

specified percentage of the holders of the Senior Secured Notes to accelerate payment of the indebtedness upon the occurrence of an event of default and to thereby make all monies owing on the notes to be immediately due and payable.

[6] Sections 4.13 and 4.16 of the Trust Indenture are also relevant to the present applications. Section 4.13 reads as follows:

(a) The Company shall not, and shall not permit any of its Restricted Subsidiaries to, directly or indirectly, create, incur, assume or suffer to exist any Lien on any property or asset now owned or hereafter acquired, or any income or profits therefrom or assign or convey any right to receive income therefrom, except Permitted Liens (provided that Liens on Note Collateral or any portion thereof shall be governed by clause (b) of this Section 4.13) unless (i) in the case of Liens securing Indebtedness which is subordinated to the Notes and the Guarantees, the Notes and the Guarantees are secured by a Lien on such property, assets, income, profits or rights that is senior in priority to such Liens and (ii) in all other cases, the Notes and the Guarantees are equally and ratably secured.

(b) The Company shall not, and shall not permit of its Restricted Subsidiaries to, directly or indirectly, create, incur, assume or suffer to exist any Lien on any property or asset now owned or hereafter acquired that constitutes Note Collateral, any income or profits from any Note Collateral or to assign or convey any right to receive income from any Note Collateral, except for Permitted Note Collateral Liens.

Section 4.16 reads, in part, as follows:

Upon the occurrence of a Change of Control, each Holder of Notes shall have the right to require the Company to repurchase all or any part (equal to U.S. \$1,000 or an integral multiple thereof) of such Holder's Notes pursuant to the offer described below (the "Change of Control offer") at an offer price in cash equal to 101% of the aggregate principal amount thereof plus accrued and unpaid interest, if any, and Liquidated Damages, if any, to the date of purchase (the "Change of Control Payment"). Within 10 days following any Change of Control, the Company shall mail a notice to each Holder stating: (1) that the Change of Control offer is being made pursuant to the covenant entitled "Change of Control" and that all Notes tendered will be accepted for payment; (2) the purchase price and the purchase date, which will be no earlier than 30 days nor later than 40 days from the date such notice is mailed and which shall be the same date as the Change of Control Payment Date with respect to the 1994 Notes and the 1997 Notes (the "Change of Control Payment Date"); ...

On the Change of Control Payment Date, the Company shall, to the extent lawful, (1) accept for payment Notes or portions thereof tendered pursuant to the Change of Control Offer, (2) deposit with the Paying Agent an amount equal to the Change of Control Payment in respect of all Notes or portions thereof so tendered and (3) deliver or cause to be delivered to the Trustee the Notes so accepted ...

[7] The Reorganization Plan does not seek to compromise the indebtedness owed to the Senior Secured Noteholders. However, the Senior Secured Noteholders maintain that they are affected or prejudiced by the Reorganization Plan. They point to sections 4.12, 6.2 and 6.3 of the Reorganization Plan, the relevant portions of which read as follows:

4.12 Waiver of Defaults and Permanent Injunction

From and after the Effective Date:

- (a) all Creditors and other Persons (including Unaffected Creditors) shall be deemed to have waived any and all defaults of the Doman Entities then existing or previously committed by the Doman Entities or caused by the Doman Entities, or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, credit document, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Doman Entities, including a default under a covenant relating to any other affiliated or subsidiary company of Doman other than the Doman Entities, and any and all notices of default and demands for payment under any instrument, including any guarantee, shall be deemed to have been rescinded;
- (b) a permanent injunction shall be pronounced on the terms of the Final Order against Creditors and all other Persons (including Unaffected Creditors) having contractual relationships with any of the Doman Entities with respect to the exercise of any right or remedy contained in the instruments evidencing such contractual relationships or at law generally, which might otherwise be available to such Creditors or other Persons as a result of the filing of the CCAA Proceedings, the content of the Plan, implementation of the Plan, any action taken by the Doman Entities or any third party pursuant to the Plan or the Final Order either before or after the Plan Implementation Date, or any other matter whatsoever relating to the CCAA Proceedings, the Plan, or the transactions contemplated by the Plan; and
- (c) the Doman Entities may in all respects carry on as if the defaults, non-compliance, rights and remedies referred to in this section 4.12 had not occurred.

6.2 Effect of Final Order:

In addition to sanctioning the Plan, the Final Order shall, among other things:

...

- (f) confirm that all executory contracts, security agreements and other contractual relationships to which the Doman Entities are parties are in full force and effect notwithstanding the CCAA Proceeding or this Plan and its attendant compromises, and that no Person party to such an executory contract, security agreement or other contractual relationship shall be entitled to terminate or repudiate its obligation under such contract or agreement, or to the benefit of any right or remedy, by reason of the commencement of the CCAA Proceeding or the content of the Plan, the Change of control of Doman resulting from the Plan, the compromises extended under the Plan, the issuance of the Junior Secured Notes, or any other matter contemplated under the Plan or the Final Order; and
- (g) confirm and give effect to the waivers, permanent injunctions and other provisions contemplated by section 4.12 of the Plan.

6.3 Conditions Precedent to Implementation of Plan:

The implementation of this Plan shall be conditional upon the fulfilment of the following conditions:

(a) Court Approval

Pronouncement of the Final Order by the Court on the terms contemplated by Section 6.2 and otherwise acceptable to the Doman Entities.

The term "Unaffected Creditors" used in Section 4.12 includes the Senior Secured Noteholders.

[8] The application of the Doman Group is relatively limited in scope because it simply seeks authorization to hold creditor meetings to consider the Reorganization Plan.

However, it is common ground that I should not authorize the holding of the creditor meetings if the Reorganization Plan cannot be sanctioned by the Court following the holding of the creditor meetings or if the implementation of the Reorganization Plan is contingent on the Court granting an order which it has no jurisdiction to make or would not otherwise make.

[9] Counsel for the Doman Group submitted that the sole issue is whether the Court has the jurisdiction to grant a stay under s. 11(4) of the **CCAA** in the form of the permanent injunction specified under clause (b) of the Section 4.12 of the Reorganization Plan. I do not agree. In particular, clause (a) of Section 4.12 purports to bind Unaffected Creditors, which include the Senior Secured Noteholders, by deeming them to have waived all defaults under instruments between them and the Doman Group. I agree with the counsel for the Senior Secured Noteholders Committee that creditors of debtor company under the **CCAA** cannot be bound by the

provisions of a plan of compromise or arrangement if they have not been given the opportunity to vote on it: see *Menegon v. Philip Services Corp.*, [1999] O.J. No. 4080 (Q. L.) (Ct. Jus.) at para. 38. It would be inappropriate for me to authorize the calling of creditor meetings to consider the Reorganization Plan when I know that this Court would refuse to sanction it on the basis that it purports to bind parties who were not given the opportunity to vote on it.

[10] However, my conclusion in this regard does not mean that I should accede to the request of the Senior Secured Noteholders Committee for the right to vote on the Reorganization Plan. In view of the submission made by the counsel for the Doman Group that the Plan was not intended to affect the rights of the Senior Secured Noteholders, I believe that the Doman Group should first be given the opportunity to propose a revised Reorganization Plan which does not include reference to Unaffected Creditors in clause (a) of Section 4.12 or any other provision which purports to bind parties who are not given the opportunity to vote on the Plan.

[11] I next turn my attention to clause (b) of Section 4.12, which is the provision upon which I believe counsel for the Doman Group is relying to prevent Senior Secured Noteholders from acting on their security following the

implementation of the Reorganization Plan. Although the permanent injunction contemplated in this clause is mentioned in the Reorganization Plan, it is not, strictly speaking, part of the Plan. Rather, the granting of the injunction is a condition precedent in the implementation of the Plan. The result of this distinction is that the Plan itself does not purport to bind the Senior Secured Noteholders in this regard and they are not entitled to vote on the Plan. Thus, the question becomes whether the Court has the jurisdiction to grant such an injunction because, if it does not have the jurisdiction, there would be no point in convening creditor meetings to consider a plan containing a condition precedent which cannot be fulfilled.

[12] The Court is given the power to grant stays of proceedings by s. 11(4) of the CCAA, which reads as follows:

(4) A court may, on an application in respect of a company other than an initial application, make an order on such term 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.

[13] Since the re-emergence of the **CCAA** in the 1980s, the Courts have utilized the stay provisions of the **CCAA** in a variety of situations for a purpose other than staying creditors from enforcing their security or otherwise preventing creditors from attempting to gain an advantage over other creditors. One of the seminal decisions is **Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.**, (1988) 72 C.B.R. (N.S.) 1 (Alta Q.B.), where the Court stayed the ability of a joint venture partner of a debtor company from relying on the insolvency of the debtor company to replace it as the operator under a petroleum operating agreement.

[14] Two other prominent examples are **Re T. Eaton Co.** (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) and **Re Playdium Enterprises Corp.** (2001), 31 C.B.R. (4th) 302, as supplemented at 31 C.B.R. (4th) 309 (Ont. Sup. Ct. Jus.). In the **T. Eaton** case, tenants in shopping centres in which Eaton's was also a tenant were prevented during the restructuring period from terminating their leases on the basis of co-tenancy clauses in their leases requiring anchor stores such as Eaton's to stay open. In the **Playdium** decision, the Court approved an assignment of an agreement in conjunction with a sale in a

failed CCAA proceeding where the other party to the agreement, which had a contractual right to consent to an assignment, was objecting to the assignment. As the Court in the *Playdium* case relied on s. 11(4) of the CCAA, I assume that the Order prevented the other party to the agreement from terminating the assigned agreement as a result of the failure to obtain its consent to the assignment. I was also referred to my decision in *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236, where I relied on the inherent jurisdiction of the court to stay the calling on letters of credit issued by third parties at the instance of the debtor company.

[15] The law is clear that the court has the jurisdiction under the CCAA to impose a stay during the restructuring period to prevent a creditor relying on an event of default to accelerate the payment of indebtedness owed by the debtor company or to prevent a non-creditor relying on a breach of a contract with the debtor company to terminate the contract. It is also my view that the court has similar jurisdiction to grant a permanent stay surviving the restructuring of the debtor company in respect of events of default or breaches occurring prior to the restructuring. In this regard, I agree with the following reasoning of Spence J. at para. 32 of the supplementary reasons in *Playdium*:

In interpreting s. 11(4), including the "such terms" clause, the remedial nature of the CCAA must be taken into account. If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency defaults which occasioned the CCAA order could not be asserted by the Famous Players after the stay period. If such an order could not be made, the CCAA regime would prospectively be of little or no value because even though a compromise of creditor claims might be worked out in the stay period, Famous Players (or for that matter, any similar third party) could then assert the insolvency default and terminate, so that the stay would not provide any protection for the continuing prospects of the business. In view of the remedial nature of the CCAA, the Court should not take such a restrictive view of the s. 11(4) jurisdiction.

[16] Spence J. made the above comments in the context of a third party which had a contract with the debtor company. In my opinion, the reasoning applies equally to a creditor of the debtor company in circumstances where the debtor company has chosen not to compromise the indebtedness owed to it. The decision in *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 179 is an example of a permanent stay being granted in respect of a creditor of the restructuring company.

[17] Accordingly, it is my view that the court does have the jurisdiction to grant a permanent stay preventing the Senior Secured Noteholders and the Trustee under the Trust Indenture from relying on events of default existing prior to or during the restructuring period to accelerate the repayment of the indebtedness owing under the Notes. It may be that the

court would decline to exercise its jurisdiction in respect of monetary defaults but this point is academic in the present case because the Doman Group does intend to pay the overdue interest on the Notes upon implementation of the Reorganization Plan.

[18] The second issue is whether the court has the jurisdiction to grant a permanent stay to prevent the Senior Secured Noteholders and the Trustee under the Trust Indenture from relying on a breach of Section 4.13 of the Trust Indenture to accelerate payment of the indebtedness owed on the Notes. The potential breach under Section 4.13 would be occasioned by the Doman Group granting second ranking security to the Unsecured Noteholders upon the implementation of the Reorganization Plan. I use the term "potential breach" because counsel for the Doman Group takes the position that the granting of this security would not contravene the provisions of Section 4.13.

[19] I have decided that I should decline to make a determination of this issue because I did not receive the benefit of detailed submissions on the interpretation of Section 4.13 and the defined terms used in that Section. Counsel for the Doman Group simply argued that the wording was circular or ambiguous and noted that the definition of

Permitted Indebtedness could include a refinancing of the Unsecured Notes. Counsel for the Senior Secured Noteholders Committee took the position, without elaboration, that Section 4.13 would be breached if the proposed security were to be granted. If the granting of the security would not contravene Section 4.13, then it would not be necessary for the court to grant a permanent stay preventing the acceleration of the indebtedness owing on the Notes as a result of the granting of the security and the issue would be academic. In my opinion, it is not appropriate for me to decide a potentially academic issue and I decline to do so.

[20] The third issue is whether the court has the jurisdiction to effectively stay the operation of Section 4.16 of the Trust Indenture. Although I understand that there is an issue as to whether the giving of 85% of the equity in the Doman Group to the Unsecured Noteholders as part of the reorganization would constitute a change of control for the purposes of the current version of the provincial forestry legislation, counsel for the Doman Group conceded that it would constitute a Change of Control within the meaning of Section 4.16.

[21] The language of s. 11(4) of the *CCAA*, on a literal interpretation, is very broad and the case authorities have

held that it should receive a liberal interpretation in view of the remedial nature of the CCAA. However, in my opinion, a liberal interpretation of s. 11(4) does not permit the court to excuse the debtor company from fulfilling its contractual obligations arising after the implementation of a plan of compromise or arrangement.

[22] In my view, there are numerous purposes of stays under s. 11 of the CCAA. One of the purposes is to maintain the status quo among creditors while a debtor company endeavours to reorganize or restructure its financial affairs. Another purpose is to prevent creditors and other parties from acting on the insolvency of the debtor company or other contractual breaches caused by the insolvency to terminate contracts or accelerate the repayment of the indebtedness owing by the debtor company when it would interfere with the ability of the debtor company to reorganize or restructure its financial affairs. An additional purpose is to relieve the debtor company of the burden of dealing with litigation against it so that it may focus on restructuring its financial affairs. As I have observed above, a further purpose is to prevent the frustration of a reorganization or restructuring plan after its implementation on the basis of events of default or breaches which existed prior to or during the

restructuring period. All of these purposes are to facilitate a debtor company in restructuring its financial affairs. On the other hand, it is my opinion that Parliament did not intend s. 11(4) to authorize courts to stay proceedings in respect of defaults or breaches which occur after the implementation of the reorganization or restructuring plan, even if they arise as a result of the implementation of the plan.

[23] In the present case, the obligation of the Doman Group to make an offer under Section 4.16 of the Trust Indenture does not arise until ten days after the Change of Control. The Change of Control will occur upon the implementation of the Reorganization Plan, with the result that the obligation of the Doman Group to make the offer does not arise until a point in time after the Reorganization Plan has been implemented. This is a critical difference in my view between this case and the authorities relied upon by the counsel for the Doman Group.

[24] Section 11(4) utilizes the verbs "staying", "Restraining" and "prohibiting". These verbs evince an intention of protecting the debtor company from the actions of others, including creditors and non-creditors, while it is endeavouring to reorganize its financial affairs. This

wording is not intended, in my view, to relieve the debtor company from the performance of affirmative obligations which arise subsequent to the implementation of the plan of compromise or arrangement. In the context of this case, the Doman Group is endeavouring to rely on s. 11(4) to relieve itself of the obligation to make an offer to repurchase the Senior Secured Notes upon a Change of Control. In my opinion, this goes beyond any liberal interpretation of s. 11(4).

[25] Counsel for Doman Group submitted that the proposed injunction is no more than a restriction upon an acceleration clause. Even if that is the case, it is an acceleration clause which does not become operative until after the restructuring has been completed. It is not a provision which the Senior Secured Noteholders are entitled to enforce as a result of an event of a default or breach occurring or existing prior to or during the restructuring period.

[26] There is no doubt that courts have power under s. 11(4) to interfere with the contractual relations during the restructuring period. It is my opinion, however, that s. 11(4) does not give the power to courts to grant permanent injunctions as a means to permit a debtor company to unilaterally and prospectively vary the terms of a contract to which it is a party.

[27] Counsel for the Doman Group also submitted that the court has the inherent jurisdiction to restrain the Doman Group from making the offer under Section 4.16 of the Trust Indenture, much in the same way as I exercised the court's inherent jurisdiction in *Woodward's*, prior to the enactment of s. 11.2 of the *CCAA*, to restrain third parties from calling on letters of credit issued by a financial institution at the instance of the debtor company. The court has the inherent jurisdiction during the restructuring period to "fill in gaps" in the *CCAA* or to "flesh out the bare bones" of the *CCAA* in order to give effect to its objects: see *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C.S.C.) at p. 93 and *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. Jus.) at p. 110. In my view, the Doman Group is not asking the court to fill in gaps in the *CCAA* during the restructuring period. Rather, it is asking the court to go beyond the type of stay contemplated by Parliament when it enacted s. 11(4) of the *CCAA*.

[28] In the event that I am mistaken and the court does have the jurisdiction to grant a stay in respect of the operation of Section 4.16 of the Trust Indenture, I would exercise my discretion against the granting of such a stay on the basis of the current circumstances. The absence of a

permanent injunction in relation to Section 4.16 will not necessarily frustrate the restructuring efforts of the Doman Group. Apart from any compromise which may be negotiated between the Doman Group and the Senior Secured Noteholders, it is far from a certainty that the Senior Secured Noteholders will accept an offer made by the Doman Group under Section 4.16 to purchase the Notes at 101% of their face value. Indeed, counsel for the Doman Group suggested that in light of the 12% interest rate applicable to the Notes and prevailing interest rates, the Noteholders would not want to accept the offer of a 1% premium because they would not be able to reinvest the funds at an interest rate as high as 11%. Counsel went so far as to characterize the right of repurchase and associated premium as "illusory benefits". In addition, it may be possible for the Doman Group to restructure its financial affairs in a fashion which does not involve a Change of Control while the Senior Secured Notes are outstanding. Finally, the Doman Group has not made any effort to negotiate an accommodation with the Senior Secured Noteholders.

[29] Although I have agreed with the reasoning of Spence J. at para. 32 of the *Playdium* decision, I should not be interpreted as agreeing with the correctness of the conclusion in *Playdium*. I have some reservations with respect to its

conclusion but, as *Playdium* is clearly distinguishable from the present case, it is not necessary for me to decide whether or not it should be followed.

[30] For these reasons, I conclude that the court does not have the jurisdiction to grant the permanent injunction contemplated by Section 4.12 (b) of the Reorganization Plan, at least as it relates to Section 4.16 of the Trust Indenture. Hence, it would be inappropriate for me to authorize the calling of creditor meetings to consider the Reorganization Plan in its present form because the condition precedent contained in section 6.3(a) of the Plan cannot be satisfied. I dismiss the application of the Doman Group, with liberty to re-apply in respect of a revised Reorganization Plan.

[31] In addition to seeking an order allowing them to vote on the Reorganization Plan, the Senior Secured Noteholder Committee applied for an order authorizing it to file a secured creditor plan of arrangement or compromise and an order directing the Doman Group to pay all of its costs.

[32] The form of the proposed secured creditor plan was attached to one of the affidavits. In essence, it includes the terms upon which the Senior Secured Noteholders represented by the Committee are prepared to waive breaches of the Trust Indenture occasioned by the restructuring of the

Doman Group and to amend the Trust Indenture to allow the restructuring. One of these terms is the payment of a fee equal to 3% of the face value of the Senior Secured Notes (approximately US\$5 million).

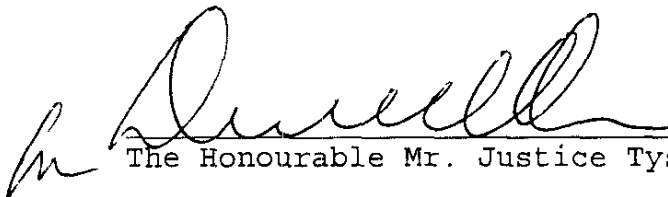
[33] I am not prepared to allow the Senior Secured Noteholders Committee to file its own plan. If such a plan were filed and approved by the Senior Secured Noteholders, they would accomplish the same thing which they are complaining that the Doman Group was endeavouring to achieve through the permanent injunction; namely, a unilateral variation of the terms of the Trust Indenture without the agreement of the other party to the Trust Indenture. Such a plan may also have the effect of giving the Senior Secured Noteholders a veto power in respect of the Doman Group's restructuring.

[34] The Senior Secured Noteholders Committee has not demonstrated a basis for the requested order that the Doman Group should pay all of its costs. The committee was presumably formed so that the Noteholders could act to protect or advance their own interests. It is not a committee requested by the Doman Group or constituted by the Court. The Noteholders may be entitled to some or all of such costs pursuant to the provisions of the Trust Indenture but that

issue is not before me. As to the costs of these applications in the context of the *Rules of Court*, there has been divided success and I direct that each party bear own costs.

[35] I dismiss the applications of the Committee for an order in relation to a secured creditor plan and an order in relation to its costs.

[36] If the Senior Secured Noteholders Committee still wishes to pursue the constitutional question, arrangements for a hearing may be made through Trial Division. However, as I am not granting the application of the Doman Group for an order authorizing the calling of creditor meetings to consider the Reorganization Plan in its present form, it would seem to me that any such hearing should await the issuance of a revised form of the Plan.

 CTSC
The Honourable Mr. Justice Tysoe



TAB 29

**5.1.3 MI 61-101 Protection of Minority Security Holders in Special Transactions and Companion Policy 61-101CP
Protection of Minority Security Holders in Special Transactions**

**MULTILATERAL INSTRUMENT 61-101
PROTECTION OF MINORITY SECURITY HOLDERS IN SPECIAL TRANSACTIONS**

TABLE OF CONTENTS

PART TITLE

PART 1 DEFINITIONS AND INTERPRETATION

- 1.1 Definitions
- 1.2 Liquid Market
- 1.3 Transactions by Wholly-Owned Subsidiary Entity
- 1.4 Transactions by Underlying Operating Entity of Income Trust
- 1.5 Redeemable Securities as Consideration in Business Combination
- 1.6 Beneficial Ownership
- 1.7 Control
- 1.8 Entity

PART 2 INSIDER BIDS

- 2.1 Application
- 2.2 Disclosure
- 2.3 Formal Valuation
- 2.4 Exemptions from Formal Valuation Requirement

PART 3 ISSUER BIDS

- 3.1 Application
- 3.2 Disclosure
- 3.3 Formal Valuation
- 3.4 Exemptions from Formal Valuation Requirement

PART 4 BUSINESS COMBINATIONS

- 4.1 Application
- 4.2 Meeting and Information Circular
- 4.3 Formal Valuation
- 4.4 Exemptions from Formal Valuation Requirement
- 4.5 Minority Approval
- 4.6 Exemptions from Minority Approval Requirement
- 4.7 Conditions for Relief from Business Corporations Act Requirements

PART 5 RELATED PARTY TRANSACTIONS

- 5.1 Application
- 5.2 Material Change Report
- 5.3 Meeting and Information Circular
- 5.4 Formal Valuation
- 5.5 Exemptions from Formal Valuation Requirement
- 5.6 Minority Approval
- 5.7 Exemptions from Minority Approval Requirement

PART 6 FORMAL VALUATIONS AND PRIOR VALUATIONS

- 6.1 Independence and Qualifications of Valuator
- 6.2 Disclosure Regarding Valuator
- 6.3 Subject Matter of Formal Valuation
- 6.4 Preparation of Formal Valuation
- 6.5 Summary of Formal Valuation
- 6.6 Filing of Formal Valuation
- 6.7 Valuator's Consent
- 6.8 Disclosure of Prior Valuation
- 6.9 Filing of Prior Valuation
- 6.10 Consent of Prior Valuator Not Required

PART 7 INDEPENDENT DIRECTORS

7.1 Independent Directors

PART 8 MINORITY APPROVAL

8.1 General

8.2 Second Step Business Combination

PART 9 EXEMPTION

9.1 Exemption

PART 10 EFFECTIVE DATE

10.1 Effective Date

MULTILATERAL INSTRUMENT 61-101
PROTECTION OF MINORITY SECURITY HOLDERS IN SPECIAL TRANSACTIONS

PART 1 DEFINITIONS AND INTERPRETATION

1.1 Definitions – In this Instrument

“affected security” means

- (a) for a business combination of an issuer, an equity security of the issuer in which the interest of a security holder would be terminated as a consequence of the transaction, and
- (b) for a related party transaction of an issuer, an equity security of the issuer;

“affiliated entity”: a person is considered to be an affiliated entity of another person if one is the subsidiary entity of the other or if both are subsidiary entities of the same person;

“arm’s length” has the meaning ascribed to that term in section 251 of the *Income Tax Act* (Canada), or any successor to that legislation, and, in addition to that meaning, a person is deemed not to deal at arm’s length with a related party of that person;

“associated entity”, when used to indicate a relationship with a person, means

- (a) an issuer of which the person beneficially owns or controls, directly or indirectly, voting securities entitling the person to more than 10% of the voting rights attached to outstanding securities of the issuer,
- (b) any partner of the person,
- (c) any trust or estate in which the person has a substantial beneficial interest or in respect of which a person serves as trustee or in a similar capacity,
- (d) a relative of that person, including
 - (i) the spouse, or
 - (ii) a relative of the person’s spouseif the relative has the same home as that person;

“beneficially owns” includes direct or indirect beneficial ownership of a security holder;

“bid” means a take-over bid or an issuer bid to which Part 2 of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* applies, and in Ontario, a formal take-over bid or formal issuer bid as defined in section 89(1) of the *Securities Act*;

“bona fide lender” means a person that

- (a) is an issuer insider of an issuer solely through the holding of, or the exercise of control or direction over, securities used as collateral for a debt under a written agreement entered into by the person as a lender, assignee, transferee or participant,
- (b) is not yet legally entitled to dispose of the securities for the purpose of applying proceeds of realization in repayment of the secured debt, and
- (c) was not a related party of the issuer at the time the agreement referred to in paragraph (a) was entered into;

“business combination” means, for an issuer, an amalgamation, arrangement, consolidation, amendment to the terms of a class of equity securities or any other transaction of the issuer, as a consequence of which the interest of a holder of an equity security of the issuer may be terminated without the holder’s consent, regardless of whether the equity security is replaced with another security, but does not include

- (a) an acquisition of an equity security of the issuer under a statutory right of compulsory acquisition or, if the issuer is not a corporation, under provisions substantially equivalent to those comprising section 206 of the CBCA,
- (b) a consolidation of securities that does not have the effect of terminating the interests of holders of equity securities of the issuer in those securities without their consent, through the elimination of post-consolidated fractional interests or otherwise, except to an extent that is nominal in the circumstances,
- (c) a termination of a holder's interest in a security, under the terms attached to the security, for the purpose of enforcing an ownership or voting constraint that is necessary to enable the issuer to comply with legislation, lawfully engage in a particular activity or have a specified level of Canadian ownership,
- (d) a downstream transaction for the issuer, or
- (e) a transaction in which no person that is a related party of the issuer at the time the transaction is agreed to
 - (i) would, as a consequence of the transaction, directly or indirectly acquire the issuer or the business of the issuer, or combine with the issuer, through an amalgamation, arrangement or otherwise, whether alone or with joint actors,
 - (ii) is a party to any connected transaction to the transaction, or
 - (iii) is entitled to receive, directly or indirectly, as a consequence of the transaction
 - (A) consideration per equity security that is not identical in amount and form to the entitlement of the general body of holders in Canada of securities of the same class,
 - (B) a collateral benefit, or
 - (C) consideration for securities of a class of equity securities of the issuer if the issuer has more than one outstanding class of equity securities, unless that consideration is not greater than the entitlement of the general body of holders in Canada of every other class of equity securities of the issuer in relation to the voting and financial participating interests in the issuer represented by the respective securities;

"CBCA" means the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44;

"class" includes a series of a class;

"collateral benefit", for a transaction of an issuer or for a bid for securities of an issuer, means any benefit that a related party of the issuer is entitled to receive, directly or indirectly, as a consequence of the transaction or bid, including, without limitation, an increase in salary, a lump sum payment, a payment for surrendering securities, or other enhancement in benefits related to past or future services as an employee, director or consultant of the issuer or of another person, regardless of the existence of any offsetting costs to the related party or whether the benefit is provided, or agreed to, by the issuer, another party to the transaction or the offeror in the bid, but does not include

- (a) a payment or distribution per equity security that is identical in amount and form to the entitlement of the general body of holders in Canada of securities of the same class,
- (b) an enhancement of employee benefits resulting from participation by the related party in a group plan, other than an incentive plan, for employees of a successor to the business of the issuer, if the benefits provided by the group plan are generally provided to employees of the successor to the business of the issuer who hold positions of a similar nature to the position held by the related party, or
- (c) a benefit, not described in paragraph (b), that is received solely in connection with the related party's services as an employee, director or consultant of the issuer, of an affiliated entity of the issuer or of a successor to the business of the issuer, if

- (i) the benefit is not conferred for the purpose, in whole or in part, of increasing the value of the consideration paid to the related party for securities relinquished under the transaction or bid,
- (ii) the conferring of the benefit is not, by its terms, conditional on the related party supporting the transaction or bid in any manner,
- (iii) full particulars of the benefit are disclosed in the disclosure document for the transaction, or in the directors' circular in the case of a take-over bid, and
- (iv)
 - (A) at the time the transaction is agreed to or the bid is publicly announced, the related party and its associated entities beneficially own or exercise control or direction over less than one per cent of the outstanding securities of each class of equity securities of the issuer, or
 - (B) if the transaction is a business combination for the issuer or a bid for securities of the issuer,
 - (I) the related party discloses to an independent committee of the issuer the amount of consideration that the related party expects it will be beneficially entitled to receive, under the terms of the transaction or bid, in exchange for the equity securities beneficially owned by the related party,
 - (II) the independent committee, acting in good faith, determines that the value of the benefit, net of any offsetting costs to the related party, is less than five per cent of the value referred to in subclause (I), and
 - (III) the independent committee's determination is disclosed in the disclosure document for the transaction, or in the directors' circular in the case of a take-over bid;

"connected transactions" means two or more transactions that have at least one party in common, directly or indirectly, other than transactions related solely to services as an employee, director or consultant, and

- (a) are negotiated or completed at approximately the same time, or
- (b) the completion of at least one of the transactions is conditional on the completion of each of the other transactions;

"consultant" means, for an issuer, a person, other than an employee or senior officer of the issuer or of an affiliated entity of the issuer, that

- (a) is engaged to provide services to the issuer or an affiliated entity of the issuer, other than services provided in relation to a distribution,
- (b) provides the services under a written contract with the issuer or an affiliated entity of the issuer, and
- (c) spends or will spend a significant amount of time and attention of the affairs and business of the issuer or an affiliated entity or the issuer

and includes, for an individual consultant a corporation of which the individual consultant is an employee or shareholder, and a partnership of which the individual consultant is an employee or partner;

"convertible" means convertible into, exchangeable for, or carrying the right or obligation to purchase or otherwise acquire or cause the purchase or acquisition of, another security;

"director", for an issuer that is a limited partnership, includes a director of the general partner of the issuer, except for the purposes of the interpretation of "control";

"disclosure document" means

- (a) for a take-over bid including an insider bid, a take-over bid circular sent to holders of offeree securities,

- (b) for an issuer bid, an issuer bid circular sent to holders of offeree securities, and
- (c) for a business combination or a related party transaction,
 - (i) an information circular sent to holders of affected securities,
 - (ii) if no information circular is required, another document sent to holders of affected securities in connection with a meeting of holders of affected securities, or
 - (iii) if no information circular or other document referred to in subparagraph (ii) is required, a material change report filed for the transaction;

“downstream transaction” means, for an issuer, a transaction between the issuer and a related party of the issuer if, at the time the transaction is agreed to

- (a) the issuer is a control person of the related party, and
- (b) to the knowledge of the issuer after reasonable inquiry, no related party of the issuer, other than a wholly-owned subsidiary entity of the issuer, beneficially owns or exercises control or direction over, other than through its interest in the issuer, more than five per cent of any class of voting or equity securities of the related party that is a party to the transaction;

“equity security” means a security of an issuer that carries a residual right to participate in the earnings of the issuer and, on liquidation or winding up of the issuer, in its assets;

“fair market value” means, except as provided in paragraph 6.4(2)(d), the monetary consideration that, in an open and unrestricted market, a prudent and informed buyer would pay to a prudent and informed seller, each acting at arm's length with the other and under no compulsion to act;

“formal valuation” means a valuation prepared in accordance with Part 6;

“freely tradeable” means, for securities, that

- (a) the securities are transferable,
- (b) the securities are not subject to any escrow requirements,
- (c) the securities do not form part of the holdings of any control person,
- (d) the securities are not subject to any cease trade order imposed by a securities regulatory authority,
- (e) all hold periods imposed by securities legislation before the securities can be traded without a prospectus or in reliance on a prospectus exemption have expired, and
- (f) any period of time imposed by securities legislation for which the issuer has to have been a reporting issuer in a jurisdiction before the securities can be traded without a prospectus or in reliance on a prospectus exemption has passed;

“incentive plan” means a group plan that provides for stock options or other equity incentives, profit sharing, bonuses, or other performance-based payments;

“independent committee” means, for an issuer, a committee consisting exclusively of one or more independent directors of the issuer;

“independent director” means, for an issuer in respect of a transaction or bid, a director who is independent as determined in section 7.1;

“independent valuator” means, for a transaction or bid, a valuator that is independent of all interested parties in the transaction, as determined in section 6.1;

“insider bid” means a take-over bid made by

- (a) an issuer insider of the offeree issuer,

- (b) an associated or affiliated entity of an issuer insider of the offeree issuer,
- (c) an associated or affiliated entity of the offeree issuer,
- (d) a person described in paragraph (a), (b) or (c) at any time within 12 months preceding the commencement of the bid, or
- (e) a joint actor with a person referred to in paragraph (a), (b), (c) or (d);

“interested party” means

- (a) for a take-over bid including an insider bid, the offeror or a joint actor with the offeror,
- (b) for an issuer bid
 - (i) the issuer, and
 - (ii) any control person of the issuer, or any person that would reasonably be expected to be a control person of the issuer upon successful completion of the issuer bid,
- (c) for a business combination, a related party of the issuer at the time the transaction is agreed to, if the related party
 - (i) would, as a consequence of the transaction, directly or indirectly acquire the issuer or the business of the issuer, or combine with the issuer, through an amalgamation, arrangement or otherwise, whether alone or with joint actors,
 - (ii) is a party to any connected transaction to the business combination, or
 - (iii) is entitled to receive, directly or indirectly, as a consequence of the transaction
 - (A) consideration per affected security that is not identical in amount and form to the entitlement of the general body of holders in Canada of securities of the same class,
 - (B) a collateral benefit, or
 - (C) consideration for securities of a class of equity securities of the issuer if the issuer has more than one outstanding class of equity securities, unless that consideration is not greater than the entitlement of the general body of holders in Canada of every other class of equity securities of the issuer in relation to the voting and financial participating interests in the issuer represented by the respective securities, and
- (d) for a related party transaction, a related party of the issuer at the time the transaction is agreed to, if the related party
 - (i) is a party to the transaction, unless it is a party only in its capacity as a holder of affected securities and is treated identically to the general body of holders in Canada of securities of the same class on a per security basis, or
 - (ii) is entitled to receive, directly or indirectly, as a consequence of the transaction
 - (A) a collateral benefit, or
 - (B) a payment or distribution made to one or more holders of a class of equity securities of the issuer if the issuer has more than one outstanding class of equity securities, unless the amount of that payment or distribution is not greater than the entitlement of the general body of holders in Canada of every other class of equity securities of the issuer in relation to the voting and financial participating interests in the issuer represented by the respective securities;

“issuer bid” has the meaning ascribed to that term in section 1.1 of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, and in Ontario, section 89(1) of the *Securities Act*;

“issuer insider” means, for an issuer

- (a) a director or senior officer of the issuer,
- (b) a director or senior officer of a person that is itself an issuer insider or subsidiary entity of the issuer, or
- (c) a person that has
 - (i) beneficial ownership of, or control or direction over, directly or indirectly, or
 - (ii) a combination of beneficial ownership of, and control or direction over, directly or indirectly, securities of the issuer carrying more than 10% of the voting rights attached to all the issuer's outstanding voting securities;

“joint actors”, when used to describe the relationship among two or more persons, means persons “acting jointly or in concert” as determined in accordance with section 1.9 of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, and in Ontario, section 91 of the *Securities Act*, with necessary modifications where the term is used in the context of a transaction that is not a take-over bid or issuer bid, but a security holder is not considered to be a joint actor with an offeror making a bid, or with a person involved in a business combination or related party transaction, solely because there is an agreement, commitment or understanding that the security holder will tender to the bid or vote in favour of the transaction;

“liquid market” means a market that meets the criteria specified in section 1.2;

“market capitalization” of an issuer means, for a transaction, the aggregate market price of all outstanding securities of all classes of equity securities of the issuer, the market price of the outstanding securities of a class being

- (a) in the case of equity securities of a class for which there is a published market, the product of
 - (i) the number of securities of the class outstanding as of the close of business on the last business day of the calendar month preceding the calendar month in which the transaction is agreed to or, if no securities of the class were outstanding on that day, on the first business day after that day that securities of the class became outstanding, so long as that day precedes the date the transaction is agreed to, and
 - (ii) the market price of the securities at the time referred to in subparagraph (i), on the published market on which the class of securities is principally traded, as determined in accordance with subsections 1.11 (1), (2) and (3) of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, and in Ontario, subsections 1.3 (1), (2) and (3) of Ontario Securities Commission Rule 62-504 *Take-Over Bids and Issuer Bids*,
- (b) in the case of equity securities of a class for which there is no published market but that are currently convertible into a class of equity securities for which there is a published market, the product of
 - (i) the number of equity securities into which the convertible securities were convertible as of the close of business on the last business day of the calendar month preceding the calendar month in which the transaction is agreed to or, if no convertible securities were outstanding or convertible on that day, on the first business day after that day that the convertible securities became outstanding or convertible, so long as that day precedes the date the transaction is agreed to, and
 - (ii) the market price of the securities into which the convertible securities were convertible, at the time referred to in subparagraph (i), on the published market on which the class of securities is principally traded, as determined in accordance with subsections 1.11 (1), (2) and (3) of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, and in Ontario, subsections 1.3 (1), (2) and (3) of OSC Rule 62-504 *Take-Over Bids and Issuer Bids*, and

- (c) in the case of equity securities of a class not referred to in paragraph (a) or (b), the amount determined by the issuer's board of directors in good faith to represent the fair market value of the outstanding securities of that class;

"minority approval" means, for a business combination or related party transaction of an issuer, approval of the proposed transaction by a majority of the votes as specified in Part 8, cast by holders of each class of affected securities at a meeting of security holders of that class called to consider the transaction;

"offeree issuer" has the meaning ascribed to that term in section 1.1 of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, and in Ontario, section 89(1) of the *Securities Act*;

"offeree security" means a security that is subject to a take-over bid or issuer bid;

"offeror" has the meaning ascribed to that term in section 1.1 of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, and in Ontario, section 89(1) of the *Securities Act*;

"person" in Ontario, includes

- (a) an individual,
- (b) a corporation,
- (c) a partnership, trust, fund and an association, syndicate, organization or other organized group of persons, whether incorporated or not, and
- (d) an individual or other person in that person's capacity as a trustee, executor, administrator or personal or other legal representative;

"prior valuation" means a valuation or appraisal of an issuer or its securities or material assets, whether or not prepared by an independent valuator, that, if disclosed, would reasonably be expected to affect the decision of a security holder to vote for or against a transaction, or to retain or dispose of affected securities or offeree securities, other than

- (a) a report of a valuation or appraisal prepared by a person other than the issuer, if
 - (i) the report was not solicited by the issuer, and
 - (ii) the person preparing the report did so without knowledge of any material information concerning the issuer, its securities or any of its material assets, that had not been generally disclosed at the time the report was prepared,
- (b) an internal valuation or appraisal prepared for the issuer in the ordinary course of business that has not been made available to, and has been prepared without the participation of
 - (i) the board of directors of the issuer, or
 - (ii) any director or senior officer of an interested party, except a senior officer of the issuer in the case of an issuer bid,
- (c) a report of a market analyst or financial analyst that
 - (i) has been prepared by or for and at the expense of a person other than the issuer, an interested party, or an associated or affiliated entity of the issuer or an interested party, and
 - (ii) is either generally available to clients of the analyst or of the analyst's employer or of an associated or affiliated entity of the analyst's employer or, if not, is not based, so far as the person required to disclose a prior valuation is aware, on any material information concerning the issuer, its securities or any of its material assets, that had not been generally disclosed at the time the report was prepared,
- (d) a valuation or appraisal prepared by a person or a person retained by that person, for the purpose of assisting the person in determining the price at which to propose a transaction that resulted in the person becoming an issuer insider, if the valuation or appraisal is not made available to any of the independent directors of the issuer, or

- (e) a valuation or appraisal prepared by an interested party or a person retained by the interested party, for the purpose of assisting the interested party in determining the price at which to propose a transaction that, if pursued, would be an insider bid, business combination or related party transaction, if the valuation or appraisal is not made available to any of the independent directors of the issuer;

“published market” means, with respect to any class of securities, a market in Canada or outside of Canada on which the securities are traded, if the prices at which they have been traded on that market are regularly

- (a) disseminated electronically, or
- (b) published in a newspaper or business or financial publication of general and regular paid circulation;

“related party” of an entity means a person, other than a person that is solely a bona fide lender, that, at the relevant time and after reasonable inquiry, is known by the entity or a director or senior officer of the entity to be

- (a) a control person of the entity,
- (b) a person of which a person referred to in paragraph (a) is a control person,
- (c) a person of which the entity is a control person,
- (d) a person that has
 - (i) beneficial ownership of, or control or direction over, directly or indirectly, or
 - (ii) a combination of beneficial ownership of, and control or direction over, directly or indirectly, securities of the entity carrying more than 10% of the voting rights attached to all the entity's outstanding voting securities,
- (e) a director or senior officer of
 - (i) the entity, or
 - (ii) a person described in any other paragraph of this definition,
- (f) a person that manages or directs, to any substantial degree, the affairs or operations of the entity under an agreement, arrangement or understanding between the person and the entity, including the general partner of an entity that is a limited partnership, but excluding a person acting under bankruptcy or insolvency law,
- (g) a person of which persons described in any paragraph of this definition beneficially own, in the aggregate, more than 50 per cent of the securities of any outstanding class of equity securities, or
- (h) an affiliated entity of any person described in any other paragraph of this definition;

“related party transaction” means, for an issuer, a transaction between the issuer and a person that is a related party of the issuer at the time the transaction is agreed to, whether or not there are also other parties to the transaction, as a consequence of which, either through the transaction itself or together with connected transactions, the issuer directly or indirectly

- (a) purchases or acquires an asset from the related party for valuable consideration,
- (b) purchases or acquires, as a joint actor with the related party, an asset from a third party if the proportion of the asset acquired by the issuer is less than the proportion of the consideration paid by the issuer,
- (c) sells, transfers or disposes of an asset to the related party,
- (d) sells, transfers or disposes of, as a joint actor with the related party, an asset to a third party if the proportion of the consideration received by the issuer is less than the proportion of the asset sold, transferred or disposed of by the issuer,

- (e) leases property to or from the related party,
- (f) acquires the related party, or combines with the related party, through an amalgamation, arrangement or otherwise, whether alone or with joint actors,
- (g) issues a security to the related party or subscribes for a security of the related party,
- (h) amends the terms of a security of the issuer if the security is beneficially owned, or is one over which control or direction is exercised, by the related party, or agrees to the amendment of the terms of a security of the related party if the security is beneficially owned by the issuer or is one over which the issuer exercises control or direction,
- (i) assumes or otherwise becomes subject to a liability of the related party,
- (j) borrows money from or lends money to the related party, or enters into a credit facility with the related party,
- (k) releases, cancels or forgives a debt or liability owed by the related party,
- (l) materially amends the terms of an outstanding debt or liability owed by or to the related party, or the terms of an outstanding credit facility with the related party, or
- (m) provides a guarantee or collateral security for a debt or liability of the related party, or materially amends the terms of the guarantee or security;

“senior officer” means the chair or a vice-chair of the board of directors, a president, a vice-president, the secretary, the treasurer or the general manager of an issuer or any other individual who performs functions for an issuer similar to those normally performed by an individual occupying any such office, and for an issuer that is a limited partnership, includes a senior officer of the general partner of the issuer;

“subsidiary entity” means a person that is controlled directly or indirectly by another person and includes a subsidiary of that subsidiary;

“take-over bid” has the meaning ascribed to that term in section 1.1 of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, and in Ontario, section 89(1) of the *Securities Act*; and

“wholly-owned subsidiary entity”: a person is considered to be a wholly-owned subsidiary entity of an issuer if the issuer owns, directly or indirectly, all the voting and equity securities and securities convertible into voting and equity securities of the person.

1.2 Liquid Market

- (1) For the purposes of this Instrument, a liquid market in a class of securities of an issuer in respect of a transaction exists at a particular time only if
 - (a) there is a published market for the class of securities,
 - (i) during the period of 12 months before the date the transaction is agreed to in the case of a business combination, or 12 months before the date the transaction is publicly announced in the case of an insider bid or issuer bid
 - (A) the number of outstanding securities of the class was at all times at least 5,000,000, excluding securities beneficially owned, or over which control or direction was exercised, by related parties and securities that were not freely tradeable,
 - (B) the aggregate trading volume of the class of securities on the published market on which the class was principally traded was at least 1,000,000 securities,
 - (C) there were at least 1,000 trades in securities of the class on the published market on which the class was principally traded, and

- (D) the aggregate value of the trades in securities of the class on the published market on which the class was principally traded was at least \$15,000,000, and
 - (ii) the market value of the class of securities on the published market on which the class was principally traded, as determined in accordance with subsection (2), was at least \$75,000,000 for the calendar month preceding the calendar month
 - (A) in which the transaction is agreed to, in the case of a business combination, or
 - (B) in which the transaction is publicly announced, in the case of an insider bid or issuer bid, or
- (b) if the test set out in paragraph (a) is not met and there is a published market for the class of securities,
 - (i) a person that is qualified and independent of all interested parties to the transaction, as determined on the same basis applicable to a valuator preparing a formal valuation under section 6.1, provides an opinion to the issuer that there is a liquid market in the class at the date the transaction is agreed to in the case of a business combination, or at the date the transaction is publicly announced in the case of an insider bid or issuer bid,
 - (ii) the opinion is included in the disclosure document for the transaction, and
 - (iii) the disclosure document for the transaction includes the same disclosure regarding the person providing the opinion as is required for a valuator under section 6.2.
- (2) For the purpose of determining whether an issuer satisfies the market value requirement of subparagraph (1)(a)(ii), the market value of a class of securities for a calendar month is calculated by multiplying
 - (a) the number of securities of the class outstanding as of the close of business on the last business day of the calendar month, excluding securities beneficially owned, or over which control or direction was exercised, by related parties of the issuer and securities that were not freely tradeable, by
 - (b) the arithmetic average of the closing prices of the securities of that class on the published market on which that class was principally traded for each of the trading days during the calendar month, if the published market provides a closing price for the securities, or
 - (c) the arithmetic average of the simple averages of the highest and lowest prices of the securities of that class on the published market on which that class was principally traded for each of the trading days for which the securities traded during the calendar month, if the published market does not provide a closing price, but provides only the highest and lowest prices of securities traded on a particular day.

1.3 Transactions by Wholly-Owned Subsidiary Entity – For the purposes of this Instrument, a transaction of a wholly-owned subsidiary entity of an issuer is deemed to be also a transaction of the issuer, and, for greater certainty, a bid made by a wholly-owned subsidiary entity of an issuer for securities of the issuer is deemed to be also an issuer bid made by the issuer.

1.4 Transactions by Underlying Operating Entity of Income Trust – For the purposes of this Instrument, a transaction of an underlying operating entity of an income trust within the meaning of National Policy 41-201 *Income Trusts and Other Indirect Offerings* is deemed to be a transaction of the income trust, and a related party of the underlying operating entity is deemed to be a related party of the income trust.

1.5 Redeemable Securities as Consideration in Business Combination – For the purposes of this Instrument, if all or part of the consideration that holders of affected securities receive in a business combination consists of securities that are redeemed for cash within seven days of their issuance, the cash proceeds of the redemption, rather than the redeemed securities, are deemed to be consideration that the holders of the affected securities receive in the business combination.

1.6 Beneficial Ownership

- (1) Despite any other provision in securities legislation, for the purposes of this Instrument,

- (a) a person is deemed to own beneficially securities beneficially owned by a person it controls or by an affiliated entity of the controlled person if the affiliated entity is a subsidiary entity of the controlled person,
 - (b) a person is deemed to own beneficially securities beneficially owned by its affiliated entity if the affiliated entity is a subsidiary entity of the person,
- (2) For the purposes of the definitions of collateral benefit, control person, downstream transaction and related party, in determining beneficial ownership, the following provisions apply:
 - (a) in Ontario, section 90 of the *Securities Act*;
 - (b) in Québec, section 1.8 of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*.
- (3) In Québec, for the purposes of this Instrument, a person that beneficially owns securities means a person that owns the securities or that holds securities registered under the name of an intermediary acting as nominee, including a trustee or agent.

1.7 Control – For the purposes of the definition of “subsidiary entity”, a person controls a second person if

- (a) the person, directly or indirectly, beneficially owns or exercises control or direction over securities of the second person carrying votes which, if exercised, would entitle the person to elect a majority of the directors of the second person, unless the person beneficially owns or exercises control or direction over voting securities only to secure an obligation,
- (b) the second person is a partnership, the person beneficially owns or exercises control or direction over more than 50 per cent of the interests in the partnership, or
- (c) the second person is a limited partnership, the person is the general partner of the limited partnership or the control person of the general partner.

1.8 Entity – For the purposes of the definition of “related party”, an entity has the meaning ascribed to the term “person” in section 1.1, other than an individual.

PART 2 INSIDER BIDS

2.1 Application

- (1) This Part applies to a bid that is an insider bid.
- (2) This Part does not apply to an insider bid in respect of which the offeror complies with National Instrument 71-101 *The Multijurisdictional Disclosure System*, unless persons whose last address as shown on the books of the offeree issuer is in Canada, as determined in accordance with subsections 12.1(2) to (4) of that instrument, hold 20 per cent or more of the class of securities that is the subject of the bid.

2.2 Disclosure

- (1) The offeror shall disclose in the disclosure document for an insider bid
 - (a) the background to the insider bid,
 - (b) in accordance with section 6.8, every prior valuation in respect of the offeree issuer that has been made in the 24 months before the date of the insider bid, and the existence of which is known, after reasonable inquiry, to the offeror or any director or senior officer of the offeror,
 - (c) the formal valuation exemption, if any, on which the offeror is relying under section 2.4 and the facts supporting that reliance, and
 - (d) the disclosure required by Form 62-104F2 *Issuer Bid Circular* of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, and in Ontario, Form 62-504F2 *Issuer Bid Circular* of OSC Rule 62-504 *Take-Over Bids and Issuer Bids*, to the extent applicable and with necessary modifications.

- (2) The board of directors of the offeree issuer shall include in the directors' circular for an insider bid
 - (a) disclosure, in accordance with section 6.8, of every prior valuation in respect of the offeree issuer not disclosed in the disclosure document for the insider bid
 - (i) that has been made in the 24 months before the date of the insider bid, and
 - (ii) the existence of which is known, after reasonable inquiry, to the offeree issuer or to any director or senior officer of the offeree issuer,
 - (b) a description of the background to the insider bid to the extent the background has not been disclosed in the disclosure document for the insider bid,
 - (c) disclosure of any bona fide prior offer that relates to the offeree securities or is otherwise relevant to the insider bid, which offer was received by the issuer during the 24 months before the insider bid was publicly announced, and a description of the offer and the background to the offer, and
 - (d) a discussion of the review and approval process adopted by the board of directors and the special committee, if any, of the offeree issuer for the insider bid, including a discussion of any materially contrary view or abstention by a director and any material disagreement between the board and the special committee.

2.3 Formal Valuation

- (1) The offeror in an insider bid shall
 - (a) obtain, at its own expense, a formal valuation,
 - (b) provide the disclosure required by section 6.2,
 - (c) include, in accordance with section 6.5, a summary of the formal valuation in the disclosure document for the insider bid, unless the formal valuation is included in its entirety in the disclosure document, and
 - (d) comply with the other provisions of Part 6 applicable to it relating to formal valuations.
- (2) An independent committee of the offeree issuer shall, and the offeror shall enable the independent committee to
 - (a) determine who the valuator will be,
 - (b) supervise the preparation of the formal valuation, and
 - (c) use its best efforts to ensure that the formal valuation is completed and provided to the offeror in a timely manner.

2.4 Exemptions from Formal Valuation Requirement

- (1) Section 2.3 does not apply to an offeror in connection with an insider bid in any of the following circumstances:
 - (a) **Lack of Knowledge and Representation** – neither the offeror nor any joint actor with the offeror has, or has had within the preceding 12 months, any board or management representation in respect of the offeree issuer, or has knowledge of any material information concerning the offeree issuer or its securities that has not been generally disclosed,
 - (b) **Previous Arm's Length Negotiations** — all of the following conditions are satisfied:
 - (i) the consideration per security under the insider bid is at least equal in value to and is in the same form as the highest consideration agreed to with one or more selling security holders of the offeree issuer in arm's length negotiations in connection with
 - (A) the making of the insider bid,

- (B) one or more other transactions agreed to within 12 months before the date of the first public announcement of the insider bid, or
 - (C) a combination of transactions referred to in clauses (A) and (B),
- (ii) at least one of the selling security holders party to an agreement referred to in clause (i)(A) or (B) beneficially owns or exercises control or direction over, or beneficially owned or exercised control or direction over, and agreed to sell
 - (A) at least five per cent of the outstanding securities of the class of offeree securities, as determined in accordance with subsection (2), if the person that entered into the agreement with the selling security holder beneficially owned 80 per cent or more of the outstanding securities of the class of offeree securities, as determined in accordance with subsection (2), or
 - (B) at least 10 per cent of the outstanding securities of the class of offeree securities, as determined in accordance with subsection (2), if the person that entered into the agreement with the selling security holder beneficially owned less than 80 per cent of the outstanding securities of the class of offeree securities, as determined in accordance with subsection (2),
- (iii) one or more of the selling security holders party to any of the transactions referred to in subparagraph (i) beneficially own or exercise control or direction over, or beneficially owned or exercised control or direction over, and agreed to sell, in the aggregate, at least 20 per cent of the outstanding securities of the class of offeree securities, as determined in accordance with subsection (3), beneficially owned, or over which control or direction was exercised, by persons other than the person, and joint actors with the person, that entered into the agreements with the selling security holders,
- (iv) the offeror reasonably believes, after reasonable inquiry, that at the time of each of the agreements referred to in subparagraph (i)
 - (A) each selling security holder party to the agreement had full knowledge and access to information concerning the offeree issuer and its securities, and
 - (B) any factors peculiar to a selling security holder party to the agreement, including non-financial factors, that were considered relevant by that selling security holder in assessing the consideration did not have the effect of reducing the price that would otherwise have been considered acceptable by that selling security holder,
- (v) at the time of each of the agreements referred to in subparagraph (i), the offeror did not know of any material information in respect of the offeree issuer or the offeree securities that
 - (A) had not been generally disclosed, and
 - (B) if generally disclosed, could have reasonably been expected to increase the agreed consideration,
- (vi) if any of the agreements referred to in subparagraph (i) was entered into with a selling security holder by a person other than the offeror, the offeror reasonably believes, after reasonable inquiry, that at the time of that agreement, the person did not know of any material information in respect of the offeree issuer or the offeree securities that
 - (A) had not been generally disclosed, and
 - (B) if disclosed, could have reasonably been expected to increase the agreed consideration,
- (vii) the offeror does not know, after reasonable inquiry, of any material information in respect of the offeree issuer or the offeree securities since the time of each of the agreements referred to in subparagraph (i) that has not been generally disclosed and could reasonably be expected to increase the value of the offeree securities;

- (c) **Auction** – all of the following conditions are satisfied:
 - (i) the insider bid is publicly announced or made while
 - (A) one or more bids for securities of the same class that is the subject of the insider bid have been made and are outstanding, or
 - (B) one or more proposed transactions are outstanding that
 - (I) are business combinations in respect of securities of the same class that is the subject of the insider bid and ascribe a per security value to those securities, or
 - (II) would be business combinations in respect of securities of the same class that is the subject of the insider bid, except that they come within the exception in paragraph (e) of the definition of business combination and ascribe a per security value to those securities,
 - (ii) at the time the insider bid is made, the offeree issuer has provided equal access to the offeree issuer, and to information concerning the offeree issuer and its securities, to the offeror in the insider bid, all offerors in the other bids, and all parties to the proposed transactions described in clause (i)(B),
 - (iii) the offeror, in the disclosure document for the insider bid,
 - (A) includes all material information concerning the offeree issuer and its securities that is known to the offeror after reasonable inquiry but has not been generally disclosed, together with a description of the nature of the offeror's access to the issuer, and
 - (B) states that the offeror does not know, after reasonable inquiry, of any material information concerning the offeree issuer and its securities other than information that has been disclosed under clause (A) or that has otherwise been generally disclosed.
- (2) For the purposes of subparagraph (b)(ii) of subsection (1), the number of outstanding securities of the class of offeree securities
 - (a) is calculated at the time of the agreement referred to in clause (b)(i)(A) or (B) of subsection (1), if the offeror knows the number of securities of the class outstanding at that time, or
 - (b) if paragraph (a) does not apply, is determined based on the information most recently provided by the offeree issuer in a material change report, or section 5.4 of National Instrument 51-102 *Continuous Disclosure Obligations*, immediately preceding the date of the agreement referred to in clause (b)(i)(A) or (B) of subsection (1).
- (3) For the purposes of subparagraph (b)(iii) of subsection (1), the number of outstanding securities of the class of offeree securities
 - (a) is calculated at the time of the last of the agreements referred to in subparagraph (b)(i) of subsection (1), if the offeror knows the number of securities of the class outstanding at that time, or
 - (b) if paragraph (a) does not apply, is determined based on the information most recently provided by the offeree issuer in a material change report, or section 5.4 of National Instrument 51-102 *Continuous Disclosure Obligations*, immediately preceding the date of the last of the agreements referred to in subparagraph (b)(i) of subsection (1).

PART 3 ISSUER BIDS

3.1 Application

- (1) This Part applies to a bid that is an issuer bid.
- (2) This Part does not apply to an issuer bid that complies with National Instrument 71-101 *The Multijurisdictional Disclosure System*, unless persons whose last address as shown on the books of the issuer is in Canada, as determined in accordance with subsections 12.1(2) to (4) of that instrument, hold 20 per cent or more of the class of securities that is the subject of the bid.

3.2 Disclosure – The issuer shall include in the disclosure document for an issuer bid

- (a) a description of the background to the issuer bid,
- (b) disclosure, in accordance with section 6.8, of every prior valuation in respect of the issuer
 - (i) that has been made in the 24 months before the date of the issuer bid, and
 - (ii) the existence of which is known, after reasonable inquiry, to the issuer or to any director or senior officer of the issuer,
- (c) disclosure of any bona fide prior offer that relates to the offeree securities or is otherwise relevant to the issuer bid, which offer was received by the issuer during the 24 months before the issuer bid was publicly announced, and a description of the offer and the background to the offer,
- (d) a discussion of the review and approval process adopted by the board of directors and the special committee, if any, of the issuer for the issuer bid, including a discussion of any materially contrary view or abstention by a director and any material disagreement between the board and the special committee,
- (e) a statement of the intention, if known to the issuer after reasonable inquiry, of every interested party to accept or not to accept the issuer bid,
- (f) a description of the effect that the issuer anticipates the issuer bid, if successful, will have on the direct or indirect voting interest in the issuer of every interested party, and
- (g) disclosure of the formal valuation exemption, if any, on which the issuer is relying under section 3.4 and the facts supporting that reliance.

3.3 Formal Valuation

- (1) An issuer that makes an issuer bid shall
 - (a) obtain a formal valuation,
 - (b) provide the disclosure required by section 6.2,
 - (c) include, in accordance with section 6.5, a summary of the formal valuation in the disclosure document for the issuer bid, unless the formal valuation is included in its entirety in the disclosure document,
 - (d) if there is an interested party other than the issuer, state in the disclosure document who will pay or has paid for the valuation, and
 - (e) comply with the other provisions of Part 6 applicable to it relating to formal valuations.
- (2) The board of directors of the issuer or an independent committee of the board shall
 - (a) determine who the valuator will be, and
 - (b) supervise the preparation of the formal valuation.

3.4 Exemptions from Formal Valuation Requirement – Section 3.3 does not apply to an issuer in connection with an issuer bid in any of the following circumstances:

- (a) **Bid for Non-Convertible Securities** – the issuer bid is for securities that are not equity securities and that are not, directly or indirectly, convertible into equity securities,
- (b) **Liquid Market** – the issuer bid is made for securities for which
 - (i) a liquid market exists,
 - (ii) it is reasonable to conclude that, following the completion of the bid, there will be a market for holders of the securities who do not tender to the bid that is not materially less liquid than the market that existed at the time of the making of the bid, and
 - (iii) if an opinion referred to in paragraph (b) of subsection 1.2(1) is provided, the person providing the opinion reaches the conclusion described in subparagraph (b)(ii) of this section 3.4 and so states in its opinion.

PART 4 BUSINESS COMBINATIONS

4.1 Application – This Part does not apply to an issuer carrying out a business combination if

- (a) the issuer is not a reporting issuer,
- (b) the issuer is a mutual fund, or
- (c)
 - (i) at the time the business combination is agreed to, securities held by beneficial owners in the local jurisdiction constitute less than two per cent of the outstanding securities of each class of affected securities of the issuer, and
 - (ii) all documents concerning the transaction that are sent generally to other holders of affected securities of the issuer are concurrently sent to all holders of the securities in the local jurisdiction.

4.2 Meeting and Information Circular

- (1) Without limiting the application of any other legal requirements that apply to meetings of security holders and information circulars, this section applies only to a business combination for which section 4.5 requires the issuer to obtain minority approval.
- (2) An issuer proposing to carry out a business combination shall call a meeting of holders of affected securities and send an information circular to those holders.
- (3) The issuer shall include in the information circular
 - (a) the disclosure required by Form 62-104F2 *Issuer Bid Circular* of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, and in Ontario, Form 62-504F2 *Issuer Bid Circular* of OSC Rule 62-504 *Take-Over Bids and Issuer Bids*, to the extent applicable and with necessary modifications,
 - (b) a description of the background to the business combination,
 - (c) disclosure in accordance with section 6.8 of every prior valuation in respect of the issuer
 - (i) that has been made in the 24 months before the date of the information circular, and
 - (ii) the existence of which is known, after reasonable inquiry, to the issuer or to any director or senior officer of the issuer,
 - (d) disclosure of any bona fide prior offer that relates to the subject matter of or is otherwise relevant to the transaction, which offer was received by the issuer during the 24 months before the business combination was agreed to, and a description of the offer and the background to the offer,

- (e) a discussion of the review and approval process adopted by the board of directors and the special committee, if any, of the issuer for the transaction, including a discussion of any materially contrary view or abstention by a director and any material disagreement between the board and the special committee,
 - (f) disclosure of the formal valuation exemption, if any, on which the issuer is relying under section 4.4 and the facts supporting that reliance,
 - (g) disclosure of the number of votes attached to the securities that, to the knowledge of the issuer after reasonable inquiry, will be excluded in determining whether minority approval for the business combination is obtained, and
 - (h) the identity of the holders of securities specified in paragraph (g) together with their individual holdings.
- (4) If, after sending the information circular and before the meeting, a change occurs that, if disclosed, would reasonably be expected to affect the decision of a holder of affected securities to vote for or against the business combination or to retain or dispose of affected securities, the issuer shall promptly disseminate disclosure of the change
 - (a) in a manner that the issuer reasonably determines will inform beneficial owners of affected securities of the change, and
 - (b) sufficiently in advance of the meeting that the beneficial owners of affected securities will be able to assess the impact of the change.
- (5) If subsection (4) applies, the issuer shall file a copy of the disseminated information contemporaneously with its dissemination.

4.3 Formal Valuation

- (1) An issuer shall obtain a formal valuation for a business combination if
 - (a) an interested party would, as a consequence of the transaction, directly or indirectly acquire the issuer or the business of the issuer, or combine with the issuer, through an amalgamation, arrangement or otherwise, whether alone or with joint actors, or
 - (b) an interested party is a party to any connected transaction to the business combination, if the connected transaction is a related party transaction for which the issuer is required to obtain a formal valuation under section 5.4.
- (2) If a formal valuation is required under subsection (1), the issuer shall
 - (a) provide the disclosure required by section 6.2,
 - (b) include, in accordance with section 6.5, a summary of the formal valuation in the disclosure document for the business combination, unless the formal valuation is included in its entirety in the disclosure document,
 - (c) state in the disclosure document for the business combination who will pay or has paid for the valuation, and
 - (d) comply with the other provisions of Part 6 applicable to it relating to formal valuations.
- (3) The board of directors of the issuer or an independent committee of the board shall
 - (a) determine who the valuator will be, and
 - (b) supervise the preparation of the formal valuation.

4.4 Exemptions from Formal Valuation Requirement

- (1) Section 4.3 does not apply to an issuer carrying out a business combination in any of the following circumstances:
 - (a) **Issuer Not Listed on Specified Markets** – no securities of the issuer are listed or quoted on the Toronto Stock Exchange, the New York Stock Exchange, the American Stock Exchange, the NASDAQ Stock Market, or a stock exchange outside of Canada and the United States other than the Alternative Investment Market of the London Stock Exchange or the PLUS markets operated by PLUS Markets Group plc,
 - (b) **Previous Arm's Length Negotiations** — all of the following conditions are satisfied:
 - (i) the consideration per affected security under the business combination is at least equal in value to and is in the same form as the highest consideration agreed to with one or more selling security holders of the issuer in arm's length negotiations in connection with
 - (A) the business combination,
 - (B) one or more other transactions agreed to within 12 months before the date of the first public announcement of the business combination, or
 - (C) a combination of transactions referred to in clauses (A) and (B),
 - (ii) at least one of the selling security holders party to an agreement referred to in clause (i)(A) or (B) beneficially owns or exercises control or direction over, or beneficially owned or exercised control or direction over, and agreed to sell
 - (A) at least five per cent of the outstanding securities of the class of affected securities, as determined in accordance with subsection (2), if the person that entered into the agreement with the selling security holder beneficially owned 80 per cent or more of the outstanding securities of the class of affected securities, as determined in accordance with subsection (2), or
 - (B) at least 10 per cent of the outstanding securities of the class of affected securities, as determined in accordance with subsection (2), if the person that entered into the agreement with the selling security holder beneficially owned less than 80 per cent of the outstanding securities of the class of affected securities, as determined in accordance with subsection (2),
 - (iii) one or more of the selling security holders party to any of the transactions referred to in subparagraph (i) beneficially owns or exercises control or direction over, or beneficially owned or exercised control or direction over, and agreed to sell, in the aggregate, at least 20 per cent of the outstanding securities of the class of affected securities, as determined in accordance with subsection (3), beneficially owned or over which control or direction was exercised by persons other than the person, and joint actors with the person, that entered into the agreements with the selling security holders,
 - (iv) the person proposing to carry out the business combination with the issuer reasonably believes, after reasonable inquiry, that at the time of each of the agreements referred to in subparagraph (i)
 - (A) each selling security holder party to the agreement had full knowledge of and access to information concerning the issuer and its securities, and
 - (B) any factors peculiar to a selling security holder party to the agreement, including non-financial factors, that were considered relevant by the selling security holder in assessing the consideration did not have the effect of reducing the price that would otherwise have been considered acceptable by that selling security holder,
 - (v) at the time of each of the agreements referred to in subparagraph (i), the person proposing to carry out the business combination with the issuer did not know of any material information in respect of the issuer or the affected securities that

- (A) had not been generally disclosed, and
 - (B) if disclosed, could have reasonably been expected to increase the agreed consideration,
 - (vi) any of the agreements referred to in subparagraph (i) was entered into with a selling security holder by a person other than the person proposing to carry out the business combination with the issuer, the person proposing to carry out the business combination with the issuer reasonably believes, after reasonable inquiry, that at the time of that agreement, the person entering into the agreement with the selling security holder did not know of any material information in respect of the issuer or the affected securities that
 - (A) had not been generally disclosed, and
 - (B) if disclosed, could have reasonably been expected to increase the agreed consideration,
 - (vii) the person proposing to carry out the business combination with the issuer does not know, after reasonable inquiry, of any material information in respect of the issuer or the affected securities since the time of each of the agreements referred to in subparagraph (i) that has not been generally disclosed and could reasonably be expected to increase the value of the affected securities,
- (c) **Auction** – all of the following conditions are satisfied:
- (i) the business combination is publicly announced while
 - (A) one or more proposed transactions are outstanding that
 - (I) are business combinations in respect of the affected securities, and ascribe a per security value to those securities, or
 - (II) would be business combinations in respect of the affected securities, except that they come within the exception in paragraph (e) of the definition of business combination, and ascribe a per security value to those securities,
 - (B) one or more bids for the affected securities have been made and are outstanding,
 - (ii) at the time the disclosure document for the business combination is sent to the holders of affected securities, the issuer has provided equal access to the issuer, and to information concerning the issuer and its securities, to the person proposing to carry out the business combination with the issuer, all parties to the proposed transactions described in clause (i)(A), and all offerors in the bids,
- (d) **Second Step Business Combination** – all of the following conditions are satisfied:
- (i) the business combination is being effected by an offeror that made a bid, or an affiliated entity of that offeror, and is in respect of the securities of the same class for which the bid was made and that were not acquired in the bid,
 - (ii) the business combination is completed no later than 120 days after the date of expiry of the bid,
 - (iii) the consideration per security that the security holders would be entitled to receive in the business combination is at least equal in value to and is in the same form as the consideration that the tendering security holders were entitled to receive in the bid,
 - (iv) the disclosure document for the bid
 - (A) disclosed that if the offeror acquired securities under the bid, the offeror intended to acquire the remainder of the securities under a statutory right of acquisition or

- under a business combination that would satisfy the conditions in subparagraphs (ii) and (iii),
 - (B) described the expected tax consequences of both the bid and the business combination if, at the time the bid was made, the tax consequences arising from the business combination
 - (I) were reasonably foreseeable to the offeror, and
 - (II) were reasonably expected to be different from the tax consequences of tendering to the bid, and
 - (C) disclosed that the tax consequences of the bid and the business combination may be different if, at the time the bid was made, the offeror could not reasonably foresee the tax consequences arising from the business combination,
- (e) **Non-redeemable Investment Fund** – the issuer is a non-redeemable investment fund that
 - (i) at least once each quarter calculates and publicly disseminates the net asset value of its securities, and
 - (ii) at the time of publicly announcing the business combination, publicly disseminates the net asset value of its securities as of the business day before the announcement,
- (f) **Amalgamation or Equivalent Transaction with No Adverse Effect on Issuer or Minority** – the transaction is a statutory amalgamation, or substantially equivalent transaction, resulting in the combination of the issuer or a wholly-owned subsidiary entity of the issuer with an interested party, that is undertaken in whole or in part for the benefit of another related party, if all of the following conditions are satisfied:
 - (i) the transaction does not and will not have any adverse tax or other consequences to the issuer, the person resulting from the combination, or beneficial owners of affected securities generally,
 - (ii) no material actual or contingent liability of the interested party with which the issuer or a wholly-owned subsidiary entity of the issuer is combining will be assumed by the issuer, the wholly-owned subsidiary entity of the issuer or the person resulting from the combination,
 - (iii) the related party benefiting from the transaction agrees to indemnify the issuer against any liabilities of the interested party with which the issuer, or a wholly-owned subsidiary entity of the issuer, is combining,
 - (iv) after the transaction, the nature and extent of the voting and financial participating interests of holders of affected securities in the person resulting from the combination will be the same as, and the value of their financial participating interests will not be less than, that of their interests in the issuer before the transaction,
 - (v) the related party benefiting from the transaction pays for all of the costs and expenses resulting from the transaction.
- (2) For the purposes of subparagraph (b)(ii) of subsection (1), the number of outstanding securities of the class of affected securities
 - (a) is calculated at the time of the agreement referred to in clause (b)(i)(A) or (B) of subsection (1), if the person proposing to carry out the business combination with the issuer knows the number of securities of the class outstanding at that time; or
 - (b) if paragraph (a) does not apply, is determined based on the information most recently provided by the issuer in a material change report, or section 5.4 of National Instrument 51-102 *Continuous Disclosure Obligations*, immediately preceding the date of the agreement referred to in clause (b)(i)(A) or (B) of subsection (1).

- (3) For the purposes of subparagraph (b)(iii) of subsection (1), the number of outstanding securities of the class of affected securities
 - (a) is calculated at the time of the last of the agreements referred to in subparagraph (b)(i) of subsection (1), if the person proposing to carry out the business combination with the issuer knows the number of securities of the class outstanding at that time; or
 - (b) if paragraph (a) does not apply, is determined based on the information most recently provided by the issuer in a material change report, or section 5.4 of National Instrument 51-102 Continuous Disclosure Obligations, immediately preceding the date of the last of the agreements referred to in subparagraph (b)(i) of subsection (1).

4.5 Minority Approval – An issuer shall not carry out a business combination unless the issuer has obtained minority approval for the business combination under Part 8.

4.6 Exemptions from Minority Approval Requirement

- (1) Section 4.5 does not apply to an issuer carrying out a business combination in any of the following circumstances if the exemption relied on, any formal valuation exemption relied on, and the facts supporting reliance on those exemptions are disclosed in the disclosure document for the business combination:
 - (a) **90 Per Cent Exemption** – subject to subsection (2), one or more persons that are interested parties within the meaning of subparagraph (c)(i) of the definition of interested party beneficially own, in the aggregate, 90 per cent or more of the outstanding securities of a class of affected securities at the time that the business combination is agreed to, and either
 - (i) an appraisal remedy is available to holders of the class of affected securities under the statute under which the issuer is organized or is governed as to corporate law matters, or
 - (ii) if an appraisal remedy referred to in subparagraph (i) is not available, holders of the class of affected securities are given an enforceable right that is substantially equivalent to the appraisal remedy provided for in section 190 of the CBCA and that is described in the disclosure document for the business combination;
 - (b) **Other Transactions Exempt from Formal Valuation** – the circumstances described in paragraph (f) of subsection 4.4 (1).
- (2) If there are two or more classes of affected securities, paragraph (a) of subsection (1) applies only to a class of which the applicable interested parties beneficially own, in the aggregate, 90 per cent or more of the outstanding securities.

4.7 Conditions for Relief from Business Corporations Act Requirements – In Ontario, an issuer that is governed by the *Business Corporations Act* (“OBCA”) and proposes to carry out a “going private transaction”, as defined in subsection 190(1) of the OBCA, is exempt from subsections (2), (3) and (4) of section 190 of the OBCA, and is not required to make an application for exemption from those subsections under subsection 190(6) of the OBCA, if

- (a) the transaction is not a business combination,
- (b) Part 4 does not apply to the transaction by reason of section 4.1, or
- (c) the transaction is carried out in compliance with Part 4, and, for this purpose, compliance includes reliance on any applicable exemption from a requirement of Part 4, including a discretionary exemption granted under section 9.1.

PART 5 RELATED PARTY TRANSACTIONS

5.1 Application – This Part does not apply to an issuer carrying out a related party transaction if

- (a) the issuer is not a reporting issuer,
- (b) the issuer is a mutual fund,

- (c)
 - (i) at the time the transaction is agreed to, securities held by beneficial owners in the local jurisdiction constitute less than two per cent of the outstanding securities of each class of affected securities of the issuer, and
 - (ii) all documents concerning the transaction that are sent generally to other holders of affected securities of the issuer are concurrently sent to all holders of the securities in the local jurisdiction,
- (d) the parties to the transaction consist solely of
 - (i) an issuer and one or more of its wholly-owned subsidiary entities, or
 - (ii) wholly-owned subsidiary entities of the same issuer,
- (e) the transaction is a business combination for the issuer,
- (f) the transaction would be a business combination for the issuer except that it comes within an exception in any of paragraphs (a) to (e) of the definition of business combination,
- (g) the transaction is a downstream transaction for the issuer,
- (h) the issuer is obligated to and carries out the transaction substantially under the terms
 - (i) that were agreed to, and generally disclosed, before December 15, 2000 in Québec and before May 1, 2000 in Ontario,
 - (ii) that were agreed to, and generally disclosed, before the issuer became a reporting issuer, or
 - (iii) of a previous transaction the terms of which were generally disclosed, including an issuance of a convertible security, if the previous transaction was carried out in compliance with this Instrument, including in reliance on any applicable exemption or exclusion, or was not subject to this Instrument,
- (i) the transaction is a distribution
 - (i) of securities of the issuer and is a related party transaction for the issuer solely because the interested party is an underwriter of the distribution, and
 - (ii) carried out in compliance with, including in reliance on any applicable exemption from, National Instrument 33-105 *Underwriting Conflicts*,
- (j) the issuer is subject to the requirements of Part IX of the *Loan and Trust Corporations Act* (Ontario), the *Act respecting Trust Companies and Savings Companies* (Quebec), Part XI of the *Bank Act* (Canada), Part XI of the *Insurance Companies Act* (Canada), or Part XI of the *Trust and Loan Companies Act* (Canada), or any successor to that legislation, and the issuer complies with those requirements, or
- (k) the transaction is a rights offering, dividend distribution, or any other transaction in which the general body of holders in Canada of affected securities of the same class are treated identically on a per security basis, if
 - (i) the transaction has no interested party within the meaning of paragraph (d) of the definition of interested party, or
 - (ii) the transaction is a rights offering, there is an interested party only because a related party of the issuer provides a stand-by commitment for the rights offering, and the stand-by commitment complies with National Instrument 45-101 *Rights Offerings*.

5.2 Material Change Report

- (1) An issuer shall include in a material change report, if any, required to be filed under securities legislation for a related party transaction

- (a) a description of the transaction and its material terms,
 - (b) the purpose and business reasons for the transaction,
 - (c) the anticipated effect of the transaction on the issuer's business and affairs,
 - (d) a description of
 - (i) the interest in the transaction of every interested party and of the related parties and associated entities of the interested parties, and
 - (ii) the anticipated effect of the transaction on the percentage of securities of the issuer, or of an affiliated entity of the issuer, beneficially owned or controlled by each person referred to in subparagraph (i) for which there would be a material change in that percentage,
 - (e) unless this information will be included in another disclosure document for the transaction, a discussion of the review and approval process adopted by the board of directors and the special committee, if any, of the issuer for the transaction, including a discussion of any materially contrary view or abstention by a director and any material disagreement between the board and the special committee,
 - (f) a summary, in accordance with section 6.5, of the formal valuation, if any, obtained for the transaction, unless the formal valuation is included in its entirety in the material change report or will be included in its entirety in another disclosure document for the transaction,
 - (g) disclosure, in accordance with section 6.8, of every prior valuation in respect of the issuer that relates to the subject matter of or is otherwise relevant to the transaction
 - (i) that has been made in the 24 months before the date of the material change report, and
 - (ii) the existence of which is known, after reasonable inquiry, to the issuer or to any director or senior officer of the issuer,
 - (h) the general nature and material terms of any agreement entered into by the issuer, or a related party of the issuer, with an interested party or a joint actor with an interested party, in connection with the transaction, and
 - (i) disclosure of the formal valuation and minority approval exemptions, if any, on which the issuer is relying under sections 5.5 and 5.7, respectively, and the facts supporting reliance on the exemptions.
- (2) If the issuer files a material change report less than 21 days before the expected date of the closing of the transaction, the issuer shall explain in the news release required to be issued under National Instrument 51-102 *Continuous Disclosure Obligations* and in the material change report why the shorter period is reasonable or necessary in the circumstances.
 - (3) Despite paragraphs (1)(f) and 5.4(2)(a), if the issuer is required to include a summary of the formal valuation in the material change report and the formal valuation is not available at the time the issuer files the material change report, the issuer shall file a supplementary material change report containing the disclosure required by paragraph (1)(f) as soon as the formal valuation is available.
 - (4) The issuer shall send a copy of any material change report prepared by it in respect of the transaction to any security holder of the issuer upon request and without charge.

5.3 Meeting and Information Circular

- (1) Without limiting the application of any other legal requirements that apply to meetings of security holders and information circulars, this section applies only to a related party transaction for which section 5.6 requires the issuer to obtain minority approval.
- (2) An issuer proposing to carry out a related party transaction to which this section applies shall call a meeting of holders of affected securities and send an information circular to those holders.

- (3) The issuer shall include in the information circular
 - (a) the disclosure required by Form 62-104F2 *Issuer Bid Circular* of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, and in Ontario, Form 62-504F2 *Issuer Bid Circular* of OSC Rule 62-504 *Take-Over Bids and Issuer Bids*, to the extent applicable and with necessary modifications,
 - (b) a description of the background to the transaction,
 - (c) disclosure, in accordance with section 6.8, of every prior valuation in respect of the issuer that relates to the subject matter of or is otherwise relevant to the transaction
 - (i) that has been made in the 24 months before the date of the information circular, and
 - (ii) the existence of which is known, after reasonable inquiry, to the issuer or to any director or senior officer of the issuer,
 - (d) disclosure of any bona fide prior offer that relates to the subject matter of or is otherwise relevant to the transaction, which offer was received by the issuer during the 24 months before the transaction was agreed to, and a description of the offer and the background to the offer,
 - (e) a discussion of the review and approval process adopted by the board of directors and the special committee, if any, of the issuer for the transaction, including a discussion of any materially contrary view or abstention by a director and any material disagreement between the board and the special committee,
 - (f) disclosure of the formal valuation exemption, if any, on which the issuer is relying under section 5.5 and the facts supporting that reliance,
 - (g) disclosure of the number of votes attached to the securities that, to the knowledge of the issuer after reasonable inquiry, will be excluded in determining whether minority approval for the related party transaction is obtained, and
 - (h) the identity of the holders of securities specified in paragraph (g) together with their individual holdings.
- (4) If, after sending the information circular and before the meeting, a change occurs that, if disclosed, would reasonably be expected to affect the decision of a holder of affected securities to vote for or against the related party transaction or to retain or dispose of affected securities, the issuer shall promptly disseminate disclosure of the change
 - (a) in a manner that the issuer reasonably determines will inform beneficial owners of affected securities of the change, and
 - (b) sufficiently in advance of the meeting that the beneficial owners of affected securities will be able to assess the impact of the change.
- (5) If subsection (4) applies, the issuer shall file a copy of the disseminated information contemporaneously with its dissemination.

5.4 Formal Valuation

- (1) An issuer shall obtain a formal valuation for a related party transaction described in any of paragraphs (a) to (g) of the definition of related party transaction.
- (2) If a formal valuation is required under subsection (1), the issuer shall
 - (a) include, in accordance with section 6.5, a summary of the formal valuation in the disclosure document for the related party transaction, unless the formal valuation is included in its entirety in the disclosure document,
 - (b) state in the disclosure document who will pay or has paid for the valuation, and
 - (c) comply with the other provisions of Part 6 applicable to it relating to formal valuations.

- (3) The board of directors of the issuer or an independent committee of the board shall
 - (a) determine who the valuator will be, and
 - (b) supervise the preparation of the formal valuation.

5.5 Exemptions from Formal Valuation Requirement – Section 5.4 does not apply to an issuer carrying out a related party transaction in any of the following circumstances:

- (a) **Fair Market Value Not More Than 25% of Market Capitalization** – at the time the transaction is agreed to, neither the fair market value of the subject matter of, nor the fair market value of the consideration for, the transaction, insofar as it involves interested parties, exceeds 25 per cent of the issuer's market capitalization, and for this purpose
 - (i) if either of the fair market values is not readily determinable, any determination as to whether that fair market value exceeds the threshold for this exemption shall be made by the issuer's board of directors acting in good faith,
 - (ii) if the transaction is one in which the issuer or a wholly-owned subsidiary entity of the issuer combines with a related party, through an amalgamation, arrangement or otherwise, the subject matter of the transaction shall be deemed to be the securities of the related party held, at the time the transaction is agreed to, by persons other than the issuer or a wholly-owned subsidiary entity of the issuer, and the consideration for the transaction shall be deemed to be the consideration received by those persons,
 - (iii) if the transaction is one of two or more connected transactions that are related party transactions and would, without the exemption in this paragraph (a), require formal valuations under this Instrument, the fair market values for all of those transactions shall be aggregated in determining whether the tests for this exemption are met, and
 - (iv) if the assets involved in the transaction (the "initial transaction") include warrants, options or other instruments providing for the possible future purchase of securities or other assets (the "future transaction"), the calculation of the fair market value for the initial transaction shall include the fair market value, as of the time the initial transaction is agreed to, of the maximum number of securities or other consideration that the issuer may be required to issue or pay in the future transaction,
- (b) **Issuer Not Listed on Specified Markets** – no securities of the issuer are listed or quoted on the Toronto Stock Exchange, the New York Stock Exchange, the American Stock Exchange, the NASDAQ Stock Market, or a stock exchange outside of Canada and the United States other than the Alternative Investment Market of the London Stock Exchange or the PLUS markets operated by PLUS Markets Group plc,
- (c) **Distribution of Securities for Cash** – the transaction is a distribution of securities of the issuer to a related party for cash consideration, if
 - (i) neither the issuer nor, to the knowledge of the issuer after reasonable inquiry, the related party has knowledge of any material information concerning the issuer or its securities that has not been generally disclosed, and the disclosure document for the transaction includes a statement to that effect, and
 - (ii) the disclosure document for the transaction includes a description of the effect of the distribution on the direct or indirect voting interest of the related party,
- (d) **Certain Transactions in the Ordinary Course of Business** – the transaction is
 - (i) a purchase or sale, in the ordinary course of business of the issuer, of inventory consisting of personal or movable property under an agreement that has been approved by the board of directors of the issuer and the existence of which has been generally disclosed, or
 - (ii) a lease of real or immovable property or personal or movable property under an agreement on reasonable commercial terms that, considered as a whole, are not less advantageous to

the issuer than if the lease was with a person dealing at arm's length with the issuer and the existence of which has been generally disclosed,

- (e) **Transaction Supported by Arm's Length Control Person** – the interested party beneficially owns, or exercises control or direction over, voting securities of the issuer that carry fewer voting rights than the voting securities beneficially owned, or over which control or direction is exercised, by another security holder of the issuer who is a control person of the issuer and who, in the circumstances of the transaction
 - (i) is not also an interested party,
 - (ii) is at arm's length to the interested party, and
 - (iii) supports the transaction,
- (f) **Bankruptcy, Insolvency, Court Order** –
 - (i) the transaction is subject to court approval, or a court orders that the transaction be effected, under
 - (A) bankruptcy or insolvency law, or
 - (B) section 191 of the CBCA, any successor to that section, or equivalent legislation of a jurisdiction,
 - (ii) the court is advised of the requirements of this Instrument regarding formal valuations for related party transactions, and of the provisions of this paragraph (f), and
 - (iii) the court does not require compliance with section 5.4,
- (g) **Financial Hardship** –
 - (i) the issuer is insolvent or in serious financial difficulty,
 - (ii) the transaction is designed to improve the financial position of the issuer,
 - (iii) paragraph (f) is not applicable,
 - (iv) the issuer has one or more independent directors in respect of the transaction, and
 - (v) the issuer's board of directors, acting in good faith, determines, and at least two-thirds of the issuer's independent directors, acting in good faith, determine that
 - (A) subparagraphs (i) and (ii) apply, and
 - (B) the terms of the transaction are reasonable in the circumstances of the issuer,
- (h) **Asset Resale** –
 - (i) the subject matter of the related party transaction was acquired by the issuer or an interested party, as the case may be, in a prior arm's length transaction that was agreed to not more than 12 months before the date that the related party transaction is agreed to, and a qualified, independent valuator provides a written opinion that, after making such adjustments, if any, as the valuator considers appropriate in the exercise of the valuator's professional judgment
 - (A) the value of the consideration payable by the issuer for the subject matter of the related party transaction is not more than the value of the consideration paid by the interested party in the prior arm's length transaction, or
 - (B) the value of the consideration to be received by the issuer for the subject matter of the related party transaction is not less than the value of the consideration paid by the issuer in the prior arm's length transaction, and

- (ii) the disclosure document for the related party transaction includes the same disclosure regarding the valuator as is required in the case of a formal valuation under section 6.2,
- (i) **Non-redeemable Investment Fund** – the issuer is a non-redeemable investment fund that
 - (i) at least once each quarter calculates and publicly disseminates the net asset value of its securities, and
 - (ii) at the time of publicly announcing the related party transaction, publicly disseminates the net asset value of its securities as of the business day before the announcement,
- (j) **Amalgamation or Equivalent Transaction with No Adverse Effect on Issuer or Minority** – the transaction is a statutory amalgamation, or substantially equivalent transaction, resulting in the combination of the issuer or a wholly-owned subsidiary entity of the issuer with an interested party, that is undertaken in whole or in part for the benefit of another related party, if all of the following conditions are satisfied:
 - (i) the transaction does not and will not have any adverse tax or other consequences to the issuer, the person resulting from the combination, or beneficial owners of affected securities generally,
 - (ii) no material actual or contingent liability of the interested party with which the issuer or a wholly-owned subsidiary entity of the issuer is combining will be assumed by the issuer, the wholly-owned subsidiary entity of the issuer or the person resulting from the combination,
 - (iii) the related party benefiting from the transaction agrees to indemnify the issuer against any liabilities of the interested party with which the issuer, or a wholly-owned subsidiary entity of the issuer, is combining,
 - (iv) after the transaction, the nature and extent of the voting and financial participating interests of holders of affected securities in the person resulting from the combination will be the same as, and the value of their financial participating interests will not be less than, that of their interests in the issuer before the transaction,
 - (v) the related party benefiting from the transaction pays for all of the costs and expenses resulting from the transaction.

5.6 Minority Approval – An issuer shall not carry out a related party transaction unless the issuer has obtained minority approval for the transaction under Part 8.

5.7 Exemptions from Minority Approval Requirement

- (1) Subject to subsections (2), (3), (4) and (5), section 5.6 does not apply to an issuer carrying out a related party transaction in any of the following circumstances if the exemption relied on, any formal valuation exemption relied on, and the facts supporting reliance on those exemptions are disclosed in the disclosure document, if any, for the transaction:
 - (a) **Fair Market Value Not More Than 25 Per Cent of Market Capitalization** – the circumstances described in paragraph (a) of section 5.5,
 - (b) **Fair Market Value Not More Than \$2,500,000** – Distribution of Securities for Cash – the circumstances described in paragraph (c) of section 5.5, if
 - (i) no securities of the issuer are listed or quoted on the Toronto Stock Exchange, the New York Stock Exchange, the American Stock Exchange, the NASDAQ Stock Market, or a stock exchange outside of Canada and the United States other than the Alternative Investment Market of the London Stock Exchange or the PLUS markets operated by PLUS Markets Group plc,
 - (ii) at the time the transaction is agreed to, neither the fair market value of the securities to be distributed in the transaction nor the consideration to be received for those securities, insofar as the transaction involves interested parties, exceeds \$2,500,000,

- (iii) the issuer has one or more independent directors in respect of the transaction who are not employees of the issuer, and
 - (iv) at least two-thirds of the directors described in subparagraph (iii) approve the transaction,
- (c) **Other Transactions Exempt from Formal Valuation** – the circumstances described in paragraphs (d), (e) and (j) of section 5.5,
- (d) **Bankruptcy, Insolvency, Court Order** – the circumstances described in subparagraph (f)(i) of section 5.5, if the court is advised of the requirements of this Instrument regarding minority approval for related party transactions, and of the provisions of this paragraph, and the court does not require compliance with section 5.6,
- (e) **Financial Hardship** – the circumstances described in paragraph (g) of section 5.5, if there is no other requirement, corporate or otherwise, to hold a meeting to obtain any approval of the holders of any class of affected securities,
- (f) **Loan to Issuer, No Equity or Voting Component** –
 - (i) the transaction is a loan, or the creation of a credit facility, that is obtained by the issuer from a related party on reasonable commercial terms that are not less advantageous to the issuer than if the loan or credit facility were obtained from a person dealing at arm's length with the issuer, and the loan, or each advance under the credit facility, as the case may be, is not
 - (A) convertible, directly or indirectly, into equity or voting securities of the issuer or a subsidiary entity of the issuer, or otherwise participating in nature, or
 - (B) repayable as to principal or interest, directly or indirectly, in equity or voting securities of the issuer or a subsidiary entity of the issuer,
 - (ii) and for this purpose, any amendment to the terms of a loan or credit facility is deemed to create a new loan or credit facility,
- (g) **90 Per Cent Exemption** – one or more persons that are interested parties within the meaning of subparagraph (d)(i) of the definition of interested party beneficially own, in the aggregate, 90 per cent or more of the outstanding securities of a class of affected securities at the time the transaction is agreed to, and either
 - (i) an appraisal remedy is available to holders of the class of affected securities under the statute under which the issuer is organized or is governed as to corporate law matters, or
 - (ii) if an appraisal remedy referred to in subparagraph (i) is not available, holders of the class of affected securities are given an enforceable right that is substantially equivalent to the appraisal remedy provided for in section 190 of the CBCA and that is described in an information circular or other document sent to holders of that class of affected securities in connection with a meeting to approve the related party transaction, or, if there is no such meeting, in another document that is sent to those security holders not later than the time by which an information circular or other document would have been required to be sent to them if there had been a meeting.
- (2) Despite subparagraph (a)(iii) of section 5.5, if the transaction is one of two or more connected transactions that are related party transactions and would, without the exemptions in paragraphs (a) and (b) of subsection (1), require minority approval under this Instrument, the fair market values for all of those transactions shall be aggregated in determining whether the tests for those exemptions are met.
- (3) If the transaction is a material amendment to the terms of a security, or of a loan or credit facility to which the exemption in paragraph (f) of subsection (1) does not apply, the fair market value tests for the exemptions in paragraphs (a) and (b) of subsection (1) shall be applied to the whole transaction as amended, insofar as it involves interested parties, rather than just to the amendment, and, for this purpose, any addition of, or amendment to, a term involving a right to convert into or otherwise acquire equity or voting securities is deemed to be a material amendment.

- (4) Subparagraphs (a)(i), (iii) and (iv) of section 5.5 apply to paragraph (b) of subsection 5.7(1) with appropriate modifications.
- (5) If there are two or more classes of affected securities, paragraph (g) of subsection (1) applies only to a class of which the applicable interested parties beneficially own, in the aggregate, 90 per cent or more of the outstanding securities.

PART 6 FORMAL VALUATIONS AND PRIOR VALUATIONS

6.1 Independence and Qualifications of Valuator

- (1) Every formal valuation required by this Instrument for a transaction shall be prepared by a valuator that is independent of all interested parties in the transaction and that has appropriate qualifications.
- (2) It is a question of fact as to whether a valuator is independent of an interested party or has appropriate qualifications.
- (3) A valuator is not independent of an interested party in connection with a transaction if
 - (a) the valuator is an associated or affiliated entity or issuer insider of the interested party,
 - (b) except in the circumstances described in paragraph (e), the valuator acts as an adviser to the interested party in respect of the transaction, but for this purpose, a valuator that is retained by an issuer to prepare a formal valuation for an issuer bid is not, for that reason alone, considered to be an adviser to the interested party in respect of the transaction,
 - (c) the compensation of the valuator depends in whole or in part on an agreement, arrangement or understanding that gives the valuator a financial incentive in respect of the conclusion reached in the formal valuation or the outcome of the transaction,
 - (d) the valuator is
 - (i) a manager or co-manager of a soliciting dealer group for the transaction, or
 - (ii) a member of a soliciting dealer group for the transaction, if the valuator, in its capacity as a soliciting dealer, performs services beyond the customary soliciting dealer's function or receives more than the per security or per security holder fees payable to other members of the group,
 - (e) the valuator is the external auditor of the issuer or of an interested party, unless the valuator will not be the external auditor of the issuer or of an interested party upon completion of the transaction and that fact is publicly disclosed at the time of or prior to the public disclosure of the results of the valuation, or
 - (f) the valuator has a material financial interest in the completion of the transaction,and for the purposes of this subsection, references to the valuator include any affiliated entity of the valuator.
- (4) A valuator that is paid by one or more interested parties in a transaction, or paid jointly by the issuer and one or more interested parties in a transaction, to prepare a formal valuation for the transaction is not, by virtue of that fact alone, not independent.

6.2 Disclosure Regarding Valuator – An issuer or offeror required to obtain a formal valuation for a transaction shall include in the disclosure document for the transaction

- (a) a statement that the valuator has been determined to be qualified and independent,
- (b) a description of any past, present or anticipated relationship between the valuator and the issuer or an interested party that may be relevant to a perception of lack of independence,
- (c) a description of the compensation paid or to be paid to the valuator,
- (d) a description of any other factors relevant to a perceived lack of independence of the valuator,

- (e) the basis for determining that the valuator is qualified, and
- (f) the basis for determining that the valuator is independent, despite any perceived lack of independence, having regard to the amount of the compensation and any factors referred to in paragraphs (b) and (d).

6.3 Subject Matter of Formal Valuation

- (1) An issuer or offeror required to obtain a formal valuation shall provide the valuation in respect of
 - (a) the offeree securities, in the case of an insider bid or issuer bid,
 - (b) the affected securities, in the case of a business combination,
 - (c) any non-cash consideration being offered to, or to be received by, the holders of securities referred to in paragraph (a) or (b), and
 - (d) the non-cash assets involved in a related party transaction.
- (2) A formal valuation of non-cash consideration or assets referred to in paragraph (1)(c) or (d) is not required if
 - (a) the non-cash consideration or assets are securities of a reporting issuer or are securities of a class for which there is a published market,
 - (b) the person that would otherwise be required to obtain the formal valuation of those securities states in the disclosure document for the transaction that the person has no knowledge of any material information concerning the issuer of the securities, or concerning the securities, that has not been generally disclosed,
 - (c) in the case of an insider bid, issuer bid or business combination
 - (i) a liquid market in the class of securities exists,
 - (ii) the securities constitute 25 per cent or less of the number of securities of the class that are outstanding immediately before the transaction,
 - (iii) the securities are freely tradeable at the time the transaction is completed, and
 - (iv) the valuator is of the opinion that a valuation of the securities is not required, and
 - (d) in the case of a related party transaction for the issuer of the securities, the conditions in subparagraphs (c)(i) and (ii) of section 5.5 are satisfied, regardless of the form of the consideration for the securities.

6.4 Preparation of Formal Valuation

- (1) A formal valuation shall contain the valuator's opinion as to a value or range of values representing the fair market value of the subject matter of the valuation.
- (2) A person preparing a formal valuation under this Instrument shall
 - (a) prepare the formal valuation in a diligent and professional manner,
 - (b) prepare the formal valuation as of an effective date that is not more than 120 days before the earlier of
 - (i) the date that the disclosure document for the transaction is first sent to security holders, if applicable, and
 - (ii) the date that the disclosure document is filed,

- (c) make appropriate adjustments in the formal valuation for material intervening events of which it is aware between the effective date of the valuation and the earlier of the dates referred to in subparagraphs (i) and (ii) of paragraph (b),
- (d) in determining the fair market value of offeree securities or affected securities, not include in the formal valuation a downward adjustment to reflect the liquidity of the securities, the effect of the transaction on the securities or the fact that the securities do not form part of a controlling interest, and
- (e) provide sufficient disclosure in the formal valuation to allow the readers to understand the principal judgments and principal underlying reasoning of the valuator so as to form a reasoned judgment of the valuation opinion or conclusion.

6.5 Summary of Formal Valuation

- (1) An issuer or offeror required to provide a summary of a formal valuation shall ensure that the summary provides sufficient detail to allow the readers to understand the principal judgments and principal underlying reasoning of the valuator so as to form a reasoned judgment of the valuation opinion or conclusion.
- (2) In addition to the disclosure referred to in subsection (1), if an issuer or offeror is required to provide a summary of a formal valuation, the issuer or offeror shall ensure that the summary
 - (a) discloses
 - (i) the effective date of the valuation, and
 - (ii) any distinctive material benefit that might accrue to an interested party as a consequence of the transaction, including the earlier use of available tax losses, lower income taxes, reduced costs or increased revenues,
 - (b) if the formal valuation differs materially from a prior valuation, explains the differences between the two valuations or, if it is not practicable to do so, the reasons why it is not practicable to do so,
 - (c) indicates an address where a copy of the formal valuation is available for inspection, and
 - (d) states that a copy of the formal valuation will be sent to any security holder upon request and without charge or, if the issuer or offeror providing the summary so chooses, for a nominal charge sufficient to cover printing and postage.

6.6 Filing of Formal Valuation

- (1) An issuer or offeror required to obtain a formal valuation in respect of a transaction shall file a copy of the formal valuation
 - (a) concurrently with the sending of the disclosure document for the transaction to security holders, or
 - (b) concurrently with the filing of a material change report for a related party transaction for which no disclosure document is sent to security holders, or if the formal valuation is not available at the time of filing the material change report, as soon as the formal valuation is available.
- (2) If the formal valuation is included in its entirety in the disclosure document, an issuer or offeror satisfies the requirement in subsection (1) by filing the disclosure document.

6.7 Valuator's Consent – An issuer or offeror required to obtain a formal valuation shall

- (a) obtain the valuator's consent to the filing of the formal valuation and to the inclusion of the formal valuation or its summary in the disclosure document for the transaction for which the formal valuation was obtained, and
- (b) include in the disclosure document a statement, signed by the valuator, substantially as follows:

We refer to the formal valuation dated •, which we prepared for (indicate name of the person) for (briefly describe the transaction for which the formal valuation was prepared). We consent to the

filing of the formal valuation with the securities regulatory authority and the inclusion of [a summary of the formal valuation/the formal valuation] in this document.

6.8 Disclosure of Prior Valuation

- (1) A person required to disclose a prior valuation shall, in the document in which the prior valuation is required to be disclosed
 - (a) disclose sufficient detail to allow the readers to understand the prior valuation and its relevance to the present transaction,
 - (b) indicate an address where a copy of the prior valuation is available for inspection, and
 - (c) state that a copy of the prior valuation will be sent to any security holder upon request and without charge or, if the issuer or offeror providing the summary so chooses, for a nominal charge sufficient to cover printing and postage.
- (2) If there are no prior valuations, the existence of which is known after reasonable inquiry, the person that would be required to disclose prior valuations, if any existed, shall include a statement to that effect in the document.
- (3) Despite anything to the contrary in this Instrument, disclosure of the contents of a prior valuation is not required in a document if
 - (a) the contents are not known to the person required to disclose the prior valuation,
 - (b) the prior valuation is not reasonably obtainable by the person required to disclose it, irrespective of any obligations of confidentiality, and
 - (c) the document contains statements regarding the prior valuation substantially to the effect of paragraphs (a) and (b).

6.9 Filing of Prior Valuation – A person required to disclose a prior valuation shall file a copy of the prior valuation concurrently with the filing of the first document in which that disclosure is required.

6.10 Consent of Prior Valuator Not Required – Despite sections 2.15 and 2.21 of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, and in Ontario, sections 94.7 and 96.1 of the *Securities Act*, a person required to disclose a prior valuation under this Instrument is not required to obtain or file the valuator's consent to the filing or disclosure of the prior valuation.

PART 7 INDEPENDENT DIRECTORS

7.1 Independent Directors

- (1) For the purposes of this Instrument, it is a question of fact as to whether a director of an issuer is independent.
- (2) A director of an issuer is not independent in connection with a transaction if the director
 - (a) is an interested party in the transaction,
 - (b) is currently, or has been at any time during the 12 months before the date the transaction is agreed to, an employee, associated entity or issuer insider of an interested party, or of an affiliated entity of an interested party, other than solely in his or her capacity as a director of the issuer,
 - (c) is currently, or has been at any time during the 12 months before the date the transaction is agreed to, an adviser to an interested party in connection with the transaction, or an employee, associated entity or issuer insider of an adviser to an interested party in connection with the transaction, or of an affiliated entity of such an adviser, other than solely in his or her capacity as a director of the issuer,
 - (d) has a material financial interest in an interested party or an affiliated entity of an interested party, or
 - (e) would reasonably be expected to receive a benefit as a consequence of the transaction that is not also available on a pro rata basis to the general body of holders in Canada of offeree securities or affected securities, including, without limitation, the opportunity to obtain a financial interest in an

interested party, an affiliated entity of an interested party, the issuer or a successor to the business of the issuer.

- (3) A member of an independent committee for a transaction to which this Instrument applies shall not receive any payment or other benefit from an issuer, an interested party or a successor to any of them that is contingent upon the completion of the transaction.
- (4) For the purposes of this section, in the case of an issuer bid, a director of the issuer is not, by that fact alone, not independent of the issuer.

PART 8 MINORITY APPROVAL

8.1 General

- (1) If minority approval is required for a business combination or related party transaction, it shall be obtained from the holders of every class of affected securities of the issuer, in each case voting separately as a class.
- (2) In determining minority approval for a business combination or related party transaction, an issuer shall exclude the votes attached to affected securities that, to the knowledge of the issuer or any interested party or their respective directors or senior officers, after reasonable inquiry, are beneficially owned or over which control or direction is exercised by
 - (a) the issuer,
 - (b) an interested party,
 - (c) a related party of an interested party, unless the related party meets that description solely in its capacity as a director or senior officer of one or more persons that are neither interested parties nor issuer insiders of the issuer, or
 - (d) a joint actor with a person referred to in paragraph (b) or (c) in respect of the transaction.

8.2 Second Step Business Combination – Despite subsection 8.1(2), the votes attached to securities acquired under a bid may be included as votes in favour of a subsequent business combination in determining whether minority approval has been obtained if

- (a) the security holder that tendered the securities to the bid was not a joint actor with the offeror in respect of the bid,
- (b) the security holder that tendered the securities to the bid was not
 - (i) a direct or indirect party to any connected transaction to the bid, or
 - (ii) entitled to receive, directly or indirectly, in connection with the bid
 - (A) consideration per offeree security that was not identical in amount and form to the entitlement of the general body of holders in Canada of securities of the same class,
 - (B) a collateral benefit, or
 - (C) consideration for securities of a class of equity securities of the issuer if the issuer had more than one outstanding class of equity securities, unless that consideration was not greater than the entitlement of the general body of holders in Canada of every other class of equity securities of the issuer in relation to the voting and financial participating interests in the issuer represented by the respective securities,
- (c) the business combination is being effected by the offeror that made the bid, or an affiliated entity of that offeror, and is in respect of the securities of the same class for which the bid was made and that were not acquired in the bid,
- (d) the business combination is completed no later than 120 days after the date of expiry of the bid,

- (e) the consideration per security that the holders of affected securities would be entitled to receive in the business combination is at least equal in value to and is in the same form as the consideration that the tendering security holders were entitled to receive in the bid, and
- (f) the disclosure document for the bid
 - (i) disclosed that if the offeror acquired securities under the bid, the offeror intended to acquire the remainder of the securities under a statutory right of acquisition or under a business combination that would satisfy the conditions in paragraphs (d) and (e),
 - (ii) contained a summary of a formal valuation of the securities in accordance with the applicable provisions of Part 6, or contained the valuation in its entirety, if the offeror in the bid was subject to and not exempt from the requirement to obtain a formal valuation,
 - (iii) stated that the business combination would be subject to minority approval,
 - (iv) disclosed the number of votes attached to the securities that, to the knowledge of the issuer after reasonable inquiry, would be required to be excluded in determining whether minority approval for the business combination had been obtained,
 - (v) identified the holders of securities specified in subparagraph (iv) and set out their individual holdings,
 - (vi) identified each class of securities the holders of which would be entitled to vote separately as a class on the business combination,
 - (vii) described the expected tax consequences of both the bid and the business combination if, at the time the bid was made, the tax consequences arising from the business combination
 - (A) were reasonably foreseeable to the offeror, and
 - (B) were reasonably expected to be different from the tax consequences of tendering to the bid, and
 - (viii) disclosed that the tax consequences of the bid and the business combination may be different if, at the time the bid was made, the offeror could not reasonably foresee the tax consequences arising from the business combination.

PART 9 EXEMPTION

9.1 Exemption

- (1) In Québec, the securities regulatory authority may grant an exemption to this Instrument, in whole or in part, subject to those conditions or restrictions as may be imposed in the exemption. This exemption is granted under section 263 of the *Securities Act* (R.S.Q., C. V-1).
- (2) In Ontario, the regulator may grant an exemption to this Instrument, in whole or in part, subject to those conditions or restrictions as may be imposed in the exemption.

PART 10 EFFECTIVE DATE

- 10.1 Effective Date** – This Instrument comes into force on February 1, 2008.

**COMPANION POLICY 61-101CP
TO MULTILATERAL INSTRUMENT 61-101
*PROTECTION OF MINORITY SECURITY HOLDERS IN SPECIAL TRANSACTIONS***

TABLE OF CONTENTS

PART TITLE

PART 1 GENERAL

- 1.1 General

PART 2 INTERPRETATION

- 2.1 Equal Treatment of Security Holders
- 2.2 Equity Participation by a Related Party
- 2.3 Direct or Indirect Parties to a Transaction
- 2.4 Amalgamations
- 2.5 Transactions Involving More than One Reporting Issuer
- 2.6 Previous Arm's Length Negotiations Exemption
- 2.7 Connected Transactions
- 2.8 Time of Agreement
- 2.9 "Acquire the Issuer"

PART 3 MINORITY APPROVAL

- 3.1 Meeting Requirement
- 3.2 Second Step Business Combination Following an Unsolicited Take-over Bid
- 3.3 Special Circumstances

PART 4 DISCLOSURE

- 4.1 Insider Bids – Disclosure
- 4.2 Business Combinations and Related Party Transactions – Disclosure

PART 5 FORMAL VALUATIONS

- 5.1 General
- 5.2 Independent Valuers

PART 6 ROLE OF DIRECTORS

- 6.1 Role of Directors

**COMPANION POLICY 61-101CP
TO MULTILATERAL INSTRUMENT 61-101
PROTECTION OF MINORITY SECURITY HOLDERS IN SPECIAL TRANSACTIONS**

PART 1 GENERAL

- 1.1 General** – The Autorité des marchés financiers and the Ontario Securities Commission (or “we”) regard it as essential, in connection with the disclosure, valuation, review and approval processes followed for insider bids, issuer bids, business combinations and related party transactions, that all security holders be treated in a manner that is fair and that is perceived to be fair. We are of the view that issuers and others who benefit from access to the capital markets assume an obligation to treat security holders fairly, and that the fulfillment of this obligation is essential to the protection of the public interest in maintaining capital markets that operate efficiently, fairly and with integrity.

We do not consider that the types of transactions covered by this Instrument are inherently unfair. We recognize, however, that these transactions are capable of being abusive or unfair, and have made the Instrument to address this.

This Policy expresses our views on certain matters related to the Instrument.

PART 2 INTERPRETATION

2.1 Equal Treatment of Security Holders

- (1) **Security Holder Choice** – The definitions of business combination, collateral benefit and interested party, as well as other provisions in the Instrument, include the concept of identical treatment of security holders in a transaction. For the purposes of the Instrument, if security holders have an identical opportunity under a transaction, then they are considered to be treated identically. For example, if under the terms of a business combination, each security holder has the choice of receiving, for each affected security, either \$10 in cash or one common share of ABC Co., we regard the security holders as having identical entitlements in amount and form, and as receiving identical treatment, even though they may not all make the same choice. This interpretation also applies where the Instrument refers to consideration that is “at least equal in value” and “in the same form”, such as in the provisions on second step business combinations.

- (2) **Multiple Classes of Equity Securities** – The definitions of business combination and interested party, and the provisions on second step business combinations in section 8.2 of the Instrument, refer to circumstances where an issuer carrying out a business combination or related party transaction has more than one class of equity securities. The Instrument’s treatment of these transactions depends on whether the entitlements of the holders of one class under the transaction are greater than those of the holders of the other classes in relation to the voting and financial participating interests in the issuer represented by the respective securities.

For example: An issuer has outstanding subordinate voting shares carrying one vote per share, and multiple voting shares carrying ten votes per share, with the shares of the two classes otherwise carrying identical rights. Under the terms of a business combination, holders of the subordinate voting shares will receive \$10 per share. For the multiple voting shareholders to be regarded as not being entitled to greater consideration than the subordinate voting shareholders under the Instrument, the multiple voting shareholders must receive no more than \$10 per share. As a second example: An issuer has the same share structure as the issuer in the first example. Under the terms of a business combination, subordinate voting shareholders will receive, for each subordinate voting Share, \$10 and one subordinate voting share of a successor issuer, carrying one vote per share. For the multiple voting shareholders to be regarded as not being entitled to greater consideration than the subordinate voting shareholders under the Instrument, the multiple voting shareholders must receive, for each multiple voting share, no more than \$10 and one multiple voting share of the successor issuer, carrying no more than ten votes per share and otherwise carrying no greater rights than those of the subordinate voting shares of the successor issuer.

- (3) **Related Party Holding Securities of Other Party to Transaction** – The Instrument sets out specific criteria for determining related party and interested party status. Without limiting the application of those criteria, a related party of an issuer is not considered to be treated differently from other security holders of the issuer in a transaction, or to receive a collateral benefit, solely by reason of being a security holder of another party to the transaction. For example, if ABC Co. proposes to amalgamate with XYZ Co., the fact that a director of ABC Co., who is not a control person of ABC Co., owns common shares of XYZ Co. (but less than 50 per cent) will not, in and of itself, cause the amalgamation to be considered a business combination for ABC Co. under the Instrument.

- (4) **Consolidation of Securities** – One of the methods that may be used to effect a business combination is a consolidation of an issuer's securities at a ratio that eliminates the entire holdings of most holders of affected securities, through the elimination of post-consolidated fractional interests. Where this or a similar method is used, the security holders whose entire holdings are not eliminated are not considered to be treated identically to the general body of security holders under the Instrument.
- (5) **Principle of Equal Treatment in Business Combinations** – The Instrument contemplates that a related party of an issuer might not be treated identically to all other security holders in the context of a business combination in which a person other than that related party acquires the issuer. There are provisions in the Instrument, including the minority approval requirement, that are intended to address this circumstance. Despite these provisions, we are of the view that, as a general principle, security holders should be treated equally in the context of a business combination, and that differential treatment is only justified if its benefits to the general body of security holders outweigh the principle of equal treatment. While we will generally rely on an issuer's review and approval process, in combination with the provisions of the Instrument, to achieve fairness for security holders, we may intervene if it appears that differential treatment is not reasonably justified. Giving a security holder preferential treatment in order to obtain that holder's support of the transaction will not normally be considered justifiable.

2.2 Equity Participation by a Related Party – If a related party of an issuer is provided with the opportunity to maintain or acquire an equity interest in the issuer, or in a successor to the business of the issuer, upon completion of a bid or business combination, the following provisions of the Instrument may be relevant.

If the equity interest will be derived solely through securities-based compensation for services as an employee, director or consultant, the provisions of the Instrument regarding collateral benefits may be applicable. In other cases, the acquisition of the equity interest or opportunity to maintain an equity interest may be a connected transaction. In either of these instances, votes attaching to the securities owned by the related party may be excluded from the minority vote required for a business combination, including a second step business combination following a bid. We are of the view that the employee compensation exemptions to the collateral benefit and connected transaction definitions do not generally apply to an issuance of securities in the issuer or a successor issuer upon completion of the transaction.

Without limiting the application of the definition of joint actor, we may consider a related party to be a joint actor with the offeror in a bid, or with the acquirer in a business combination, if the related party becomes a control person of the issuer or a successor issuer upon completion of the transaction or if the related party, whether alone or with joint actors, beneficially owns securities with more than 20 per cent of the voting rights. We may also consider a related party's continuing equity interest in the issuer or a successor issuer upon completion of the transaction in making an assessment of joint actor status generally. A joint actor characterization could cause a bid to be regarded as an insider bid, or an otherwise arm's length transaction to be regarded as a business combination, that requires preparation of a formal valuation.

2.3 Direct or Indirect Parties to a Transaction

- (1) The Instrument makes references to direct and indirect parties to a transaction in the definition of connected transactions and in subparagraph 8.2(b)(i) regarding minority approval for a second step business combination. For the purposes of the Instrument, a person is considered to be an indirect party if, for example, a direct party to the transaction is a subsidiary entity, nominee or agent of the person. A person is not an indirect party merely because it negotiates or approves the transaction on behalf of a party, holds securities of a party or agrees to support the transaction in the capacity of a security holder of a party.
- (2) For the purposes of the Instrument, we do not consider a person to be a direct or indirect party to a business combination solely because the person receives pro rata consideration in its capacity as a security holder of the issuer carrying out the business combination.

2.4 Amalgamations – Under the Instrument, an amalgamation may be a business combination, related party transaction or neither, depending on the circumstances. For example, an amalgamation is a business combination for an issuer if, as a consequence of the amalgamation, holders of equity securities of the issuer become security holders of the amalgamated entity, unless an exception in one of the lettered paragraphs in the definition of business combination applies. An amalgamation is a related party transaction for an issuer rather than a business combination if, for example, a wholly-owned subsidiary entity of the issuer amalgamates with a related party of the issuer, leaving the equity securities of the issuer unaffected.

2.5 Transactions Involving More than One Reporting Issuer – The characterization of a transaction or the availability of a valuation or minority approval exemption under the Instrument must be considered individually for each reporting issuer involved in the transaction. For example, an amalgamation may be a downstream transaction for one party and

a business combination for the other, in which case the latter party is the only party to whom the requirements of the Instrument may apply.

2.6 Previous Arm's Length Negotiations Exemption

- (1) For the purposes of the formal valuation exemptions based on previous arm's length negotiations in paragraph (b) of subsection 2.4(1) and paragraph (b) of subsection 4.4(1) of the Instrument for insider bids and business combinations, respectively, the arm's length relationship must be between the selling security holder and all persons or companies that negotiated with the selling security holder.
- (2) We note that the previous arm's length negotiations exemption is based on the view that those negotiations can be a substitute for a valuation. An important requirement for the exemption to be available is that the offeror or proponent of the business combination, as the case may be, engages in "reasonable inquiries" to determine whether various circumstances exist. In our view, if this requirement cannot be satisfied through receipt of representations of the parties directly involved or some other suitable method, the offeror or proponent of the transaction is not entitled to rely on this exemption.

2.7 Connected Transactions

- (1) "Connected transactions" is a defined term in the Instrument, and reference is made to connected transactions in a number of parts of the Instrument. For example, subparagraph (a)(iii) of section 5.5 of the Instrument requires connected transactions to be aggregated, in certain circumstances, for the purpose of determining the availability of the formal valuation exemption for a related party transaction that is not larger than 25 per cent of the issuer's market capitalization. In other circumstances, it is possible for an issuer to rely on an exemption for each of two or more connected transactions. However, we may intervene if we believe that a transaction is being carried out in stages or otherwise divided up for the purpose of avoiding the application of a provision of the Instrument.
- (2) One method of acquiring all the securities of an issuer is through a plan of arrangement or similar process comprised of a series of two or more interrelated steps. The series of steps is the "transaction" for the purposes of the definition of business combination. However, a related party transaction that is carried out in conjunction with a business combination, and that is not simply one of the procedural steps in implementing the acquisition of the affected securities in the business combination, is subject to the Instrument's requirements for related party transactions. This applies where, for example, a related party buys some of the issuer's assets that the acquirer in the business combination does not want.
- (3) An agreement, commitment or understanding that a security holder will tender to a bid or vote in favour of a transaction is not, in and of itself, a connected transaction to the bid or to the transaction for purposes of the Instrument.

2.8 Time of Agreement – A number of provisions in the Instrument refer to the time a business combination or related party transaction is agreed to. This should be interpreted as the time the issuer first makes a legally binding commitment to proceed with the transaction, subject to any conditions such as security holder approval. Where the issuer does not technically negotiate the transaction with another party, such as in the case of a share consolidation, the time the transaction is agreed to should be interpreted as the time at which the issuer's board of directors determines to proceed with the transaction, subject to any conditions.

2.9 "Acquire the Issuer" – In some definitions and elsewhere in the Instrument, reference is made to a transaction in which a related party would "directly or indirectly acquire the issuer ... through an amalgamation, arrangement or otherwise, whether alone or with joint actors". This refers to the acquisition of all of the issuer, not merely the acquisition of a control position. For example, a related party "acquires" an issuer when it acquires all of the securities of the issuer that it does not already own, even if that related party held a control position in the issuer prior to the transaction.

PART 3 MINORITY APPROVAL

3.1 Meeting Requirement – The definition of minority approval and subsections 4.2(2) and 5.3(2) of the Instrument provide that minority approval, if required, must be obtained at a meeting of holders of affected securities. The issuer may be able to demonstrate that holders of a majority of the securities that would be eligible to be voted at a meeting would vote in favour of the transaction under consideration. In this circumstance, the regulator or the securities regulatory authority will consider granting an exemption under section 9.1 of the Instrument from the requirement to hold a meeting, conditional on security holders being provided with disclosure similar to that which would be available to them if a meeting were held.

- 3.2 Second Step Business Combination Following an Unsolicited Take-over Bid** – Section 8.2 of the Instrument allows the votes attached to securities acquired under a bid to be included as votes in favour of a subsequent business combination in determining whether minority approval has been obtained if certain conditions are met. One of the conditions is that the security holder that tendered the securities in the bid not receive an advantage in connection with the bid, such as a collateral benefit, that was not available to other security holders. There may be circumstances where this condition could cause difficulty for an offeror who wishes to acquire all of an issuer through a business combination following a bid that was unsolicited by the issuer. For example, in order to establish that a benefit received by a tendering security holder is not a collateral benefit under the Instrument, the offeror may need the cooperation of an independent committee of the offeree issuer during the bid. This cooperation may not be forthcoming if the bid is unfriendly. In this type of circumstance, the fact that the bid was unsolicited would normally be a factor the regulator or the securities regulatory authority would take into account in considering whether exemptive relief should be granted to allow the securities to be voted.
- 3.3 Special Circumstances** – As the purpose of the Instrument is to ensure fair treatment of minority security holders, abusive minority tactics in a situation involving a minimal minority position may cause the regulator or the securities regulatory authority to grant an exemption from the requirement to obtain minority approval. Where an issuer has more than one class of equity securities, exemptive relief may also be appropriate if the Instrument's requirement of separate minority approval for each class could result in unfairness to security holders who are not interested parties, or if the policy objectives of the Instrument would be accomplished by the exclusion of an interested party's votes in one or more, but not all, of the separate class votes.

PART 4 DISCLOSURE

- 4.1 Insider Bids – Disclosure** – Subsection 2.2(1)(d) of the Instrument requires, for an insider bid, the disclosure required by Form 62-104F1 *Take-Over Bid Circular* of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, and in Ontario, Form 62-504F1 *Take-Over Bid Circular* of OSC Rule 62-504 *Take Over Bids and Issuer Bids*, and by Form 62-104F2 *Issuer Bid Circular* of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, and in Ontario, Form 62-504F2 *Issuer Bid Circular* of OSC Rule 62-504 *Take Over Bids and Issuer Bids*, appropriately modified. In our view, Form 62-104F2 and in Ontario, Form 62-504F2, disclosure would generally include, in addition to Form 62-104F1 and in Ontario, Form 62-504F1, disclosure, disclosure for the following items, with necessary modifications, in the context of an insider bid:

1. Item 9 – Purpose of the bid
2. Item 13 – Acceptance of issuer bid
3. Item 14 – Benefits from the bid
4. Item 16 – Other benefits
5. Item 17 – Arrangements between issuer and security holders
6. Item 18 – Previous purchases and sales
7. Item 20 – Valuation
8. Item 23 – Previous distribution
9. Item 24 – Dividend policy
10. Item 25 – Tax consequences
11. Item 26 – Expenses of bid

- 4.2 Business Combinations and Related Party Transactions – Disclosure** – Paragraphs 4.2(3)(a) and 5.3(3)(a) of the Instrument require in the information circulars for a business combination and a related party transaction, respectively, the disclosure required by Form 62-104F2, and in Ontario, Form 62-504F2, to the extent applicable and with necessary modifications. In our view, Form 62-104F2, and in Ontario, Form 62-504F2, disclosure would generally include disclosure for the following items, with necessary modifications, in the context of those transactions:

1. Item 4 – Consideration
2. Item 9 – Purpose of the bid
3. Item 10 – Trading in securities to be acquired
4. Item 11 – Ownership of securities of issuer
5. Item 12 – Commitments to acquire securities of issuer
6. Item 13 – Acceptance of issuer bid
7. Item 14 – Benefits from the bid
8. Item 15 – Material changes in the affairs of issuer
9. Item 16 – Other benefits
10. Item 17 – Arrangements between issuer and security holders
11. Item 18 – Previous purchases and sales
12. Item 19 – Financial statements
13. Item 20 – Valuation

- 14. Item 21 – Securities of issuer to be exchanged for others
- 15. Item 22 – Approval of issuer bid circular
- 16. Item 23 – Previous distribution
- 17. Item 24 – Dividend policy
- 18. Item 25 – Tax consequences
- 19. Item 26 – Expenses of bid
- 20. Item 29 – Other material information
- 21. Item 30 – Solicitations

PART 5 FORMAL VALUATIONS

5.1 General

- (1) The Instrument requires formal valuations in a number of circumstances. We are of the view that a conclusory statement of opinion as to the value or range of values of the subject matter of a valuation does not by itself fulfil this requirement.
- (2) The disclosure standards for formal valuations in By-laws 29.14 to 29.23 of the Investment Dealers Association of Canada and Appendix A to Standard No. 110 of the Canadian Institute of Chartered Business Valuators each generally represent a reasonable approach to meeting the applicable legal requirements. Specific disclosure standards, however, cannot be construed as a substitute for the professional judgment and responsibility of the valuator and, on occasion, additional disclosure may be necessary.
- (3) An issuer that is required to obtain a formal valuation, or the offeree issuer in the case of an insider bid, should work in cooperation with the valuator to ensure that the requirements of the Instrument are satisfied. At the valuator's request, the issuer should promptly furnish the valuator with access to the issuer's management and advisers, and to all material information in the issuer's possession relevant to the formal valuation. The valuator is expected to use that access to perform a comprehensive review and analysis of information on which the formal valuation is based. The valuator should form its own independent views of the reasonableness of this information, including any forecasts, projections or other measurements of the expected future performance of the enterprise, and of any of the assumptions on which it is based, and adjust the information accordingly.
- (4) The disclosure in the valuation of the scope of review should include a description of any limitation on the scope of the review and the implications of the limitation on the valuator's conclusion. Scope limitations should not be imposed by the issuer, an interested party or the valuator, but should be limited to those beyond their control that arise solely as a result of unusual circumstances. In addition, it is inappropriate for any interested party to exercise or attempt to exercise any influence over a valuator.
- (5) Subsection 2.3(2) of the Instrument provides that in the context of an insider bid, an independent committee of the offeree issuer shall, and the offeror shall enable the independent committee to, determine who the valuator will be and supervise the preparation of the formal valuation. Although the subsection also requires the independent committee to use its best efforts to ensure that the valuation is completed and provided to the offeror in a timely manner, we are aware that an independent committee could attempt to use the subsection to delay or impede an insider bid viewed by the committee as unfriendly. In a situation where an offeror is of the view that an independent committee is not acting in a timely manner in having the formal valuation prepared, the offeror may seek relief under section 9.1 of the Instrument from the requirement that the offeror obtain a valuation.
- (6) Similarly, in circumstances where an independent committee is of the view that a bid that has been announced will not actually be made or that the bid is not being made in good faith, the independent committee may apply for relief from the requirements of subsection 2.3(2) of the Instrument.
- (7) Requirements in securities legislation relating to forward-looking information do not apply to a formal valuation for which financial forecasts and projections are relied on and disclosed.

5.2 Independent Valuators – While, except in certain prescribed situations, the Instrument provides that it is a question of fact as to whether a valuator (which for the purposes of this section includes a person providing a liquidity opinion) is independent, situations have been identified in the past that raise serious concerns for us. These situations, which are set out below, must be assessed for materiality by the board or committee responsible for choosing the valuator, and disclosed in the disclosure document for the transaction. In determining the independence of the valuator from an interested party, relevant factors may include whether

- (a) the valuator or an affiliated entity of the valuator has a material financial interest in future business under an agreement, commitment or understanding involving the issuer, the interested party or an associated or affiliated entity of the issuer or interested party;
- (b) during the 24 months before the valuator was first contacted for the purpose of the formal valuation or opinion, the valuator or an affiliated entity of the valuator
 - (i) had a material involvement in an evaluation, appraisal or review of the financial condition of the interested party, or an associated or affiliated entity of the interested party, other than the issuer,
 - (ii) had a material involvement in an evaluation, appraisal or review of the financial condition of the issuer, or an associated or affiliated entity of the issuer, if the evaluation, appraisal or review was carried out at the direction or request of the interested party or paid for by the interested party, other than the issuer in the case of an issuer bid,
 - (iii) acted as a lead or co-lead underwriter of a distribution of securities by the interested party, or acted as a lead or co-lead underwriter of a distribution of securities by the issuer if the retention of the underwriter was carried out at the direction or request of the interested party or paid for by the interested party, other than the issuer in the case of an issuer bid,
 - (iv) had a material financial interest in a transaction involving the interested party, other than the issuer in the case of an issuer bid, or
 - (v) had a material financial interest in a transaction involving the issuer other than by virtue of performing the services referred to in subparagraph (b)(ii) or (b)(iii), or
- (c) the valuator or an affiliated entity of the valuator is
 - (i) a lead or co-lead lender or manager of a lending syndicate in respect of the transaction in question, or
 - (ii) a lender of a material amount of indebtedness in a situation where the interested party or the issuer is in financial difficulty, and the transaction would reasonably be expected to have the effect of materially enhancing the lender's position.

PART 6 ROLE OF DIRECTORS

6.1 Role of Directors

- (1) Paragraphs 2.2(2)(d), 3.2(d), 4.2(3)(e), 5.2(1)(e) and 5.3(3)(e) of the Instrument require that the disclosure for the applicable transaction include a discussion of the review and approval process adopted by the board of directors and the special committee, if any, of the issuer, including any materially contrary view or abstention by a director and any material disagreement between the board and the special committee.
- (2) An issuer involved in any of the types of transactions regulated by the Instrument should provide sufficient information to security holders to enable them to make an informed decision. Accordingly, the directors should disclose their reasonable beliefs as to the desirability or fairness of the proposed transaction and make useful recommendations regarding the transaction. A statement that the directors are unable to make or are not making a recommendation regarding the transaction, without detailed reasons, generally would be viewed as insufficient disclosure.
- (3) In reaching a conclusion as to the fairness of a transaction, the directors should disclose in reasonable detail the material factors on which their beliefs regarding the transaction are based. Their disclosure should discuss fully the background of deliberations by the directors and any special committee, and any analysis of expert opinions obtained.
- (4) The factors that are important in determining the fairness of a transaction to security holders and the weight to be given to those factors in a particular context will vary with the circumstances. Normally, the factors considered should include whether the transaction is subject to minority approval, whether the transaction has been reviewed and approved by a special committee and, if there has been a formal valuation, whether the consideration offered is fair in relation to the valuation conclusion arrived at through the application of the valuation methods considered relevant for the subject matter of the formal valuation. A statement that the

directors have no reasonable belief as to the desirability or fairness of the transaction or that the transaction is fair in relation to values arrived at through the application of valuation methods considered relevant, without more, generally would be viewed as insufficient disclosure.

- (5) The directors of an issuer involved in a transaction regulated by the Instrument are generally in the best position to assess the formal valuation to be provided to security holders. Accordingly, we are of the view that, in discharging their duty to security holders, the directors should consider the formal valuation and all prior valuations disclosed and discuss them fully in the applicable disclosure document.
- (6) To safeguard against the potential for an unfair advantage for an interested party as a result of that party's conflict of interest or informational or other advantage in connection with the proposed transaction, it is good practice for negotiations for a transaction involving an interested party to be carried out by or reviewed and reported upon by a special committee of disinterested directors. Following this practice normally would assist in addressing our interest in maintaining capital markets that operate efficiently, fairly and with integrity. While the Instrument only mandates an independent committee in limited circumstances, we are of the view that it generally would be appropriate for issuers involved in a material transaction to which the Instrument applies to constitute an independent committee of the board of directors for the transaction. Where a formal valuation is involved, we also would encourage an independent committee to select the valuator, supervise the preparation of the valuation and review the disclosure regarding the valuation.
- (7) A special committee should, in our view, include only directors who are independent from the interested party. While a special committee may invite non-independent board members and other persons possessing specialized knowledge to meet with, provide information to, and carry out instructions from, the committee, in our view non-independent persons should not be present at or participate in the decision-making deliberations of the special committee.
- (8) We recognize that directors who serve on a special committee or independent committee must be adequately compensated for their time and effort. However, members of the committee should ensure that compensation for serving on the committee will not compromise their independence. Subsection 7.1(3) of the Instrument prohibits members of an independent committee reviewing a transaction from receiving any payment that is contingent on completion of the transaction. We are of the view that the compensation of committee members should ideally be set when the committee is created and be based on fixed sum payments or the work involved.

TAB 30

SCHEDULE "A"

COURT FILE NUMBER 1301-02432
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY

Clerk's Stamp

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 RS
TECHNOLOGIES INC.

DOCUMENT **ORDER (Plan Sanction and Amendments
to ASPA)**

ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION OF
PARTY FILING THIS
DOCUMENT
McCARTHY TÉTRAULT LLP
Barristers & Solicitors
Sean F. Collins/Walker W. MacLeod
Suite 3300, 421-7th Avenue S.W.
Calgary AB T2P 4K9
Phone: 403-260-3531/403-260-3710
Fax: 403-260-3501
Email: scollins@mccarthy.ca
wmacleod@mccarthy.ca
File: 207091-451454

DATE ON WHICH THIS ORDER WAS PRONOUNCED: September 9, 2013

JUDGE PRONOUNCING THIS ORDER: Justice A.D. Macleod

LOCATION OF HEARING: Calgary, Alberta

UPON the application of FTI Consulting Canada Inc. (the "**Monitor**"), in its capacity as court appointed monitor of RS Technologies Inc. (the "**Company**") pursuant to the initial order issued under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") on March 14, 2013 (the "**Initial Order**"); **AND UPON** reading the sixth report of the Monitor, dated August 30, 2013 (the "**Sixth Monitor's Report**"); **AND UPON** reading the affidavit of service of ●, sworn ●, 2013 (the "**Affidavit of Service**"); **AND UPON** hearing from counsel for the Monitor, for the Company, for

Melbye Skandinavia AS and Werklund Capital Corporation (collectively referred to as the “**Buyers**”) and any other persons present; **IT IS HEREBY ORDERED AND DECLARED THAT:**

Defined Terms

1. All capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Plan of Compromise and Arrangement in respect of RS, substantially in the form attached as Appendix “**A**” to the Sixth Monitor’s Report (the “**Plan**”).

Service of Application

2. Service of the application filed in the within proceedings on September 3, 2013 and the Sixth Monitor’s Report is deemed to be good, sufficient and validated on all Persons affected by the Plan including, without limitation, all of the Affected Creditors and all of the Existing Shareholders.

Sanction and Implementation of the Plan

3. The Company has complied in all material respects with the provisions of the CCAA and all previous Orders issued in the CCAA Proceedings.

4. The Plan has been agreed to and approved by the Required Majority of Creditors in accordance with the requirements of the CCAA.

5. The Plan is found to be fair and reasonable to the Creditors, is in the best interests of the Company and all affected Persons and is hereby finally and absolutely sanctioned and approved pursuant to the provisions of the CCAA.

6. As of the Plan Implementation, the Plan and all associated steps, transactions, arrangements, assignments, releases and reorganizations effected hereby are approved, binding and effective as set out therein upon the Company, all Affected Creditors, the Existing Shareholders and all other Persons and parties affected by the Plan.

7. The steps to occur, be taken and be effected, and the releases to be effected, on the Plan Implementation are deemed to occur, be taken and effected, and be effective in the sequential order contemplated by Section 6.4(a) of the Plan on Plan Implementation, beginning at the Effective Time.

8. Effective upon the fulfillment, satisfaction or waiver of the conditions in Section 9.1 and in the sequential order contemplated by Section 6.4:

- (a) all Existing Shares are redeemed as of Plan Implementation for no consideration and any rights of the Existing Shareholders under, pursuant to or arising from their Existing Shares are extinguished;
- (b) all classes of Existing Shares are cancelled and extinguished;
- (c) the Class A Common Shares are issued to the Buyers and the Class B Common Shares are issued to the Affected Creditors free and clear of any Encumbrances or Claims;
- (d) the releases referred to in Section 7.1 of the Plan are effective in accordance with the Plan, the Released Parties are discharged and released from any and all Affected Claims of any Affected Creditor, the ability of any Affected Creditor to proceed against the Released Parties in respect of or relating to Affected Claims is hereby forever barred, extinguished, discharged and restrained and all proceedings with respect to, in connection with or relating to such Claims hereby are permanently stayed;
- (e) the CCAA Charges are terminated and discharged (effective, in the case of the Administration Charge, on the filing by the Monitor of the certificate contemplated by Section 8.2(i) of the Plan); and
- (f) any and all Encumbrances in favour of any Affected Creditor or which any Affected Creditor holds by way of subrogation are terminated and discharged, and any Registrar of any personal property security registry or any real property registry is hereby authorized and directed to discharge any such Encumbrance. For greater certainty, and without limiting the generality of the foregoing, the Monitor is expressly authorized and directed to effect the discharge of the registrations in the Alberta Personal Property Registry as identified in Schedule "A" hereto.

Continuation of Obligations and Agreements

9. All obligations, agreements or leases to which the Company is a party are declared to be and remain in full force and effect, unamended, as at Plan Implementation, and no party to any such obligation or agreement will on or following Plan Implementation accelerate, terminate, refuse to renew, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or

exercise (or purport to enforce or exercise) any right or remedy under or in respect of any such obligation, agreement or lease, by reason:

- (a) of any event which occurred prior to, and not continuing after, Plan Implementation or which is or continues to be suspended or waived under this Plan, which would have entitled any other party thereto to enforce those rights or remedies;
- (b) that the Company has sought or obtained relief or has taken steps as part of the Plan or under the CCAA or ABCA;
- (c) of any default or event of default arising as a result of the financial condition or insolvency of the Company;
- (d) of the effect upon the Company of the completion of any of the transactions contemplated under the Plan; or
- (e) of any restructurings or reorganizations effected pursuant to the Plan;

Barring of Claims and Stay in favour of Released Parties

10. Without limiting anything in the Claims Procedure Order, any Claims that are not Proven Claims are forever barred and extinguished, the Company is discharged and released from any and all Claims of any nature in accordance with the Plan, the ability of any Person to proceed against the Company in respect of or relating to any Claims is forever discharged and restrained and all proceedings with respect to, in connection with or relating to such Claims are permanently stayed, subject to the right of the Affected Creditors to receive distributions of Class B Common Shares and any other payments expressly provided for in the Plan, provided that nothing shall release or discharge (a) the Company from any obligation to an Affected Creditor or holder of Class A Common Shares or Class B Common Shares created by the Plan, (b) a Released Party (as defined in the Plan) from any criminal, fraudulent or other willful misconduct, (c) a Released Party from any claim with respect to matters set out in Section 5.1(2) of the CCAA, or (d) the Company from the satisfaction of any Unaffected Claims in the manner and to the extent contemplated in section 5.9 of the Plan.

11. The right to commence, take, apply for, issue or continue any and all steps or proceedings, including administrative hearings and orders, declarations or assessments commenced, taken or proceeded with or that may be commenced, taken or proceeded with against a Released Party in

respect of all Claims released by paragraph 10 hereof and the Plan and any other matter pursuant to Section 7.1 of the Plan is hereby stayed, suspended and forever extinguished..

Extension of Stay of Proceedings

12. The Stay Period (as such term is defined in the Initial Order) be and is extended in respect of the Company, the Directors and the Officers to and including Plan Implementation.

Authorization and Discharge of the Monitor

13. The Monitor is authorized and empowered to perform all of its functions and fulfil all of its obligations under the Plan to facilitate the implementation of the Plan.

14. Upon completion by the Monitor of its duties in respect of the Company pursuant to the CCAA and the Orders, the Monitor may file with the Court a certificate of Plan completion stating that all of its duties in respect of the Company pursuant to the CCAA and the Orders have been completed and thereupon, FTI Consulting Canada Inc. will be deemed to be discharged from its duties as Monitor of the Company and the Administration Charge will be terminated and released.

Multilateral Instrument 61-101

15. The Company is hereby released from further compliance with sections 4.2 and 4.5 of Multilateral Instrument 61-101- Protection of Minority Securities Holders in Special Transaction, other than those steps as outlined in the Sixth Monitor's Report.

Further Advice and Directions

16. The Company, the Monitor and the Buyers may apply to the Court for advice and direction in respect of any matter arising from or under the Plan.

Termination of Proceedings

17. The Initial Order shall have no further force or effect from and after 11:59 p.m. on the date of the Plan Implementation. The CCAA Proceedings are declared completed and the Stay Period (as such term is defined in the Initial Order) shall be terminated as of 11:59 p.m. on the date of the Plan Implementation.

No Fraudulent Preference or Conveyance

18. Notwithstanding:

- (b) the pendency of these proceedings;
- (c) a bankruptcy of the Company; and
- (d) the provisions of any federal or provincial statute,

none of the transactions contemplated by the Plan will be void or voidable at the instance of Creditors and shall not constitute nor shall they be deemed to be settlements, fraudulent preferences, assignments, fraudulent conveyances or other reviewable transactions under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislations, and they do not constitute conduct meriting an oppression remedy and shall be binding on a trustee in bankruptcy in respect of the Company.

Request for Assistance of Foreign Courts

19. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States or any other foreign jurisdiction, to give effect to this Order and to assist the Company, the Monitor, the Buyers and their respective agents in carrying out the terms of this Order and in implementing the Plan. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order and to implement the Plan.

Amendments to the ASPA

20. The amending agreement to the ASPA, substantially in the form attached as Appendix “B” to the Sixth Monitor’s Report (the “**Amending Agreement**”), be and is hereby approved and the Company, the Buyers and the Monitor are authorized to enter into the Amending Agreement.

Service of Order

21. Service of this Order shall be good, sufficient and validated on all Persons affected by the Plan including, without limitation, all of the Affected Creditors and all of the Existing Shareholders, by performance of the following:

- (a) by delivery of this Order to all Persons appearing at the Application by email, courier, registered mail or personal delivery;

- (b) by the delivery of this Order to Computershare Trust Company of Canada by email, courier, registered mail or personal delivery;
- (c) by the posting of this Order on the website established by the Monitor in the within proceedings; and
- (d) by the issuance of a press release by the Company advising of the issuance of this Order.

J.C.Q.B.A.

SCHEDULE "A"

ALBERTA PPR REGISTRATIONS TO BE DISCHARGED

Registration Number	Registration Type	Secured Party	Collateral Description
10031812059	Security Agreement	Canadian Western Bank 606-4 th Street S.W. Calgary, AB T2P 1T1	All present and hereafter acquired personal property of the debtor of whatsoever nature and kind and wheresoever situate. Proceeds: All presently owned and hereafter acquired personal property of the debtor relating to the foregoing.
10031812233	Land Charge	Canadian Western Bank 606-4th Street S.W. Calgary, AB T2P 1T1	N/A

TAB 31

THE QUEEN'S BENCH
Winnipeg Centre

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR
ARRANGEMENT WITH RESPECT TO ARCTIC GLACIER INCOME
FUND, ARCTIC GLACIER INC. AND ARCTIC GLACIER
INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON
SCHEDULE "A" HERETO"

(collectively, the "Applicants")

APPLICATION UNDER THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

CERTIFIED COPY

AMENDED AND RESTATED CANADIAN VESTING AND APPROVAL ORDER

DATE OF HEARING: THURSDAY, JUNE 21, 2012 AT 10 A.M.

BEFORE THE HONOURABLE MADAM JUSTICE SPIVAK

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THE QUEEN'S BENCH
Winnipeg Centre

THE HONOURABLE MADAM	)	THURSDAY, THE 21st
	)	
JUSTICE SPIVAK	)	DAY OF JUNE, 2012

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

AND IN THE MATTER OF A PROPOSED PLAN OF
COMPROMISE OR ARRANGEMENT WITH RESPECT TO
ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC.
AND ARCTIC GLACIER INTERNATIONAL INC. and the
ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A"
HERETO"

(collectively, the "**Applicants**")

APPLICATION UNDER THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, R.S.C. c. C-36, AS AMENDED

CERTIFIED COPY

of

AMENDED AND RESTATED CANADIAN VESTING AND APPROVAL ORDER

THIS MOTION, made by the Applicants for an order, among other things, approving the sale transaction (the "**Transaction**") contemplated by the Asset Purchase Agreement (the "**Asset Purchase Agreement**") between the Applicants and Glacier Valley Ice Company, L.P. (California) (together, the "**Vendors**"), as vendors, and H.I.G. Zamboni, LLC (now known as Arctic Glacier LLC), as purchaser, made as of June 7, 2012; vesting the Vendors' right, title and interest in and to the assets described in the Asset Purchase Agreement (the "**Assets**"), to Arctic Glacier LLC, Arctic Glacier Canada Inc. and Arctic Glacier U.S.A., Inc. (collectively, the "**Purchaser**"); and, extending the Stay Period defined in paragraph 30 of the Initial Order of the Honourable Madam Justice Spivak dated February 22, 2012 (the "**Stay Period**"), was heard this day at the Law Courts Building at 408 York Avenue, in The City of Winnipeg, in the Province of Manitoba.

ON READING the Affidavit of Keith McMahon sworn June 13, 2012 (the "**Affidavit**"), and the Fourth Report of Alvarez & Marsal Canada Inc. (the "**Monitor**") dated June 15, 2012 (the "**Fourth Report**"), and on hearing the submissions of counsel for the Monitor, the Applicants, the Purchaser, the Arctic Lenders, TD Bank and the US Direct Purchaser Antitrust Settlement Class, counsel for the Trustees of Arctic Glacier Income Fund also appearing, counsel for Centerbridge Partners L.P. appearing on a watching brief, representatives of Talamod Master Fund, L.P. and TD Securities Inc. also present in person or by telephone, and no one appearing for any other person, including the U.S. Department of Justice Antitrust Division and parties to Assigned Contracts that are being assigned pursuant to this Order, although properly served as appears from the Affidavit of Corrine Smorhay and the Affidavit of Kelly Peters, both sworn June 20, 2012, both filed:

1. THIS COURT ORDERS that all capitalized terms used herein and not otherwise defined shall have the meaning ascribed thereto in the Asset Purchase Agreement.

SERVICE

2. THIS COURT ORDERS that the time for service of the Notice of Motion, the Affidavit, the Fourth Report and the supporting materials is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

SALE TRANSACTION

3. THIS COURT ORDERS AND DECLARES that the Transaction is hereby approved, and the execution of the Asset Purchase Agreement by the Vendors is hereby authorized and approved, with such minor amendments as the Vendors may deem necessary. The Vendors are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Assets to the Purchaser or such other person(s) as the Purchaser may direct and the Monitor may agree.
4. THIS COURT ORDERS AND DECLARES that upon the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule "B" hereto (the "**Monitor's Certificate**"):

- (a) all of the Vendors' right, title, benefit and interest in and to the Assets other than the Canadian Assets (as herein defined) (the "**U.S. Assets**"), including, without limitation, the Vendors' rights, title and interest in and to any applicable Assigned Contracts, including all leases of real property, shall vest, without further instrument of transfer or assignment, absolutely in Arctic Glacier U.S.A., Inc. or such other person(s) as the Purchaser may direct and the Monitor may agree (provided that no agreement will be required if such transfer is to an Affiliate that agrees to be jointly and severally liable with the Purchaser), free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, pledges, options, warrants, trusts or deemed trusts (whether contractual, statutory, or otherwise), encumbrances, obligations, liabilities, demands, guarantees, restrictions, contractual commitments, rights, including without limitation, rights of first refusal and rights of set-off, liens, executions, levies, penalties, charges, or other financial or monetary claims, adverse claims, or rights of use, puts or forced sales provisions exercisable as a consequence of or arising from closing of the Transaction, whether arising prior to or subsequent to the commencement of these CCAA Proceedings, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured, legal, equitable, possessory or otherwise, actual or threatened civil, criminal, administrative, regulatory, arbitral or investigative inquiry, action, complaint, suit, investigation, dispute, petition or proceeding by or before any Governmental Authority or person at law or in equity whether imposed by agreement, understanding, law, equity or otherwise, and any claim or demand resulting therefrom including but not limited to Antitrust proceedings commenced by the U.S. Department of Justice and various State's Attorney Generals (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice Spivak dated February 22, 2012 and any subsequent charges created by the Court (the "**Court Charges**"); (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Manitoba) or any other personal property registry system; (iii) Excluded Liabilities as defined in the Asset Purchase Agreement; and (iv) those Claims listed on Schedule "C" hereto (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule "D") and, for greater certainty, this Court orders that all of the Claims and Encumbrances affecting or relating to the U.S. Assets are hereby released, extinguished, expunged and discharged as against the U.S. Assets; and
- (b) all of Arctic Glacier Inc.'s right, title, benefit and interest in and to the Assets (the "**Canadian Assets**"), including, without limitation, the Vendors' rights, title and interest in and to any applicable Assigned Contracts, including all leases of real property, shall vest, without further instrument of transfer or assignment, absolutely in Arctic Glacier Canada Inc. or such other person(s) as the Purchaser may direct and the Monitor may agree (provided that no agreement will be required if such transfer is to an Affiliate that agrees to be jointly and severally liable with the Purchaser), free and clear of and from any and all Claims including, without limiting the generality of the foregoing: (i) any Court Charges; (ii) all charges, security interests or claims evidenced by registrations pursuant to

the Personal Property Security Act (Manitoba) or any other personal property registry system; (iii) Excluded Liabilities as defined in the Asset Purchase Agreement; and (iv) those Claims listed on Schedule "C" hereto (all of which are collectively referred to as the "Encumbrances", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule "D") and, for greater certainty, this Court orders that all of the Claims and Encumbrances affecting or relating to the Canadian Assets are hereby released, extinguished, expunged and discharged as against the Canadian Assets.

5. THIS COURT ORDERS that upon the registration in the applicable land registry office or land titles office of a Transfer/Deed of Land or equivalent document, or of an application for registration of this vesting order in the applicable prescribed form, the applicable land registrar or equivalent official is hereby directed to enter the applicable Purchaser (or such other person(s) as the Purchaser may direct and the Monitor may agree) (provided that no agreement will be required if such transfer is to an Affiliate that agrees to be jointly and severally liable with the Purchaser) as the owner of the subject real property in fee simple, and is hereby directed to delete and expunge from title to the real property any and all Claims and Encumbrances, including, without limitation, all of the Claims and Encumbrances listed in Schedule "C" hereto.

6. THIS COURT ORDERS that upon delivery of the Monitor's Certificate all of the rights and obligations of the Vendors under the Assigned Contracts (as defined in the Asset Purchase Agreement) shall be assigned to the applicable Purchaser or such other person(s) as the Purchaser may direct and the Monitor may agree (provided that no agreement will be required if such transfer is to an Affiliate that agrees to be jointly and severally liable with the Purchaser) (the "Assignee") pursuant to section 2.12 of the Asset Purchase Agreement and pursuant to section 11.3 of the CCAA and remain in full force and effect for the benefit of the Purchaser in accordance with their respective terms.

7. THIS COURT ORDERS that the assignment of the rights and obligations of the Vendors under the Assigned Contracts to the Assignee pursuant to section 2.12 of the Asset Purchase Agreement and pursuant to this order is valid and binding upon all of the counterparties to the Assigned Contracts, without further documentation, as if the Assignee was a party to the Assigned Contracts, notwithstanding any restriction, condition or prohibition contained in any such Assigned Contracts relating to the assignment thereof, including any provision requiring the consent of any party to the assignment.

8. THIS COURT ORDERS that each counterparty to the Assigned Contracts is prohibited from exercising any right or remedy under the Assigned Contracts by reason of any defaults thereunder arising from these CCAA proceedings or the insolvency of the Vendors, or any failure of the Vendors to perform a non-monetary obligation under the Assigned Contracts, or as a result of any actions taken pursuant to or as a result of the Asset Purchase Agreement. All notices of default and demands given in connection with any such defaults under, or non-compliance with the Assigned Contracts shall be deemed to have been rescinded and shall be of no further force or effect.

9. THIS COURT ORDERS that as a condition of the closing of the Transaction, all existing monetary defaults in relation to the Assigned Contracts, other than those arising by reason of the Vendors' insolvency, the commencement of these CCAA Proceedings, or the Vendors' failure to perform a non-monetary obligation, shall be paid in accordance with section 2.12 of the Asset Purchase Agreement.

10. THIS COURT ORDERS that notwithstanding anything contained in this order, nothing shall derogate from the obligations of the Purchaser (or such other person(s) as the Purchaser may direct and the Monitor may agree) (provided that no agreement will be required if such transfer is to an Affiliate that agrees to be jointly and severally liable with the Purchaser) to assume the Assumed Liabilities, including the Assumed Accounts Payable, and to perform its obligations under the Assigned Contracts, as set out the Asset Purchase Agreement and the Designated Purchaser Agreement.

11. THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Assets shall stand in the place and stead of the Assets, and that from and after the delivery of the Monitor's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Assets with the same priority as they had with respect to the Assets immediately prior to the sale, as if the Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

12. THIS COURT ORDERS that the Monitor shall, in accordance with the provisions of the SISP (as defined in the Affidavit), be authorized and directed to pay to the Arctic Lenders (as defined in the Asset Purchase Agreement) from the net proceeds of the sale of the Assets an

amount sufficient to pay the Lender Claims (as defined in the SISP and as calculated on the closing of the Transaction) in full and in cash, as specified in a pay-out letter to be provided by the Arctic Lenders on or before the closing of the Transaction. Such payment shall be made concurrently with, and as a condition precedent to, the closing of the Transaction. The balance of the net proceeds of the sale of the Assets shall be held by the Monitor in accordance with the terms hereof or any further order of the Court; provided that the Monitor may pay any amounts owing from time to time to persons who are entitled to the benefit of a Court Charge.

13. THIS COURT ORDERS AND DIRECTS the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof.

14. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act* and any equivalent legislation in any other jurisdiction applicable, the Vendors are authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Vendors' records pertaining to the Vendors' past and current employees. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Vendors.

15. THIS COURT ORDERS that, notwithstanding:

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of and of the Vendors and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of and of the Vendors;

the vesting of the Assets in the Purchaser (or such other person(s) as the Purchaser may direct and the Monitor may agree) pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Vendors and shall not be void or voidable by creditors of the Vendors, nor shall it constitute nor be deemed to be a settlement, fraudulent preference,

assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

16. THIS COURT ORDERS AND DECLARES that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario) and any equivalent legislation in any other jurisdiction in which all or any part of the Assets are located.

17. THIS COURT ORDERS AND DECLARES that nothing in this Order or the Asset Purchase Agreement discharges, releases, or precludes any environmental liability under United States law to the United States or any department, agency, or instrumentality thereof (each, a "U.S. Governmental Unit") of any entity based on its ownership or operation after the Time of Closing (as defined in the Asset Purchase Agreement) of real property. Nor shall anything in this Order enjoin or otherwise bar a U.S. Governmental Unit from asserting or enforcing, outside this Court, any liability described in the preceding sentence.

18. THIS COURT ORDERS that any interested party served with notice of this motion after Friday, June 15, 2012, including those additional parties identified by the Purchaser as parties to receive service after the issuance of this Order, may apply to this Court by notice of motion served on or before July 3, 2012 for hearing on July 12, 2012 to vary or amend this Order other than paragraph 12 hereof. Service on such parties in such manner is hereby validated. If no such application is brought on or before July 3, 2012, this Order shall be deemed effective, nunc pro tunc, and without such further right of comeback, as against such parties.

STAY EXTENSION

19. THIS COURT ORDERS that the Stay Period is hereby extended until and including September 14, 2012.

MONITOR'S REPORT AND ACTIVITIES

20. THIS COURT ORDERS that the Third Report of the Monitor dated May 14, 2012 and the Fourth Report and the activities described therein are hereby approved.

23. THIS COURT ORDERS that this Order shall have full force and effect in all provinces and territories in Canada.

[Signature]
J. B. Bivale
CERTIFIED

B Mitchell
DEPUTY REGISTRAR

SCHEDULE "A" - Additional Applicants

Arctic Glacier California Inc.
Arctic Glacier Grayling Inc.
Arctic Glacier Lansing Inc.
Arctic Glacier Michigan Inc.
Arctic Glacier Minnesota Inc.
Arctic Glacier Nebraska Inc.
Arctic Glacier Newburgh Inc.
Arctic Glacier New York Inc.
Arctic Glacier Oregon Inc.
Arctic Glacier Party Time Inc.
Arctic Glacier Pennsylvania Inc.
Arctic Glacier Rochester Inc.
Arctic Glacier Services Inc.
Arctic Glacier Texas Inc.
Arctic Glacier Vernon Inc.
Arctic Glacier Wisconsin Inc.
Diamond Ice Cube Company Inc.
Diamond Newport Corporation
Glacier Ice Company, Inc.
Ice Perfection Systems Inc.
ICESurance Inc.
Jack Frost Ice Service, Inc.
Knowlton Enterprises, Inc.
Mountain Water Ice Company
R&K Trucking, Inc.
Winkler Lucas Ice and Fuel Company
Wonderland Ice, Inc.

Schedule B – Form of Monitor’s Certificate

THE QUEEN’S BENCH
Winnipeg Centre

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

AND IN THE MATTER OF A PROPOSED PLAN OF
COMPROMISE OR ARRANGEMENT WITH RESPECT TO
ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC.
AND ARCTIC GLACIER INTERNATIONAL INC. and the
ADDITIONAL APPLICANTS LISTED ON SCHEDULE “A”
HERETO”

(collectively, the “**Applicants**”)

MONITOR’S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Madam Justice Spivak of the Manitoba Court of Queen’s Bench (the “**Court**”) dated February 22, 2012, Alvarez & Marsal Canada Inc. was appointed as the monitor (the “**Monitor**”) in the Applicants’ proceedings under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

B. Pursuant to an Order of the Court dated June 21, 2012 (the “**Canadian Vesting and Approval Order**”), the Court approved an asset purchase agreement made as of June 7, 2012 (the “**Asset Purchase Agreement**”) between the Applicants and Glacier Valley Ice Company, L.P. (California) (together, the “**Vendors**”), as vendors, and H.I.G. Zamboni, LLC (now known as Arctic Glacier LLC), and provided for the vesting of all of the Vendors’ right, title and interest in and to the Assets described in the Asset Purchase Agreement, including, without limitation, the Vendors’ rights, title and interest in and to any Assigned Contracts (as defined therein), including all leases of real property in Arctic Glacier LLC, Arctic Glacier Canada Inc. and Arctic Glacier U.S.A., Inc. (collectively the “**Purchaser**”), which vesting is to be effective with respect to the Assets upon the delivery by the Monitor to the Purchaser of a certificate confirming (i) the

payment by the Purchaser of the Purchase Price for the Assets; (ii) that the conditions to Closing as set out in the Asset Purchase Agreement have been satisfied or waived by the Vendors and the Purchaser, respectively; and (iii) the Transaction has been completed to the satisfaction of the Monitor.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Asset Purchase Agreement.

THE MONITOR CERTIFIES the following:

1. The Purchaser has paid and the Vendors have received the Purchase Price for the Assets payable on the Closing Date pursuant to the Asset Purchase Agreement;
2. The conditions to Closing as set out in the Asset Purchase Agreement have been satisfied or waived by the Vendors and the Purchaser, respectively; and
3. The Transaction has been completed to the satisfaction of the Monitor.
4. This Certificate was delivered by the Monitor at _____ [TIME] on _____ [DATE].

**Alvarez & Marsal Canada Inc., in its capacity
as Monitor, and not in its personal or
corporate capacity**

Per: _____

Name:

Title:

Schedule C – Claims to be deleted and expunged

REAL PROPERTY ENCUMBRANCES TO BE DISCHARGED

A. OWNED PROPERTY

1. 12132 & 12136 - 121 A Street, Edmonton, Alberta, T5L 0A4

(a) Title No.: 012 170 358

Legal Description: Plan RN64, Block 24, Lot 8 excepting thereout the Westerly 10 feet throughout of the said lot, excepting thereout all mines and minerals.

Municipality: City of Edmonton

Registered Owner: Arctic Glacier Inc.

Encumbrances:

Registration No.	Date	Instrument Type/ Description	From/By
992 255 839	27/08/1999	Mortgage	Montreal Trust Company

(b) Title No.: 012 170 700

Legal Description: Plan RN64, Block 24, Lots 9 and 10 excepting thereout the most Westerly 10 feet in uniform width throughout said lots, taken for lane, as shown on Road Plan 2199NY excepting thereout all mines and minerals.

Municipality: City of Edmonton

Registered Owner: Arctic Glacier Inc.

Encumbrances:

Registration No.	Date	Instrument Type/ Description	From/By
992 255 839	27/08/1999	Mortgage	Montreal Trust Company

2. 412 - 41 Avenue N.E. Calgary, Alberta, T2E 2N3

(a) Title No.: 981 406 325

Legal Description: Plan Calgary 7410938, Block 13, that portion of Lot "A", which lies to the west of the easterly Fifty Four and Thirty Hundredths (54.30) metres in perpendicular width throughout containing 0.203 hectare more or less, excepting thereout all mines and minerals

Municipality: City of Calgary

Registered Owner: Arctic Glacier Inc.

Encumbrances:

Registration No.	Date	Instrument Type/ Description	From/By
991 250 891	31/08/1999	Mortgage	Montreal Trust Company

3. 625 Henry Avenue, Winnipeg, Manitoba, R3A 0B1

(a) Winnipeg Land Titles Office Title No.: 2028565/1

Legal Description: Parcels A to E Plan 42917 WLTO

Said Parcel A being together with a right-of-way for all purposes and as appurtenant to the land above described over and upon Parcel 2 Plan 2547 WLTO in RL 35 Parish of St. John.

Registered Owner: Arctic Glacier Inc.

Encumbrances:

Registration No.	Date	Instrument Type/ Description	From/By
2410597/1	1999/08/25	Mortgage	Montreal Trust Company

(b) Winnipeg Land Titles Office Title No.: 2030254/1

Legal Description: Firstly: Lot 3 and all those portions of Lots 1 and 2 Block 41 Plan No. 331 WLTO (W Div) lying to the NW of those portions of said Lots 1 and 2 shewn as Parcel 2 Plan No. 2547 WLTO Lot 35 Parish of St. John

Secondly: All those portions of said Lots 1 and 2 shewn as Parcel 2 on said Plan No. 2547 WLTO subject to a right-of-way for all purpose and as appurtenant to that portion of said Lot 1, lying to the SE of said Parcel 2 and appurtenant to Block 7 Plan 94 WLTO (W Div) over and upon the whole of said Parcel 2.

Registered Owner: Arctic Glacier Inc.

Encumbrances:

Registration No.	Date	Instrument Type/ Description	From/By
3075752/1	2004/12/10	Mortgage	Computershare Trust Company of Canada

(c) Winnipeg Land Titles Office Title No.: 2030253/1

Legal Description: ELY 20 feet of Lot 4 Block 41 Plan 331 WLTO (W Div) in RL 35 Parish of St John.

Registered Owner: Arctic Glacier Inc.

Encumbrances:

Registration No.	Date	Instrument Type/ Description	From/By
3075752/1	2004/12/10	Mortgage	Computershare Trust Company of Canada

4. 200 Statesman Drive, Mississauga, Ontario, L5S 1X7

(a) Land Registry Office #43, Parcel Register for Property Identifier: 14029-1139 (LT)

Legal Description: Parcel Block 33-1, Section 43M-957; Block 33, Plan 43M957, together with Part Lot 11, Concession 1, East of Hurontario Street, Part 4, Plan 43R16717 as in TT81032; subject to LT1098087 Mississauga

Registered Owner: Arctic Glacier Inc.

Encumbrances:

Registration No.	Date	Instrument Type	Description
LT1098091Z	1990/02/12	Application to Annex Restrictive Covenants	Lostrock Corp.
LT1979090	1999/08/23	Charge	From 1179554 Ontario Inc. to Montreal Trust Company
PR180019	2001/12/14	Transfer	From 1394332 Ontario Inc. to The Arctic Group Inc.
PR255417	2002/06/04	APL Ch Name Owner	From The Arctic Group Inc. to Arctic Glacier Inc.

5. 6 McKinsty Street, Hamilton, Ontario, L8L 6C1

(a) Land Registry Office #62, Parcel Register for Property Identifier: 17192-0005 (LT)

Legal Description: Part Reserve 3, Survey 32, as in AB319263; Part Reserve 3, Survey 32, Part 1, 62R9795; Part Reserve 3, Survey 32, Part 2, 62R7060, except Part 1, 62R7413; Reserving Minerals in CD306923; together with access over Part 1 on 62R7413, as in CD305159; Hamilton

Registered Owner: Arctic Glacier Inc.

Encumbrances:

Registration No.	Date	Instrument Type	Description
LT566928	1999/08/23	Deed Trust Mort	From 1334202 Ontario Inc. to Montreal Trust Company
WE70318	2001/12/13	Transfer	From 1394332 Ontario Inc. to The Arctic Group Inc.
WE98279	2002/06/04	APL Ch Name Owner	From The Arctic Group Inc. to Arctic Glacier Inc.

6. 745 Park Avenue W., Chatham, Ontario, N7M 1X3

(a) Land Registry Office #24, Parcel Register for Property Identifier: 00527-0044 (LT)

Legal Description: Part of Lot 20, Concession 1 Eastern Boundary Raleigh as in 590170, except Part 1, 24R6402; together with 590170; subject to 495938, 495939; Chatham-Kent

Registered Owner: Arctic Glacier Inc.

Encumbrances:

Registration No.	Date	Instrument Type	Description
593547	1999/08/23	Deed Trust Mort	From 1334202 Ontario Inc. to Montreal Trust Company
595536	1999/11/04	Deed Trust Mort	From 1334202 Ontario Inc. to Montreal Trust Company
612238	2001/12/12	Transfer	From 1394332 Ontario Inc. to The Arctic Group Inc.
CK43065	2010/02/18	APL Ch Name Owner	From The Arctic Group Inc. to Arctic Glacier Inc.
CK43433	2010/03/03	APL (General)	Arctic Glacier Inc.

7. 2655 – 2677 Reading Street, Montreal, Quebec, H3K 1P6

(a) Description: An immovable property fronting on Reading Street, in the City of Montreal, Province of Quebec, known and designated as lot number ONE MILLION THREE HUNDRED AND EIGHTY-TWO THOUSAND THREE HUNDRED AND FIFTY-FIVE (1 382 355) of the Cadastre of Quebec, Registration Division of Montreal.

With the building thereon erected bearing civic numbers 2655, 2675 and 2677 Reading Street, City of Montreal, Province of Quebec.

Registered Owner: Arctic Glacier Inc. Deed of Transfer registered under number 5 293 999 on October 12, 2001.

Hypothecs and Encumbrances:

- i. Deed of Hypothec and Issue of Bonds executed before Mtre. Jean Mousseau, Notary, on August 19, 1999 and registered on August 20, 1999 under number 5 118 118 by 3149030 Canada Limited in favour of Montreal Trust Company for an amount of \$ 500,000,000.00 bearing interest at the rate of 25% per annum and an additional hypothec in the amount of \$100,000,000.
- ii. Deed of Hypothec and Issue of Bonds executed before Mtre. Steve Collins, Notary, on March 22, 2002 and registered on the same day under number 5 331 878 by Arctic Glacier Inc. in favour of Computershare Trust Company of Canada for an amount of \$ 500,000,000.00 bearing interest at the rate of 25% per annum.
- iii. Supplemental Deed of Hypothec executed before Me Tamar Chamelian, Notary, on February 8, 2010 and registered on the same day under number 16 919 886 by Arctic Glacier Inc. in favour of Computershare Trust Company of Canada for an amount of \$ 500,000,000.00 bearing interest at the rate of 25% per annum.

8. 2760 Reading Street, Montreal, Quebec, H3K 1P6

- (a) Description:** An immovable property fronting on Reading Street, in the City of Montreal, Province of Québec, known and designated as lot number ONE MILLION THREE HUNDRED AND EIGHTY-TWO THOUSAND THREE HUNDRED AND THIRTEEN (1 382 313) of the Cadastre of Québec, Registration Division of Montreal.

With a building thereon erected bearing civic number 2760 Reading Street, City of Montreal, Province of Québec.

Registered Owner: Arctic Glacier Inc. Deed of Transfer registered under number 5 293 999 on October 12, 2001.

Hypothecs and Encumbrances:

- i. Deed of Hypothec and Issue of Bonds executed before Mtre. Jean Mousseau, Notary, on August 19, 1999 and registered on August 20, 1999 under number 5 118 118 by 3149030 Canada Limited in favour of Montreal Trust Company for an amount of \$ 500,000,000.00 bearing interest at the rate of 25% per annum and an additional hypothec in the amount of \$100,000,000.
- ii. Deed of Hypothec and Issue of Bonds executed before Mtre. Steve Collins, Notary, on March 22, 2002 and registered on the same day under number 5 331 878 by Arctic Glacier Inc. in favour of Computershare Trust Company of Canada for an amount of \$ 500,000,000.00 bearing interest at the rate of 25% per annum.
- iii. Supplemental Deed of Hypothec executed before Me Tamar Chamelian, Notary, on February 8, 2010 and registered on the same day under number 16 919 886 by Arctic Glacier Inc. in favour of Computershare Trust Company of Canada for an amount of \$ 500,000,000.00 bearing interest at the rate of 25% per annum.

B. LEASED PROPERTY

1. 9679 (also known as 9669) 186th Street, Surrey, British Columbia, V4N 3N8

(a) New Westminster Land Title Office Title No.: AA60615E

Legal Description: Parcel Identifier: 007-144-431. Lot A (AA60615) District Lot 99 Group 2 New Westminster District Plan 54762.

Registered Owner: Shogun Compu-Time Ltd.

Encumbrances:

Registration No.	Date	Instrument Type/ Description	From/By
BT97364 (of Lease BT97363)	2002-03-25	Mortgage, transferred to BT130238	Computershare Trust Company of Canada (Inc. No. A52313)

2. 1625 McAra Street, Regina, Saskatchewan, S4N 6H4

(a) Title No.: 139229321

Legal Description: Lot K Blk/Par 96 Plan No. 87R08061 Extension 0 as described on Certificate of Title 87R08068.

Registered Owners: Cynthia Hughes, James Hughes, Darlene Panchuk and Clayton Panchuk

Encumbrances:

Interest No./ Int. Register No.	Date	Instrument Type/ Description	From/By
151304183 100851612	26 May 1998	Personal Property Security Interest	RoyNat
151304172 100851601	26 Aug 1999	Personal Property Security Interest	Montreal Trust Company
153713718 117035883	17 Dec 2010	Mortgage of Lease	Arctic Glacier Inc. to Computershare Trust Company of Canada
153736768 117041914	21 Dec 2010	Mortgage of Lease	Arctic Glacier Inc. to Computershare Trust Company of Canada

(b) Title No.: 139229376

Legal Description: Lot K Blk/Par 96 Plan No. 87R08061 Extension 0 as described on Certificate of Title 87R08068.

Registered Owners: Cynthia Hughes, James Hughes, Darlene Panchuk and Clayton Panchuk

Encumbrances:

Interest No./ Int. Register No.	Date	Instrument Type/ Description	From/By
151304251 100851612	26 May 1998	Personal Property Security Interest	RoyNat
151304240 100851601	26 Aug 1999	Personal Property Security Interest	Montreal Trust Company
153713729 117035883	17 Dec 2010	Mortgage of Lease	Arctic Glacier Inc. to Computershare Trust Company of Canada
153736779 117041914	21 Dec 2010	Mortgage of Lease	Arctic Glacier Inc. to Computershare Trust Company of Canada

**Schedule D – Permitted Encumbrances, Easements and Restrictive Covenants
related to the Real Property**

(unaffected by the Vesting Order)

1. Reservations, limitations, provisos and conditions expressed in any original grant from any Governmental Authority.
2. Liens for Taxes, local improvements, assessments or governmental charges or levies not at the time due or delinquent.
3. Applicable municipal by-laws, development agreements, subdivision agreements, site plan agreements, other agreements, building and other restrictions, easements, servitudes, rights of way and licences affecting the use or value of the Lands which do not materially impair the use or value of the Lands affected thereby as presently used.
4. Defects or irregularities in title to the Lands affecting the use or value of the Lands which do not materially impair the use or value of the Lands affected thereby as presently used.
5. Any matters which might be revealed by (i) an up-to-date survey of any Lands; or (ii) an inspection and/or site investigation of any owned Lands together with any errors in the survey, which do not materially impair the use or value of the Lands affected thereby as presently used.
6. Any rights of expropriation, access or use, or any other similar rights conferred or reserved by or in any statute of Canada or any province or territory thereof or of the United States or any state, jurisdiction, territory or possession thereof.
7. Undetermined, inchoate or statutory Liens (including the Liens of public utilities, workers, suppliers of materials, builders, contractors, architects and unpaid vendors of moveable property) incidental to the current operation of the Lands which relate to obligations not yet due or delinquent and which have not been registered in accordance with Applicable Law.

TAB 32

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.

)

MONDAY, THE 9TH

JUSTICE NEWBOULD

)

DAY OF MAY, 2016

)

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
FIRSTONSITE G.P. INC.

Applicant

APPROVAL AND VESTING ORDER

THIS MOTION, made by FirstOnSite G.P. Inc. (the "**Applicant**"), for an order, *inter alia*:
(i) approving the sale transaction (the "**Transaction**") contemplated by an agreement of purchase and sale dated April 20, 2016 (the "**Sale Agreement**") between FirstOnSite Restoration L.P. by its general partner FirstOnSite G.P. Inc. (the "**Vendors**") and 3297167 Nova Scotia Limited (the "**Purchaser**") and appended to the Affidavit of Kevin McElcheran dated April 26, 2016 (the "**Sale Approval Affidavit**"); and (ii) vesting in the Purchaser the Vendors' right, title and interest in and to the assets described in the Sale Agreement ("**Purchased Assets**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of the Applicant, the Sale Approval Affidavit and the Exhibits attached thereto, the affidavit of Adam Zalev, sworn April 26, 2016 and the Exhibits attached thereto (the "**Financial Advisor's Affidavit**"), the Second Report of FTI Consulting Canada Inc., in its capacity as Monitor of the Vendors (the "**Monitor**"), and on being advised that those parties disclosed on the Service List attached to the Motion Record were given notice, and on hearing the submissions of counsel for the Monitor, the Vendors and the Purchaser and

the other parties appearing, no one appearing for any other person on the service list, although properly served as appears from the affidavits of Vlad Calina, sworn April 28, 2016 and May 6, 2016 and the affidavits of Teresa Koren, sworn April 29, 2016 and May 3, 2016, filed:

1. **THIS COURT ORDERS** that, unless otherwise indicated or defined herein, capitalized terms used in this Order shall have the meaning given to them in the Sale Agreement.
2. **THIS COURT ORDERS AND DECLARES** that the Transaction is hereby approved, and the execution of the Sale Agreement by the Vendors is hereby authorized and approved, with such minor amendments as the Vendors and the Purchaser, with the approval of the Monitor, may agree upon. The Vendors are hereby authorized and directed, and the Monitor is authorized and empowered, to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Purchased Assets to the Purchaser.
3. **THIS COURT ORDERS** that the Vendors are authorized and directed to perform their obligations under the Sale Agreement and any ancillary documents related thereto.
4. **THIS COURT ORDERS AND DECLARES** that upon the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule A hereto (the "**Monitor's Certificate**"), all of the Vendors' right, title and interest in and to the Purchased Assets and the proceeds thereof (including, for greater certainty, any funds received by the Purchaser on account of any Accounts Receivable) shall vest absolutely in the Purchaser, free and clear of and from any and all ownership claims, security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, pledges, trusts, constructive trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, encumbrances, obligations, liabilities, claims, demands, guarantees, set-off, liens, executions, levies, charges, or other financial or monetary claims, adverse claims, or rights of use, puts or forced sale provisions exercisable as a consequence of or arising from closing of the Transaction whether arising prior to or subsequent to the commencement of the CCAA proceedings, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured, legal equitable, possessory or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice Newbould dated April 21, 2016, and any subsequent charges created by the Court; (ii) all

charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario), the *Personal Property Security Act* (Alberta), the *Personal Property Security Act* (British Columbia), the *Personal Property Security Act* (Manitoba), the *Personal Property Security Act* (New Brunswick), the *Personal Property Security Act* (Nova Scotia), the *Personal Property Security Act* (Prince Edward Island), the Civil Code of Quebec, the *Personal Property Security Act* (Saskatchewan) or any other personal property registry system; and (iii) those Claims listed on Schedule "B" hereto (all of which are collectively referred to as the "Encumbrances", which term shall not include the Permitted Encumbrances) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

5. **THIS COURT ORDERS** that notwithstanding anything in this Order or the Sale Agreement, no right, title or interest of the Vendor in the lease agreements with Jim Pattison Industries Ltd. ("JPL"), or the assets subject to the lease agreements, shall transfer or vest in the Purchaser, until the assignment of such lease agreements to the Purchaser either on consent or subject to assignment under section 11.3 of the CCAA, and such right, title and interest shall transfer subject to JPL's interest in the lease agreements.

6. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall be paid to the Monitor as set out in the Sale Agreement and shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Monitor's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale. The Monitor is hereby authorized and empowered to hold the net proceeds from the sale of the Purchased Assets delivered to it pursuant to the Sale Agreement pending further order of the Court.

7. **THIS COURT ORDERS AND DIRECTS** the Monitor, in its capacity as Escrow Agent, to:

- (a) from and after the Closing Time, hold the Potential Trust Claimant Reserve in escrow as set out in the Escrow Agreement; and

- (b) release the Potential Trust Claimant Reserve, or any portion thereof, at such times and in such amounts as are contemplated by the Escrow Agreement or as otherwise ordered by the Court,

and in each case the Monitor shall incur no liability with respect to the foregoing.

8. **THIS COURT ORDERS AND DIRECTS** the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof.

9. **THIS COURT ORDERS** that the Monitor may rely on written notice from the Vendors and the Purchaser regarding fulfillment of conditions to closing under the Sale Agreement, and shall incur no liability with respect to the delivery of the Monitor's Certificate.

10. **THIS COURT ORDERS** that, provided that the Sale Agreement has not been terminated, any plan of compromise or arrangement that may be filed by the Vendors shall not derogate or otherwise affect any right or obligation of the Vendors or the Purchaser under the Sale Agreement unless otherwise agreed by the Vendors and the Purchaser.

11. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* (Canada), the Vendors and the Monitor are authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Vendors' records pertaining to the Vendors past and current employees. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Vendors.

12. **THIS COURT ORDERS** that, notwithstanding:

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Vendors and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of the Vendors;

the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Vendors and shall not be void or voidable by creditors of the Vendors, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

13. **THIS COURT ORDERS AND DECLARES** that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario).

14. **THIS COURT ORDERS** that (i) on or after the Closing Date, the Vendors are hereby permitted to execute and file articles of amendment or such other documents or instruments as may be required to change their respective legal names in accordance with section 10.3 of the Sale Agreement, and such articles, documents or other instruments shall be deemed to be duly authorized, valid and effective and shall be accepted by the applicable Governmental Authority without the requirement (if any) of obtaining director, partner or shareholder approval pursuant to any federal or provincial legislation; and (ii) upon the official change to the legal names of the Vendors that is occur in accordance with section 10.3 of the Sale Agreement, the names of the Vendors in the within title of proceedings shall be deleted and replaced with the new legal names of the Vendors, and any document filed thereafter in these proceedings (other than the Monitor's Certificate) shall be filed using such revised title of proceedings.

15. **THIS COURT ORDERS** that the Confidential Exhibits to the Sale Approval Affidavit and the Financial Advisor Affidavit shall be sealed, kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court File, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of the Court.

16. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Vendors and the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies

are hereby respectfully requested to make such orders and to provide such assistance to the Vendors and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Vendors and the Monitor and their respective agents in carrying out the terms of this Order.

_____

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

MAY 09 2016

PER / PAR: 

Schedule A – Form of Monitor’s Certificate

Court File No. CV-16-11358-00CL

**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 A PLAN OF COMPROMISE OR ARRANGEMENT OF
FIRSTONSITE G.P. INC.

Applicant

MONITOR’S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Justice Newbould of the Ontario Superior Court of Justice (the “**Court**”) dated April 21, 2016, FTI Consulting Canada Inc. was appointed as the monitor (the “**Monitor**”) of FirstOnSite G.P. Inc. and FirstOnSite Restoration L.P. (collectively, the “**Vendors**”) in respect of these CCAA Proceedings.

B. Pursuant to an Order of the Court dated May 9, 2016 (the “**Approval and Vesting Order**”), the Court approved the sale transaction contemplated by the agreement of purchase and sale made as of April 20, 2016 (the “**Sale Agreement**”) between the Vendors and 3297167 Nova Scotia Limited (the “**Purchaser**”) and provided for the vesting in the Purchaser of the Vendors’ right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Monitor to the Purchaser of a certificate confirming: (i) the Monitor has received the Closing Cash Payment to be delivered to it in accordance with Section 3.2(b) of the Sale Agreement; and (ii) that the conditions to Closing under the Sale Agreement have been satisfied or waived by the Vendors and the Purchaser (as applicable).

C. Pursuant to the Approval and Vesting Order, the Monitor may rely on written notice from the Vendors and the Purchaser regarding fulfillment of conditions to closing under the Sale Agreement.

D. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE MONITOR CERTIFIES the following:

1. The Vendors and the Purchaser have each delivered written notice to the Monitor that all applicable conditions under the Sale Agreement have been satisfied and/or waived, as applicable; and
2. The Monitor has received that portion of the Closing Cash Payment to be delivered to it in accordance with Section 3.2(b) of the Sale Agreement.
3. This Certificate was delivered by the Monitor at _____ [TIME] on _____, 2016.

**FTI Consulting Canada Inc., in its capacity as
Monitor of the Vendors, and not in its
personal or corporate capacity**

Per: _____
Name:
Title:

**Schedule B – Claims to be released, discharged and expunged from Purchased Assets
upon delivery of the Monitor’s Certificate**

1. The security granted by one or both of the Vendors under the following personal property system registrations:

Secured Party	Jurisdiction of Personal Property Registration									
	Alberta Reg. No.	BC Reg. No.	Manitoba Reg. No.	NB Reg. No.	Nova Scotia Reg. No.	Ontario Reg. No.	PEI Reg. No.	Quebec Reg. No.	Sask. Reg. No.	Nfld. Reg. No.
Torquest Partners Fund II, L.P.	10122318161	926057F (with renewal #593659G and #244785H)	201021420102	19617349	17547563	201012231124 1590 4247	2597513		300670830	
2123101 Ontario Inc.	10122318199	926059F (with amendment #593492G, and renewal #593654G and #244807H)	201021420307	19617398	17547589	201012231126 1590 4248 (with amendment #201202171159 1590 6405, and renewal #201202171451 1590 6436 and #201303191044 1590 7241)	2597522		300670832	
1347605 Ontario Ltd	10122318232	926071F (with renewal #593662G)	201021420900	19617406	17547613	201012231131 1590 4251 (with renewal #201202171451 1590 6435)	2597531		300670833	
Edenvale Restoration Specialists Ltd.	10122318310	926073F	201021421303	19617414	17547639	201012231132 1590 4252	2597540		300670835	
Boulanger, Andrew, William	10122318411	926076F	201021424205	19617422	17547670	201012231138 1590 4256	2597559		300670837	
2149530 Ontario Ltd.	10122318566	926078F	201021425104	19617430	17547704	201012231138 1590 4257	2597568		300670838	
2976367 Manitoba Ltd.	10122318624	926082F	201021425503	19617455	17547746	201012231138 1590 4258	2597577		300670839	
330214 Ontario Inc.	10122318689	926085F	201021426003	19617463	17547753	201012231139 1590 4259	2597586		300670840	

Secured Party	Jurisdiction of Personal Property Registration									
	Alberta Reg. No.	BC Reg. No.	Manitoba Reg. No.	NB Reg. No.	Nova Scotia Reg. No.	Ontario Reg. No.	PEI Reg. No.	Quebec Reg. No.	Sask. Reg. No.	Nfld. Reg. No.
2356723 Nova Scotia Limited	1012231 8743	926087F (with renewal #593669G)	20102142 6500	1961747 1	17547761	20101223 1140 1590 4260 (with renewal #20120217 1451 1590 6434)	2597602		300670 841	
Barry-Robert Enterprises Ltd.	1012231 8809	926089F (with renewal #593674G)	20102142 7301	19617 497	17547787	20101223 1140 1590 4261 (with renewal #20120217 1451 1590 6433)	2597611		300670 842	
1640334 Ontario Inc.	1012231 8838	926090F	2010214284 05	1961752 1	17547795	20101223 1141 1590 4262	2597620		300670 843	
Spring Fresh Cleaning & Restoration Canada Inc.	1012231 8891	926092F	2010214289 01	1961753 9	17547803	20101223 1141 1590 4263	2597639		300670 844	
Demos Canada Limited	1012231 8932	926093F (with renewal #593678G and #244792H)	2010214294 01	1961754 7	17547829	20101223 1141 1590 4264 (with renewal #20120217 1451 1590 6432 and #20130319 1044 1590 7239)	2597648		300670 845	
Jackson, Mark	1106151 2297	200467G	2011098797 09	2022341 8	18199166	20110615 1206 1590 3376	2696728		300736 981	
Walpole, Noel	1106151 2319	200471G	2011098811 00	2022344 2	18199232	20110615 1207 1590 3377	2696737		300736 990	
Fournier Brothers Holdings Inc.	1202171 3422	593645G	20120271 7603	2113711 2	1917663 5	20120217 1157 1590 6403	2848057		300831 515	
101109 P.E.I. Inc.	1202171 3478	593650G	2012027180 06	2113713 8	19176684	20120217 1157 1590 6404	2848066		300831 521	
JJAB Holdings Inc.	1303191 3602	244822H	2013044905 06	22731 335	20953907	20130319 0954 1590 7207	3132158		300998 053	
Ross, Barry	1408053 4885	107915I	2014145417 00	2474642 2	23142250	20140805 1432 1590 7735	3485320		301223 638	
Wells Fargo Capital Finance Corporation Canada, As Agent	1411121 6898	282633I	20142144 9703	2515308 1	2357187 0	20141112 1103 1862 4890 and 20141112 1106 1862 4893	3555272	14-1078395-0001	301268 160	124679 65

Secured Party	Jurisdiction of Personal Property Registration									
	Alberta Reg. No.	BC Reg. No.	Manitoba Reg. No.	NB Reg. No.	Nova Scotia Reg. No.	Ontario Reg. No.	PEI Reg. No.	Quebec Reg. No.	Sask. Reg. No.	Nfld. Reg. No.
Business Development Bank Of Canada	14111227954	2833971	201421483405	25154428	23573462	201411121420 17930277 and 201411131648 17930324	3555496	14-1079832-0001	301268347	12469060
BDC Capital Inc.	14111228010	2833941	201421483502	25154436	23573496	201411121423 17930279 and 201411131650 17930325	3555511	14-1080142-0002	301268348	12469078
Bank Of Montreal, As Agent						200701250952 15908846 (with amendment #200702161317 15900120 and #200712191005 15905550 and #201411261002 15904545) and renewal #201309261704 14629640)				
A.F. MacPhee Holdings Limited				20209227	18184952 18184937					
MacPhee Pontiac Buick GMC Ltd							26548623649966			
De Lage Landen Financial Services Canada Inc.						201109151054 15292934				
Toshiba Finance									300594820	
National Leasing Group Inc.						201304161542 60056632				

Secured Party	Jurisdiction of Personal Property Registration									
	Alberta Reg. No.	BC Reg. No.	Manitoba Reg. No.	NB Reg. No.	Nova Scotia Reg. No.	Ontario Reg. No.	PEI Reg. No.	Quebec Reg. No.	Sask. Reg. No.	Nfld. Reg. No.
Element Fleet Management Inc.						[20131017 1033 1529 6944 and 20011109 1454 1254 8730 (with amendment #20030429 1834 1531 0707 and 20070222 1125 1254 2869 and 20070223 1116 1254 2870 and 20080117 1254 1254 3252 and 20131017 1033 1529 6944 and other #20141117 1045 1529 9941)(with renewal #20061106 0956 1254 2660 and 20111024 1002 1254 3922)]		[14-0089984-0001 and 15-0504620-0002 and 15-0504622-0002 and 15-0504612-0002 and 15-0504620-0002]		
Element Fleet Services LP								11-0684838-0001 and 13-0492746-0001		
Element Fleet Services GP Limited								15-0504612-0004 and 15-0504612-0004		
Element Fleet Lease Receivables L.P.								15-0504622-0002 and 15-0504624-0002		
Roynat Inc.	11051019 468	856513G				20120719 1325 1902 1599				

Secured Party	Jurisdiction of Personal Property Registration									
	Alberta Reg. No.	BC Reg. No.	Manitoba Reg. No.	NB Reg. No.	Nova Scotia Reg. No.	Ontario Reg. No.	PEI Reg. No.	Quebec Reg. No.	Sask. Reg. No.	Nfld. Reg. No.
XEROX Canada Ltd.		681797H				20110621 1401 1462 3571 and 20110617 1703 1462 2858				
RCAP Leasing Inc.	13081521 126 and 14063006 550							13- 0230636- 0003 and 13- 0265837- 0005		
La Garantie de Construction Résidentiel (GCR)								16- 0106478- 0001		

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

Court File No. CV-16-11358-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF FIRSTONSITE G.P.
INC.

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

Proceeding commenced at Toronto

APPROVAL AND VESTING ORDER

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Lawyers for the Applicant

TAB 33

Case Name:
Canwest Global Communications Corp. (Re)

**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"**

[2009] O.J. No. 4788

Court File No. CV-09-8241-OOCL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

November 12, 2009.

(43 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Applications -- Sanction by court -- Application by a group of debtor companies for approval of an agreement that would enable them to restructure their business affairs, allowed -- Applicants were under the protection of the Companies' Creditors Arrangement Act -- Agreement was approved because it facilitated the restructuring of the applicants to enable them to become viable and competitive industry participants and it was fair -- Related transaction regarding the transfer of the business and assets of a newspaper that the applicants had an interest in did not require Court approval under s. 36 of the Act because it was an internal corporate reorganization which was in the ordinary course of business -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 36.

Application by a group of debtor companies and entities for an order approving a Transition and Reorganization Agreement between them and other related parties. The applicants were granted protection under the Companies' Creditors Arrangement Act on October 6, 2009. They were engaged in the newspaper, digital media and television business. The Agreement pertained to the restructuring of the applicants' business affairs. It was an internal reorganization transaction that was designed to realign shared services and assets within the corporate family that the applicants belonged to. The Agreement was entered into after extensive negotiations between the parties who

were affected by it. The Monitor, who was appointed under the Act, concluded that this transaction had several advantages over a liquidation.

HELD: Application allowed. Court approval under s. 36 of the Act was required if a debtor company under the protection of the Act proposed to sell or dispose of assets outside the ordinary course of business. It did not apply to a transaction regarding the transfer of the assets and business of a newspaper that the applicants had an interest in because it was an internal corporate reorganization which was in the ordinary course of business. The Agreement was approved because it facilitated the restructuring of the applicants to enable them to become viable and competitive industry participants and it was fair. It also allowed a substantial number of the businesses operated by the applicants to continue as going concerns. The Agreement did not prejudice the applicants' major creditors. In the absence of the Agreement the newspaper would have to shut down and most of its employees would lose their employment. The stay that was granted under the Act was extended to enable the applicants to continue to work with their various stakeholders on the preparation and filing of a proposed plan of arrangement.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act,

Bulk Sales Act, R.S.O. 1990, c. B.14,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2(1), s. 2(1), s. 36, s. 36(1), s. 36(4), s. 36(7)

Counsel:

Lyndon Barnes and Jeremy Dacks for the Applicants.

Alan Merskey for the Special Committee of the Board of Directors of Canwest.

David Byers and Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett for the Ad Hoc Committee of Noteholders.

Peter J. Osborne for Proposed Management Directors of National Post.

Andrew Kent and Hilary Clarke for Bank of Nova Scotia, Agent for Senior Secured Lenders to LP Entities.

Steve Weisz for CIT Business Credit Canada Inc.

Amanda Darroch for Communication Workers of America.

Alena Thouin for Superintendent of Financial Services.

REASONS FOR DECISION

S.E. 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.

Background 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.

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 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 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 reorganization 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 Act¹ 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.

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

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 Book³ 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*. 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*, 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 seller⁷. In *Pacific Mobile Corp.*, 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, [1982] C.A. 501, 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.'

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: *Re Stelco Inc.*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 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.

S.E. PEPALL J.

cp/e/qlrxg/qljxr/qlced/qlaxw

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 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.

10 *Supra*, note 3.

11 *Supra*, note 9.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF PERFORMANCE SPORTS GROUP LTD. ET. AL.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**BOOK OF AUTHORITIES OF THE APPLICANTS
(RE: SALE APPROVAL)**

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