

**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 OLD PSG
WIND-DOWN LTD., OLD BHR WIND-DOWN CORP., OLD BPSU WIND-DOWN CORP.,
OLD BPSDS WIND-DOWN CORP., OLD EBS WIND-DOWN CORP., OLD PLG WIND-
DOWN CORP., OLD PSGI WIND-DOWN CORP., OLD BHR INC., OLD BH INC., OLD
BPSU INC., OLD BPSCI INC., OLD BPSUSH INC., OLD EBS INC., OLD PLG INC., AND
OLD PSGI INC.

(Applicants)

**BOOK OF AUTHORITIES OF THE APPLICANTS
(Re: Disallowance of Putative Class Claim)**

Dated: October 12, 2017

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TAB 1

2015 ONSC 1354
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2015 CarswellOnt 2936, 2015 ONSC 1354, 23 C.B.R. (6th) 264, 250 A.C.W.S. (3d) 196

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

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation,
Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks
International Corporation and Nortel Networks Technology Corporation Application
under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

Newbould J.

Heard: February 27, 2015

Judgment: March 4, 2015

Docket: 09-CL-7950

Proceedings: full reasons to *Nortel Networks Corp., Re* (2015), 2015 CarswellOnt 3019, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Harvey G. Chaiton, George Benchetrit for SNMP Research International, Inc. and SNMP Research, Inc.
Joseph Pasquariello, Christopher G. Armstrong for Monitor, Ernst & Young Inc.

Alan Merskey, Vasuda Sinha for Nortel applicants

Scott A. Bomhoff for U.S. Debtors

Shayne Kukulowicz for US Unsecured Creditors' Committ

Jonathan Bell for Ad Hoc Group of Bondholders

Aubrey E. Kauffman for Avaya Inc.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX](#) Companies' Creditors Arrangement Act

[XIX.2](#) Initial application

[XIX.2.f](#) Lifting of stay

Headnote

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

Creditor company licensed its software to debtor companies pursuant to licence agreement — License agreement contained forum and choice of law clause providing that New York law would apply and that venue for disputes was Tennessee — Debtors became insolvent — Creditor filed proofs of claim in Companies' Creditors Arrangement Act (CCAA) proceedings and U.S. Chapter 11 proceedings for pre-filing claims against debtors — Creditor filed complaint in U.S. alleging post-filing unauthorized use of its software by debtors — Creditor brought motion to lift stay of CCAA proceedings to permit post-filing claims against Canadian debtors to be tried via jury trial in U.S. District Court for Delaware — Motion dismissed — Creditor did not show sufficient reason to displace present

court's jurisdiction to keep all of creditor's claims against Canadian debtors within single proceeding — If claim against Canadian debtors for its post-filing conduct was tried in separate U.S. jury proceeding, there would be multiplicity of proceedings against Canadian debtors — Overlap between pre- and post-filing claims regarding unauthorized use of software created risk of inconsistent findings of fact — CCAA court should not lightly lose control of process for determining claims against debtor — There was nothing to indicate Delaware District Court would have interest in controlled process that would take into account insolvency of Canadian debtors and need for timely resolution of all claims and preserving debtors' resources.

Table of Authorities

Cases considered by *Newbould J.*:

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

Expedition Helicopters Inc. v. Honeywell Inc. (2010), 319 D.L.R. (4th) 316, 70 B.L.R. (4th) 60, 87 C.P.C. (6th) 210, 262 O.A.C. 195, 2010 CarswellOnt 3091, 2010 ONCA 351, 100 O.R. (3d) 241 (Ont. C.A.) — considered

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKCA 72, 2007 CarswellSask 324, [2007] 9 W.W.R. 79, (sub nom. *Bricore Land Group Ltd., Re*) 299 Sask. R. 194, (sub nom. *Bricore Land Group Ltd., Re*) 408 W.A.C. 194, 33 C.B.R. (5th) 50 (Sask. C.A.) — considered

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

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

Z.I. Pompey Industrie v. ECU-Line N.V. (2003), 2003 SCC 27, 2003 CarswellNat 1031, 2003 CarswellNat 1032, 2003 A.M.C. 1280, (sub nom. *Pompey (Z.I.) Industrie v. Ecu-Line N.V.*) 303 N.R. 201, 2003 CSC 27, 30 C.P.C. (5th) 1, [2003] 1 S.C.R. 450, 240 F.T.R. 318 (note), 224 D.L.R. (4th) 577 (S.C.C.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 187(7) — considered

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

Generally — referred to

s. 11(1) — considered

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

FULL REASONS to judgment reported at *Nortel Networks Corp., Re* (2015), 2015 CarswellOnt 3019 (Ont. S.C.J. [Commercial List]) dismissing motion to lift stay of proceedings under *Companies' Creditors Arrangement Act* to permit post-filing claims against Canadian debtors to be tried in United States.

Newbould J.:

1 SNMP Research International, Inc. and SNMP Research, Inc. moved for an order to lift the stay of proceedings contained in the Initial Order to permit an action in the United States to proceed against a number of Nortel entities, including NNC and NNL. At the conclusion of the hearing I dismissed the motion for reasons to follow. These are my reasons.

Background to this litigation

2 SNMP Research, Inc. and SNMP Research International, Inc. (together "SNMPRI") are corporations in the business of producing and distributing software for the simple network management protocol ("SNMP"). The basic purpose of the SNMP is to manage and monitor network-attached devices.

3 Prior to the commencement of the CCAA Proceedings on January 14, 2009, SNMPRI licensed its software to Nortel for use in a number of Nortel products and from which Nortel purchased SNMP technologies and products. This relationship was governed by a license agreement between Nortel Network Corporation and SNMP Research International, Inc. dated December 23, 1999 together with certain schedules.

4 Following Nortel's insolvency filings, SNMPRI filed proofs of claim in the CCAA proceedings and the U.S Chapter 11 proceedings for pre-filing claims.

5 In the spring of 2011, SNMPRI indicated that it also intended to file a complaint for alleged post-filing unauthorized use, distribution, license and sale of SNMPRI software by certain of the Nortel entities after January 14, 2009 (the "Complaint"). The Complaint also asserted claims against certain parties who purchased assets from Nortel in the CCAA and chapter 11 proceedings, including Avaya Inc. SNMPRI seeks to recover at least \$86 million from the Canadian and U.S. Debtors on an "administrative expense" basis, including damages based on the proceeds of the sales of certain Nortel lines of business approved by this Court and the U.S. Bankruptcy Court. By the administrative expense claim, SNMPRI seeks to collect 100 cents on the dollar as it is a post-filing claim.

6 On September 21, 2011, SNMPRI filed this motion for relief from the stay imposed by the Initial Order to permit the Complaint to proceed in the U.S. Bankruptcy Court against the Canadian Debtors and the U.S. Debtors. In the circumstances, because there was some risk of the Complaint becoming statute barred, SNMPRI and Nortel entered into a letter agreement on October 25, 2011 under which Nortel permitted SNMPRI to initiate the Complaint in the U.S. Bankruptcy Court on the condition that the proceeding be immediately stayed. The letter agreement provided that the parties would mediate the issues in the SNMPRI claims and that the stay of proceedings would continue until the parties had completed mediation. It also provided that if the mediation was not successful, SNMPRI could not to proceed with its Complaint until its motion to lift the stay was decided. An order was made on consent permitting the stay in the Initial Order to be lifted for the limited purpose as agreed.

7 On December 27, 2013, SNMPRI filed an amended complaint (the "First Amended Complaint") with the U.S. Bankruptcy Court. The First Amended Complaint contains additional allegations arising from the post-filing sales of Nortel's assets and of copyright infringement by Nortel.

8 As with the original Complaint, in the First Amended Complaint SNMPRI seeks to pursue all of its claims, including those against the Canadian Debtors, by way of a jury trial in the U.S. Shortly before amending the Complaint, SNMPRI filed notice of its intent to "withdraw the reference" from the U.S. Bankruptcy Court, meaning that it would seek to have the Complaint heard not by the U.S. Bankruptcy Court but by the United States Court for the District of Delaware. Thus on this record, SNMPRI seeks a jury trial in the U.S. District Court for Delaware.

9 The mediation failed. It concluded on March 14, 2014.

The SNMPRI claims

10 In the SNMPRI claim made in this CCAA proceeding for pre-filing claims, SNMPRI claims:

- (a) A claim for approximately \$22,000 for certain stayed royalty payments owing for Q4 2008.
- (b) A claim for \$3.6 million for fees and pre-filing interest resulting from an alleged unauthorized and illegal usage by the Nortel debtors of SNMPRI's EMANATE software in its MG9000 software.
- (c) A claim for \$3.8 million for fees and pre-filing interest resulting from an alleged unauthorized and illegal usage by the Nortel debtors of SNMPRI's EMANATE software used in Nortel's Bay Software.
- (d) SNMPRI claims further amounts to be determined under the U.S. Copyright Act, applicable trade secret law, and other intellectual property law for unauthorized use and distribution of SNMPRI software with the MG9000 software and Bay Software and other products of the Canadian Debtors.

11 In the Complaint that SNMPRI filed in the U.S. Bankruptcy Court, SNMPRI sues to recover from the Canadian and U.S. Debtors damages and post-petition profits from Nortel's alleged unauthorized post-petition use, distribution, license or sale of SNMPRI software and Nortel's post-petition asset sale to Aveya. Pleaded is an alleged improper use by Nortel of SNMPRI's EMANATE software in Nortel's MG9000 software and in its MG9000 Bay Software. SNMPRI claims to recover from Aveya damages and profits from Aveya's alleged unauthorized possession, use, distribution, license or sale of SNMPRI software, including the SNMPRI Bay Software.

12 The nub of the claims asserted in the Complaint is that Nortel post-filing improperly used or sold SNMPRI software that was not licensed to Nortel and that Aveya purchased a line of business which contained the SNMPRI software and has not paid anything for it. It is essentially a claim for the same alleged illegal activity as claimed in the pre-filing claim against the Canadian Debtors in this CCAA proceeding.

Analysis

13 A court has wide powers under the CCAA. Section 11(1) of the CCAA provides that a court may make any order it considers appropriate in the circumstances. Section 11.02(1) and (2) grants jurisdiction in an Initial Order or a later order to stay any action already commenced against a debtor and to stay any proposed action for any period that the court considers necessary. It is a discretionary matter. The onus is on the party applying to lift the stay of proceedings.

14 There is little authority in how the court's consideration of a request to lift a stay should be dealt with in a liquidating insolvency. In one such case, *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 33 C.B.R. (5th) 50 (Sask. C.A.), the supervising trial judge refused to lift the stay to permit an action to proceed against the debtor because the claimant failed to establish that it had a tenable claim. That order was upheld on appeal. In the Court of Appeal, Jackson J.A. stated that there ought not to be rigid requirements on how a supervising judge is to exercise his or her discretion. She stated:

66 Given the broad discretion granted to a supervisory judge under the CCAA, as well as the knowledge and experience he or she gains from the ongoing dealings with the parties under the proceedings, it would be contrary

to the purpose of the *CCAA* for the law under it to develop in a restrictive way. Having regard for this, there ought not to be rigid requirements imposed on how a supervising *CCAA* judge must exercise his or her discretion with respect to lifting the stay.

15 Jackson J.A. went on to discuss guidance from previous decisions. She stated:

68 In determining what constitutes "sound reasons," much is left to the discretion of the judge. However, previous decisions on this point provide some guidance as to factors that may be considered:

(a) the balance of convenience;

(b) the relative prejudice to the parties;

(c) the merits of the proposed action, where they are relevant to the issue of whether there are "sound reasons" for lifting the stay (i.e., as was said in *Ma, Re*, if the action has little chance of success, it may be harder to establish "sound reasons" for allowing it to proceed).

16 In this case, no one raises the point that the merits of the proposed action against the Canadian Nortel are so lacking that the motion should be decided on that ground. The issue is whether the action should proceed in this Court or in a U.S. court.

17 SNMPRI contends that the parties agreed to a trial in the U.S., albeit Knoxville Tennessee. Section 9.11 of the License Agreement between Nortel and SNMPRI contains a forum and choice of law clause providing that New York law is to apply to the license and for disputes to be heard in Knoxville, Tennessee. It states:

This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without reference to its choice of law provisions, and the federal laws of the United States applicable therein. The venue for any disputes arising under or in respect to this Agreement shall be Knoxville, Tennessee, U.S.A. All proceedings shall be conducted in English.

18 SNMPRI contends that as the parties have agreed on a forum to resolve their disputes, the onus lies on the Monitor and the Canadian Nortel debtors to displace the forum chosen by the parties. It relies on *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450 (S.C.C.) as authority for the proposition that to displace a forum selection clause in a commercial agreement, strong cause must be shown.

19 SNMPRI also relies on a statement of Jurianz J.A. in *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351 (Ont. C.A.) that a departure from a forum selection clause should only be permitted in exceptional circumstances. He went on to state:

24. A forum selection clause in a commercial contract should be given effect. The factors that may justify departure from that general principle are few. The few factors that might be considered include the plaintiff was induced to agree to the clause by fraud or improper inducement or the contract is otherwise unenforceable, the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim, the claim or the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause, the plaintiff can no longer expect a fair trial in the selected forum due to subsequent events that could not have been reasonably anticipated, or enforcing the clause in the particular case would frustrate some clear public policy. Apart from circumstances such as these, a forum selection clause in a commercial contract should be enforced.

20 I note that included in the factors referred to by Jurianz J.A. that might justify a departure from a forum selection clause was if the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause or that enforcing the clause would frustrate some clear public policy.

21 The Monitor and the Canadian Debtors say that because of the insolvency of Nortel, the onus lies on the SNMPRI to justify lifting the stay of proceedings. They say that all matters involving the Canadian Debtors should be dealt with in the CCAA court in Toronto. They rely on *Eagle River International Ltd., Re*, [2001] 3 S.C.R. 978 (S.C.C.) [hereinafter Sam Lévy]. That case involved a Quebec bankrupt company under bankruptcy administration in Quebec. The Trustee commenced a petition in Quebec to recover assets against a British Columbia company, which moved to transfer the matter to B.C. under section 187(7) of the BIA which permitted the transfer if there was "sufficient cause". The B.C. company relied on a type of forum selection clause, although Binnie J. held it to be only a choice of law clause.

22 In *Sam Lévy*, Binnie J. referred to and adopted a "single control" model that favours litigation involving an insolvent company to be dealt with in one jurisdiction. He stated that a choice of forum clause in an insolvency situation should be taken into account but it is not binding or controlling. He stated in particular:

26 The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage (1916)*, 53 S.C.R. 337, at p. 345, "if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation"....

27 Stewart was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse....

63 Leaving aside, then, the inapplicable directives of the Civil Code of Québec, the question is whether a choice of forum clause would amount to "sufficient cause" for the purpose of s. 187(7) to the extent that it would be an error of law for the motions judge to have declined to give it effect in the circumstances of this case. In my view a choice of forum clause (where there really is one) ought to be taken into careful consideration by a motions judge but it is not binding: [authorities omitted].

64 It could be argued that the public policy favouring a "single control" of bankruptcy proceedings and opposition to their fragmentation demands that a choice of forum clause receive lesser effect in bankruptcy than in the context of ordinary commercial litigation: *Industrial Packaging Products Co. v. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (Pa. 1960); *In re Treco*, 239 B.R. 36 (S.D.N.Y. 1999), aff'd 240 F.3d 148 (2d Cir. 2001).

67 The implementation of these public policies might be expected to take priority over private "choice of forum" agreements where the two come into conflict, as indeed Robert J.A. concluded in the Quebec Court of Appeal. A similar position is expressed in I. F. Fletcher, *Insolvency in Private International Law* (1999), at p. 47, fn. 73:

[P]rivate contractual arrangements between parties cannot prevail over the exercise of bankruptcy jurisdiction, which belongs to the realm of public policy, serving a wider spread of interests including, ultimately, those of society at large.

In the United States, however, there is a competing body of judicial opinion that a trustee in bankruptcy who sues on an agreement containing a forum selection clause should, as a general rule, be bound by that clause to the same extent as the parties thereto: see *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (3d Cir. 1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (3d Cir. 1987), and *Hays and Co. v. Merrill Lynch*, 885 F.2d 1149 (3d Cir. 1989).

68 In my view, for the reasons previously mentioned, the choice of forum clause would be a significant factor under s. 187(7) but not, in the context of the public policies expressed in the Act, a controlling factor.

23 Justice Binnie stated that a creditor who was not a stranger to the bankruptcy had the onus to establish that multiple jurisdictions should be available for claims. He said:

76 ...Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions....

24 *Sam Lévy* involved a BIA proceeding. In it, Binnie J. referred to *Stewart v. LePage* [1916 CarswellPEI 1 (S.C.C.)], a winding-up application. I see no reason why the principles in *Sam Lévy* should not be applicable in a CCAA proceeding. In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter *Century Cities*], it was noted that the CCAA offers more flexibility and greater judicial discretion than the rules-based mechanism under the BIA and the principle was enunciated that the harmonization of insolvency law common to the BIA and CCAA is desirable to the extent possible. The central nature of insolvency and the resolution of issues caused by insolvency are common to both BIA and CCAA proceedings and so too should the underlying principles.

25 In *Century Cities*, nearly 10 years after *Sam Lévy*, Deschamps J. made clear why public policy prefers the resolution of all claims against a debtor to be determined in a single proceeding model. She stated:

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.

26 Justice Jurianz in *Expedition Helicopters* listed as one of the factors that might justify a departure from a forum selection clause is if the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause. The license agreement between SNMPRI and Nortel Networks Corporation was made on December 23, 1999. It is inconceivable that an insolvency of NNC, the parent company of all of the Nortel entities, was within the contemplation of the parties at that time. If it were, the license agreement presumably would not have been made. That is a significant change in circumstances.

27 Another factor referred to by Justice Jurianz was if enforcing the forum selection clause would frustrate some clear public policy. I think it follows from *Sam Lévy* that public policy in this country at least precludes a forum selection clause from being controlling in an insolvency situation. A CCAA insolvency proceeding serves a wider spread of interests than the parties to the agreement, including in this case the interests of pension and other claims asserted by the former employees of Nortel. A method that results in the most expeditious and fair determination of the claims of SNMPRI is clearly in the interests of all stakeholders in this CCAA process.

28 It is to be noted that whereas the forum selection clause provides for Knoxville, Tennessee to be the venue for any dispute, SNMPRI has stated in its filings that it wishes a jury trial in Delaware. Thus SNMPRI is not following the clause. During argument counsel for SNMPRI said that if successful in having the case sent from the U.S. Bankruptcy Court to the Delaware District Court, it then might seek a transfer to Tennessee. Whether that could be done I do not know, but it would not bode well for a timely disposition of the action. The prospect of the Nortel Debtors being dragged

around in different U.S. courts is not an appealing one. For them to become entangled in a drawn-out, foreign litigation process that will likely have no regard for the practical concerns of this insolvency, including the importance of resolving all remaining unresolved claims against the Canadian Debtors in a timely and efficient manner so that these proceedings, already pending for six years, can be brought to their conclusion, is a situation that should be avoided.

29 So far as the forum selection clause providing that the license is to be governed by and construed in accordance with New York law and the federal laws of the United States applicable therein, no evidence has been filed as to what those laws are or to indicate that those laws are in any substantial way different from the laws of this country. Even if they were, Canadian courts can and often have applied foreign law. The recent UKPC claims against NNC and NNL is but one such example. I do not consider this much of a factor, if any, in favour of lifting the stay of proceedings.

30 I also do not think that the location of witnesses in the U.S. or in Canada is a compelling factor, as contended for by SNMPRI. In any event, material was not provided in any detail as to expected witnesses and where they reside.

31 SNMPRI says that the claims against the Canadian Debtors arise from common issues of fact and law as in the claim against the U.S. Debtors and against Aveya. Therefore SNMPRI says these claims should be heard together in the U.S. with the claims against the U.S. Debtors and against Aveya. This is particularly so, it asserts, because of its right to a jury trial in the U.S. in its claim against Aveya.

32 There would appear to be nothing to stop SNMPRI from claiming against the U.S. Debtors and Aveya in Canada, although it might be that Aveya would attempt to challenge the claim against it being tried in Canada. There would certainly be nothing to stop SNMPRI from claiming against the Canadian Debtors in this CCAA proceeding and against the U.S. Debtors in the U.S. Bankruptcy Court and having a joint trial under the protocols established between the two courts. SNMPRI could make Aveya a defendant in the action in the U.S. Bankruptcy Court, and Mr. Kauffman who appeared for Aveya said it would be content to have the claim against it dealt with in the U.S. Bankruptcy Court.

33 I agree with all of those opposing SNMPRI's motion to lift the stay that the supposed difficulties that may be caused by its rights to a jury trial in its claim against Aveya are of its own choosing. SNMPRI may want to have the claim against Aveya tried together with the claims against Nortel, and try to have them all tried by a jury, but should that require the claim against the Canadian Debtors to be tried that way? It could be said, as one counsel did, that the tail is wagging the dog.

34 If the claim against the Canadian Debtors for its post-filing conduct is tried in a separate U.S. jury proceeding, it means that there will be a multiplicity of proceedings against the Canadian Debtors. The pre-filing claim must be determined in the CCAA proceedings. The post-filing claims would be tried before a jury. It is quite evident that there is overlap between these claims. Indeed the issues are the same except as to the timing of the alleged unauthorized use of SNMPRI software, one claim being for pre-filing unauthorized use and the other being for post-filing unauthorized use. The risk of inconsistent findings of fact is obvious.

35 A CCAA court should not lightly lose control of the process whereby claims against the debtor are to be determined. I agree that procedures should be imposed to ensure that the process for resolving the Canadian SNMPRI claims does not become more expensive or complicated than the circumstances permit or the claims merit. Such an approach would be consistent with this Court's earlier orders in these proceedings. The allocation and inter-estate claims trials were, among other things, ordered to proceed on an accelerated timetable, with a controlled process for documentary and oral discovery. There is nothing in the materials that would indicate that a Delaware District Court would have any interest in a controlled process that would take into account the insolvency of the Canadian Debtors and the need for a timely resolution of all claims and preserving the debtors' resources as much as is reasonably possible.

36 Is SNMPRI a stranger to the bankruptcy in the sense articulated by Binnie J. in *Sam Lévy*? I think not. SNMPRI has participated in and objected to the sales of Nortel's lines of business and it has filed a CCAA proof of claim against the Canadian Debtors. It has not met its burden of demonstrating sufficient reason to displace this Court's jurisdiction

to keep all of the SNMPRI claims against the Canadian Debtors within a single proceeding. Even if the onus were on the Monitor and the Canadian Debtors to prevent the stay from being listed, I am of the view that they would have met that onus.

37 In the circumstances, the motion by SNMPRI to lift the stay of proceedings to permit the post-filing claims against the Canadian Debtors to be tried in the U.S. was dismissed.

Order accordingly.

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TAB 2

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

Essar Steel Algoma Inc., Re

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

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

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

Newbould J.

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

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

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

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX](#) Companies' Creditors Arrangement Act

[XIX.5](#) Miscellaneous

Conflict of laws

[VI](#) Contracts

[VI.1](#) Choice of law

[VI.1.c](#) Forum conveniens

[VI.1.c.iv](#) Miscellaneous

Headnote

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

Jurisdiction — Steel company E and group of mining companies C were parties to supply agreement governed
by Ohio law — Dispute arose regarding amount of iron ore pellets E was obliged to take from 2013 to 2015 —
C commenced action in Ohio for damages for breach of contract — E commenced counterclaim for damages for

breach of contract — C purported to terminate agreement in October 2015 based on E's alleged multiple breaches and repudiation — E commenced application for relief under Companies' Creditors Arrangement Act (CCAA) in November 2015 — Action in Ohio was essentially stayed — E commenced motion in Ontario essentially seeking resolution of prior dispute as part of CCAA proceedings — C brought motion for dismissal or stay of E's motion on basis of lack of jurisdiction or forum non conveniens — Motion dismissed — Court acting under CCAA clearly had power to make procedural orders of kind sought by E in this case — Issues between E and C were subject to "single control" model that favoured litigation involving insolvent company to be dealt with in one jurisdiction — C was not stranger to present insolvency proceedings — C's action against E in Ohio made C purported creditor of E — C's termination of agreement had been important factor that led to E filing for protection under CCAA — Single control model required C's claim against E to be dealt with in this CCAA proceeding — Issues between E and C were completely interwoven so it made no sense to require E to litigate its claim against C in United States when C's claim had to be considered here — Ontario court also had jurisdiction simpliciter, and C failed to establish Ontario was not convenient forum.

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

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

Table of Authorities

Cases considered by Newbould J.:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11(4) — considered

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

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 17.02 — considered

R. 17.02(f)(i) — considered

R. 17.02(p) — considered

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

Newbould J.:

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

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

Relevant history

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

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

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

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

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

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

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

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

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

12 On October 5, 2015 Cliffs purported to terminate the Cliffs Contract by letter which stated that as a result of multiple and material breaches and repudiation of the Cliffs Contract by Essar Algoma, Cliffs was treating the Cliffs Contract as

terminated effective immediately. The termination came with no advance notice and within days of the next adjustment in price and at a time of year that Essar Algoma has historically begun building up inventory before the winter freeze.

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

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

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

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

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

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

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

Relevant motions in the CCAA proceeding

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

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

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

Analysis

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

Jurisdiction under the CCAA

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

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

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

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

27 The CCAA is skeletal in nature and does not contain a comprehensive code that lays out all that is permitted or barred. A court under the CCAA has both statutory authority granted under the CCAA and an inherent and equitable jurisdiction when supervising a reorganization. The most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the CCAA text before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceeding. See *Ted Leroy Trucking Ltd., Re*, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter *Century Services*] at paras. 57, 64 and 65.

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

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

26 The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage* (1916), 53 S.C.R. 337, at p. 345, "if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation"...

27 *Stewart* was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse...

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

31 In this case Cliffs has sued in Ohio for damages claiming material breaches of the Cliffs Contract. It is thus a party that has claimed to be a creditor of Essar Algoma². The single control model requires that its claim against Essar Algoma be dealt with in this CCAA proceeding. Essar Algoma claims in this Court a declaration that the Cliffs Contract has not been legally terminated. Cliffs says that the material breaches by Essar Algoma that it claimed in the Ohio litigation to have occurred permit it to terminate the Cliffs Contract. These issues are completely interwoven and it would make no sense to require Essar Algoma to litigate its claim against Cliffs in the United States³ when Cliffs' claim against Essar Algoma must be dealt with in this Court in Ontario. The claim of Essar Algoma against Cliffs is an asset of the applicants to be dealt with in this Court.

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

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

33 For the single control model to apply, the third-party, in this case Cliffs, must not be a stranger to the insolvency proceedings. Cliffs has raised significant damage claims against Essar Algoma and seeks to have those claims remain alive and dealt with in Ohio. Its purported termination of the Cliffs Contract was an important factor that led to Essar Algoma filing for protection under the CCAA. Cliffs is not a stranger to these proceedings.

Jurisdiction simpliciter

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

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

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

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

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

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

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

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

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

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

(f) in respect of a contract where,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

53 Rule 17.02(p) provides:

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

(p) against a person ordinarily resident or carrying on business in Ontario;

54 The three Cliffs corporations that are a party to the Cliffs Contract are The Cleveland-Cliffs Iron Company, an Ohio corporation with its principal place of business in Cleveland, Cliffs Mining Company, a Delaware corporation with

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

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

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

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

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

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

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

Forum non conveniens

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

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

63 Before going through these factors, there is an issue as to whether Ohio is the alternative jurisdiction. Essar Algoma says the alternative jurisdiction is Delaware in which the chapter 15 proceedings are taking place. I hesitate to get into that issue and will assume that the alternative forum is the Ohio District Court. That is certainly the view of the expert witness Allan L. Gropper relied on by Cliffs.

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

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

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

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

67 This factor is essentially a neutral one.

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

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

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

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

71 Whatever the situation, this Court can accommodate the parties quickly. The situation for Essar Algoma is critical, and the Monitor has stated in its sixth report that in developing and carrying out the SISP, which has tight timelines,

Algoma needs certainty concerning the status of the Cliffs Contract and an expedited determination of the rights of the parties is linked to the development of the SISF. Whether those rights can be determined that quickly may be a question mark, but this Court is in at least as good a position as the Ohio court to deal with the issues quickly.

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

(iii) The possibility of conflicting judgments

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

(iv) Location of evidence

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

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

(v) Applicable law

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

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

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

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

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

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

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

(vi) *Recognition and enforcement of an Ontario judgment*

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

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

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

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

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

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

86 I could hardly quarrel with an opinion on these matters by someone as eminent as Mr. Gropper. However, Mr. Gropper was instructed to assume that Cliffs does not carry on business in Canada, and that assumption is critical

to his analysis. That assumption cannot stand in light of the findings that I have made regarding Cliffs carrying on business in Ontario. While Mr. Gropper opines that a U.S. court must scrutinize the basis on which a foreign court asserts jurisdiction over a defendant, and in light of international concepts of jurisdiction to adjudicate, there is no discussion of this issue if the foreign court such as this Court has found that the defendant has carried on business in Ontario under a contract made in Ontario.

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

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

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

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

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

In *Hilton v. Guyot*, the Supreme Court held that if the foreign forum provides "a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting," the judgment should be enforced and not "tried afresh." *Hilton*, 159 U.S. at 202-03. "[W]hen the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the

procedural safeguards employed in those foreign proceedings." *In re Bd. of Dirs. of Hopewell Int'l. Ins. Ltd., Inc.*, 238 B.R. 25, 66 (Bankr. S.D.N.Y. 1999), *aff'd*, 238 B.R. 699 (S.D.N.Y. 2002) (internal quotation marks and citations omitted). For example, the U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process. U.S. federal courts have repeatedly granted comity to Canadian proceedings.

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

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

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

(vii) *Conclusion on forum non conveniens*

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

Is the relief inappropriate for a summary proceeding?

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

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

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

98 I would not at this stage order that Essar Algoma deliver a statement of claim. What the form of the process will take is yet to be decided. I agree with Cliffs that the procedural rights of the parties should be protected as much as possible as the circumstances will permit. Those circumstances, of course, include the fact that Essar Algoma filed

under the CCAA shortly after Cliffs purported to terminate the Cliffs Contract and that the issue needs to be dealt with quickly for the sake of both parties. As well, the principles laid out in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) and the need to be mindful of the most proportionate procedure for a case will need to be considered.

Conclusion

99 The motion of Cliffs is dismissed.

Motion dismissed.

Footnotes

- 1 The power in section 11 is "subject to the restrictions set out in this Act." Cliffs argued that an inference should be drawn that because Essar Algoma withdrew its critical supplier motion, an inference should be drawn that it did so because it could not comply with the critical supplier tests in section 11(4). Thus the failure to be able to comply with section 11(4) should be read as a restriction in the Act preventing the use of section 11 by the applicants. I decline to make such an inference and in any event do not think a failure to fall into the language of section 11(4) which provides that a court *may* make an order can be read to be a restriction under section 11. It is commonplace in CCAA proceedings to make orders requiring supply without invoking section 11(4).
- 2 At the request of Cliffs, the claims procedure order signed on January 14, 2016 in this CCAA proceeding by agreement did not cover Cliffs' claims and the procedure to govern those claims is to await the determination of this motion.
- 3 It would be up to the Delaware Bankruptcy Court to determine if the claim should proceed in that Court or in the Ohio District Court.
- 4 Although Justice Dumas referred to a trustee and the Bankruptcy Court, the case was a CCAA case and the MME was not a bankrupt.
- 5 Mr. Gropper went on in his opinion to give his view ("it is submitted...") that a U.S. Court would not find that Cliffs has submitted to the jurisdiction of the Canadian courts. I have serious doubts as to whether an expert in foreign law should go beyond stating what the foreign law is and give an opinion on what the foreign court would do in a particular case. See my comments in *Nortel Networks Corp., Re* (2014), 20 C.B.R. (6th) 171 (Ont. S.C.J. [Commercial List]) at paras. 103-104. In any event, his opinion was based on the assumption that Cliffs did not carry on business in Canada.
- 6 Mr. Gropper also referred, in a footnote to his statement that in appropriate circumstances a non-monetary may be enforced under the common law principle of comity, to the *Sea Search* case as authority that where the Uniform Act has been adopted, courts have consistently denied enforcement to non-monetary judgments. However Professor Brand's analysis is a complete answer to that case. I would note that while Mr. Gropper has extremely impressive credentials as a bankruptcy expert, his *curriculum vitae* does not list experience in dealing with state courts or the enforcement of foreign judgments under state legislation.

TAB 3

2014 ONSC 6973
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2014 CarswellOnt 17291, 2014 ONSC 6973, 17 C.C.P.B. (2nd) 10, 20 C.B.R. (6th) 171, 248 A.C.W.S. (3d) 21

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

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks
Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel
Networks International Corporation and Nortel Networks Technology Corporation

Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

Newbould J.

Heard: July 7-11, 14-18, 21-22, 2014; September 29-30, 2014; October 1, 2014

Judgment: December 9, 2014

Docket: 09-CL-7950

Counsel: Michael Barrack, John Finnigan, D.J. Miller, Andrea McEwan, Michael Shakra, Brian O'Connor, Matthew Bullen, James McCreath, Chris Edward-Earl for United Kingdom Pension Claimants

Alan Mark, Jessica Kimmel, Graham Smith, Jason Wadden, Gale Rubenstein, Christopher Armstrong, Derrick Tay, Jennifer Stam, Melanie Ouanounou, Vasuda Sinha, Nicholas Kluge, Niklas Holmberg, Jonathan Edge, Joe Pasquariello, Jesse Mighton for Monitor & Canadian Debtors

Subject: Corporate and Commercial; Evidence; Income Tax (Federal); Insolvency; Restitution; Employment

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.5 Miscellaneous](#)

Business associations

[III Specific matters of corporate organization](#)

[III.3 Shareholders](#)

[III.3.e Shareholders' remedies](#)

[III.3.e.ii Relief from oppression](#)

[III.3.e.ii.B Standing to apply](#)

[III.3.e.ii.B.3 Creditor](#)

Pensions

[IV Miscellaneous](#)

Restitution and unjust enrichment

[I General principles](#)

[I.2 Requirements for unjust enrichment](#)

[I.2.b Deprivation corresponding to enrichment](#)

Restitution and unjust enrichment**I General principles****I.2 Requirements for unjust enrichment****I.2.c No juristic reason for enrichment****Tax****II Income tax****II.19 Non-residents****II.19.e Transfer pricing****Headnote****Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous**

Telecommunications company with offices worldwide filed for bankruptcy protection under Companies' Creditors Arrangement Act [CCAA], and ultimately determination was made to liquidate business — UK subsidiary of telecommunications company had pension shortfall which had resulted in funding agreement designed to correct shortfall — Funding agreement was guaranteed by operating subsidiary of telecommunications company — Operating subsidiary owed debt on interest-free loan to UK subsidiary, for which transfer of other subsidiaries to UK subsidiary was to be arranged — Operating subsidiary signed guarantee to account for potential loss that would accrue to pension plan of UK subsidiary if it failed — In CCAA proceedings, trustee of UK subsidiary's pension plan and board of UK Pension Protection Fund [PPF] made claims based on amount it stated would be owed under financial support direction under Pensions Act 2004 (UK), amount under funding guarantee, amount under guarantee on interest free loan, and amounts for oppression and unjust enrichment — Monitor disallowed claims — Hearing held regarding claims — Claims allowed regarding guarantee on funding agreement only — Claim based on UK regulator issuing contribution notice under financial support direction regime was too remote or speculative to allow — Regulator began proceedings against telecommunications company and operating subsidiary, but these were found to be nullity because of stay under CCAA — Whether financial support direction constituted improper exercise of foreign authority was policy issue for parliament rather than court — Financial support direction proceedings were not intended to impermissibly reorder and interfere with rights of creditors — Trustee and board of PPF had status to bring claim — Trustee was given economic interest in claim under UK legislation, and pension regulator was not in better position to make claim — Determination of chances that contribution notice or financial support direction would be issued was required to measure contingent claim, which was not dependent on actual order or specific time being selected — Intercompany financing was common between UK subsidiary and other entities in telecommunications company — Telecommunications company or operating subsidiary might not consent to jurisdiction of English court in making order, and amount regulator might seek was unknowable — It might be unreasonable to issue contribution notice that would negatively affect former employees of other branches of telecommunications company in order to profit former UK employees or PPF — There was little guidance available on whether contribution notice would be ordered, or amount — Pension contribution holiday and interest-free loan from UK subsidiary to operating subsidiary were not factors which would have affected issuance of contribution notice — Not shown that UK subsidiary was insufficiently resourced — Operating subsidiary had liability on funding guarantee — UK subsidiary had suffered insolvency event under Pensions Act 2004 (UK), which prevented it from making required payments regarding pension — Under terms of guarantee, obligations of operating subsidiary were not affected by unenforceability of contribution requirements against UK subsidiary — Amount of claim was 339.75 million pounds sterling — Claim based on guarantee of interest free loan had been properly disallowed — Commercial reality was that liquidation of assets had occurred, so that insolvency event under terms of agreement had occurred — That UK plan had not yet been wound up, did not affect liability of operating subsidiary — However, demand was premature as there was no actuarial certificate at time of demand, and no other demand was made by time guarantee expired.

Pensions --- Miscellaneous

Telecommunications company with offices worldwide filed for bankruptcy protection under Companies' Creditors Arrangement Act [CCAA], and ultimately determination was made to liquidate business — UK subsidiary of telecommunications company had pension shortfall which had resulted in funding agreement designed to correct shortfall — Funding agreement was guaranteed by operating subsidiary of telecommunications company — Operating subsidiary owed debt on interest-free loan to UK subsidiary, for which transfer of other subsidiaries to UK subsidiary was to be arranged — Operating subsidiary signed guarantee to account for potential loss that would accrue to pension plan of UK subsidiary if it failed — In CCAA proceedings, trustee of UK subsidiary's pension plan and board of UK Pension Protection Fund [PPF] made claims based on amount it stated would be owed under financial support direction under Pensions Act 2004 (UK), amount under funding guarantee, amount under guarantee on interest free loan, and amounts for oppression and unjust enrichment — Monitor disallowed claims — Hearing held regarding claims — Claims allowed regarding guarantee on funding agreement only — Claim based on UK regulator issuing contribution notice under financial support direction regime was too remote or speculative to allow — Regulator began proceedings against telecommunications company and operating subsidiary, but these were found to be nullity because of stay under CCAA — Whether financial support direction constituted improper exercise of foreign authority was policy issue for parliament rather than court — Financial support direction proceedings were not intended to impermissibly reorder and interfere with rights of creditors — Trustee and board of PPF had status to bring claim — Trustee was given economic interest in claim under UK legislation, and pension regulator was not in better position to make claim — Determination of chances that contribution notice or financial support direction would be issued was required to measure contingent claim, which was not dependent on actual order or specific time being selected — Intercompany financing was common between UK subsidiary and other entities in telecommunications company — Telecommunications company or operating subsidiary might not consent to jurisdiction of English court in making order, and amount regulator might seek was unknowable — It might be unreasonable to issue contribution notice that would negatively affect former employees of other branches of telecommunications company in order to profit former UK employees or PPF — There was little guidance available on whether contribution notice would be ordered, or amount — Pension contribution holiday and interest-free loan from UK subsidiary to operating subsidiary were not factors which would have affected issuance of contribution notice — Not shown that UK subsidiary was insufficiently resourced — Operating subsidiary had liability on funding guarantee — UK subsidiary had suffered insolvency event under Pensions Act 2004 (UK), which prevented it from making required payments regarding pension — Under terms of guarantee, obligations of operating subsidiary were not affected by unenforceability of contribution requirements against UK subsidiary.

Tax --- Income tax — Non-residents — Transfer pricing

Telecommunications company with offices worldwide filed for bankruptcy protection under Companies' Creditors Arrangement Act [CCAA], and ultimately determination was made to liquidate business — UK subsidiary of telecommunications company had pension shortfall which had resulted in funding agreement designed to correct shortfall — Funding agreement was guaranteed by operating subsidiary of telecommunications company — Operating subsidiary owed debt on interest-free loan to UK subsidiary, for which transfer of other subsidiaries to UK subsidiary was to be arranged — Operating subsidiary signed guarantee to account for potential loss that would accrue to pension plan of UK subsidiary if it failed — In CCAA proceedings, trustee of UK subsidiary's pension plan and board of UK Pension Protection Fund [PPF] made claims based on amount it stated would be owed under financial support direction under Pensions Act 2004 (UK), amount under funding guarantee, amount under guarantee on interest free loan, and amounts for oppression and unjust enrichment — Monitor disallowed claims — Hearing held regarding claims — Claims allowed regarding guarantee on funding agreement only — Claim based on UK regulator issuing contribution notice under financial support direction regime was too remote or speculative to allow — There was little guidance available on whether contribution notice would be ordered, or amount — Pension contribution holiday and interest-free loan from UK subsidiary to operating subsidiary were not factors which would have affected issuance of contribution notice — Transfer pricing arrangements did not fail to compensate UK subsidiary for contributions to telecommunications company — Arrangements in restructuring agreements of

telecommunications company did not offend transfer pricing principles and were not factor in whether contribution notice would be ordered.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Standing to apply — Creditor

Telecommunications company with offices worldwide filed for bankruptcy protection under Companies' Creditors Arrangement Act [CCAA], and ultimately determination was made to liquidate business — UK subsidiary of telecommunications company had pension shortfall which had resulted in funding agreement designed to correct shortfall — Funding agreement was guaranteed by operating subsidiary of telecommunications company — Operating subsidiary owed debt on interest-free loan to UK subsidiary, for which transfer of other subsidiaries to UK subsidiary was to be arranged — Operating subsidiary signed guarantee to account for potential loss that would accrue to pension plan of UK subsidiary if it failed — In CCAA proceedings, trustee of UK subsidiary's pension plan and board of UK Pension Protection Fund [PPF] made claims based on amount it stated would be owed under financial support direction under Pensions Act 2004 (UK), amount under funding guarantee, amount under guarantee on interest free loan, and amounts for oppression and unjust enrichment — Monitor disallowed claims — Hearing held regarding claims — Claims allowed regarding guarantee on funding agreement only — Claim in oppression was properly disallowed — Claimants did not have standing to bring claim in oppression — Claimants were creditors of telecommunications company, but complained about conduct of UK subsidiary — Inappropriate to impose duty on telecommunications company to act in interests of UK subsidiary under s. 141(2) of Canada Business Corporations Act — Complaints of claimants related to transactions to which UK subsidiary was party.

Restitution and unjust enrichment --- General principles — Requirements for unjust enrichment — Deprivation corresponding to enrichment

Telecommunications company with offices worldwide filed for bankruptcy protection under Companies' Creditors Arrangement Act [CCAA], and ultimately determination was made to liquidate business — UK subsidiary of telecommunications company had pension shortfall which had resulted in funding agreement designed to correct shortfall — Funding agreement was guaranteed by operating subsidiary of telecommunications company — Operating subsidiary owed debt on interest-free loan to UK subsidiary, for which transfer of other subsidiaries to UK subsidiary was to be arranged — Operating subsidiary signed guarantee to account for potential loss that would accrue to pension plan of UK subsidiary if it failed — In CCAA proceedings, trustee of UK subsidiary's pension plan and board of UK Pension Protection Fund [PPF] made claims based on amount it stated would be owed under financial support direction under Pensions Act 2004 (UK), amount under funding guarantee, amount under guarantee on interest free loan, and amounts for oppression and unjust enrichment — Monitor disallowed claims — Hearing held regarding claims — Claims allowed regarding guarantee on funding agreement only — Claim for unjust enrichment was properly disallowed — Trustee did not establish any harm from deprivation caused to UK subsidiary — Interest free loan was not shown to provide enrichment to telecommunications company — Funds were moved throughout company as required, and fact that books of UK subsidiary reflected was no proof that telecommunications company used cash for its own purposes — No enrichment shown from loans or from interest free aspect of loans — As there was no proof that had loans not existed or had interest been paid on them, money would have gone into UK pension plan, no corresponding deprivation occurred — No claim for unjust enrichment could be made on difference between guarantee and amount said to be promised on value of transferred subsidiaries to UK subsidiary — Valuations showed no deprivation to UK subsidiary.

Restitution and unjust enrichment --- General principles — Requirements for unjust enrichment — No juristic reason for enrichment

Telecommunications company with offices worldwide filed for bankruptcy protection under Companies' Creditors Arrangement Act [CCAA], and ultimately determination was made to liquidate business — UK subsidiary of telecommunications company had pension shortfall which had resulted in funding agreement designed to correct shortfall — Funding agreement was guaranteed by operating subsidiary of telecommunications company —

Operating subsidiary owed debt on interest-free loan to UK subsidiary, for which transfer of other subsidiaries to UK subsidiary was to be arranged — Operating subsidiary signed guarantee to account for potential loss that would accrue to pension plan of UK subsidiary if it failed — In CCAA proceedings, trustee of UK subsidiary's pension plan and board of UK Pension Protection Fund [PPF] made claims based on amount it stated would be owed under financial support direction under Pensions Act 2004 (UK), amount under funding guarantee, amount under guarantee on interest free loan, and amounts for oppression and unjust enrichment — Monitor disallowed claims — Hearing held regarding claims — Claims allowed regarding guarantee on funding agreement only — Claim for unjust enrichment was properly disallowed — No enrichment shown from loans or from interest free aspect of loans — No absence of juristic reason for interest free loans, as agreement between telecommunications company and UK subsidiary was juristic reason for loans — Board of UK subsidiary considered loans to be in best interests UK subsidiary — No claim for unjust enrichment could be made on difference between guarantee and amount said to be promised on value of transferred subsidiaries to UK subsidiary — No lack of juristic reason existed for size of guarantee — Guarantees were negotiated by telecommunications company and trustee, and if it became unenforceable there was no enrichment of telecommunications company.

Table of Authorities

Cases considered by *Newbould J.*:

AbitibiBowater Inc., Re (2012), 352 D.L.R. (4th) 399, 71 C.E.L.R. (3d) 1, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.*) 438 N.R. 134, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.*) [2012] 3 S.C.R. 443, 2012 SCC 67, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 95 C.B.R. (5th) 200 (S.C.C.) — considered

Appleby Estates Ltd., Re (1984), 53 C.B.R. (N.S.) 10, 12 D.L.R. (4th) 435, 5 O.A.C. 39, 48 O.R. (2d) 1, 1984 CarswellOnt 167 (Ont. C.A.) — referred to

BCE Inc., Re (2008), (sub nom. *Aegon Capital Management Inc. v. BCE Inc.*) 383 N.R. 119, 71 C.P.R. (4th) 303, 52 B.L.R. (4th) 1, (sub nom. *Aegon Capital Management Inc. v. BCE Inc.*) 301 D.L.R. (4th) 80, 2008 SCC 69, (sub nom. *BCE Inc. v. 1976 Debentureholders*) [2008] 3 S.C.R. 560, 2008 CarswellQue 12595, 2008 CarswellQue 12596 (S.C.C.) — considered

Bloom v. Pensions Regulator (2013), [2014] A.C. 209 (U.K. S.C.) — considered

Chartbrook Ltd. v. Persimmon Homes Ltd. (2009), [2010] 1 P & CR 9, [2009] 4 All E.R. 677, [2010] 1 All E.R. (Comm) 365, [2009] 3 W.L.R. 267, [2009] 1 A.C. 1101, [2009] B.L.R. 551, [2009] Bus. L.R. 1200, 125 Con. L.R. 1, [2009] UKHL 38 (U.K. H.L.) — considered

Condon, Re (1874), 3 Jur. 538, [1874-80] All E.R. Rep. 388, (sub nom. *James, Ex Parte*) 9 Ch. App. 609 (Eng. Ch. App.) — considered

Confederation Treasury Services Ltd., Re (1997), 43 C.B.R. (3d) 4, (sub nom. *Confederation Treasury Services Ltd. (Bankrupt), Re*) 96 O.A.C. 75, 1997 CarswellOnt 31 (Ont. C.A.) — considered

Garland v. Consumers' Gas Co. (2004), 2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 2004 SCC 25, 72 O.R. (3d) 80 (note), 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 9 E.T.R. (3d) 163, 42 Alta. L. Rev. 399, 72 O.R. (3d) 80, 2004 CSC 25, 186 O.A.C. 128, [2004] 1 S.C.R. 629 (S.C.C.) — referred to

Investors Compensation Scheme Ltd. v. West Bromwich Building Society (1997), [1998] 1 All E.R. 98, [1998] 1 W.L.R. 896, [1997] UKHL 28 (U.K. H.L.) — considered

J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd. (2008), 41 B.L.R. (4th) 51, 2008 CarswellOnt 1348, 2008 ONCA 183, 234 O.A.C. 59, 67 R.P.R. (4th) 1 (Ont. C.A.) — referred to

Kaupthing Singer & Friedlander Ltd. (In Administration), Re (2010), [2010] EWHC 316 (Eng. & Wales H.C. [T. & C.C.]) — referred to

Key2Law (Surrey) LLP v. De'Antiquis (2011), [2011] EWCA Civ 1567 (Eng. & Wales C.A. (Civil)) — considered

M.C.C. Precision Products Ltd., Re (1972), [1972] 2 O.R. 825, 1972 CarswellOnt 63, 17 C.B.R. (N.S.) 28, 27 D.L.R. (3d) 4 (Ont. S.C.) — considered

Manufacturers Life Insurance Co. v. AFG Industries Ltd. (2008), 2008 CarswellOnt 171, 44 B.L.R. (4th) 277 (Ont. S.C.J.) — considered

Marley v. Rawlings (2014), [2014] 1 All E.R. 807, [2014] Fam. Law 466, [2014] 2 W.L.R. 213, [2014] W.T.L.R. 299, 16 I.T.E.L.R. 642, [2014] UKSC 2 (U.K. S.C.) — considered

Nortel Networks Corp., Re (2010), 2010 CarswellOnt 1597, 2010 ONSC 1304, 65 C.B.R. (5th) 231 (Ont. S.C.J. [Commercial List]) — referred to

People's Department Stores Ltd. (1992) Inc., Re (2004), (sub nom. *Peoples Department Stores Inc. (Bankrupt) v. Wise*) 326 N.R. 267 (Eng.), (sub nom. *Peoples Department Stores Inc. (Bankrupt) v. Wise*) 326 N.R. 267 (Fr.), 4 C.B.R. (5th) 215, [2004] 3 S.C.R. 461, 2004 SCC 68, 2004 CarswellQue 2862, 2004 CarswellQue 2863, (sub nom. *Peoples Department Stores Inc. (Trustee of) v. Wise*) 244 D.L.R. (4th) 564, 49 B.L.R. (3d) 165, 2004 CSC 68 (S.C.C.) — considered

PMSM Investments Ltd. v. Bureau (1995), 25 O.R. (3d) 586, 24 B.L.R. (2d) 295, 1995 CarswellOnt 1394 (Ont. Gen. Div. [Commercial List]) — followed

PNPF Trust Co. Ltd. v. Taylor (2010), [2010] EWHC 1573, [2010] Pens. L.R. 261 (Eng. & Wales H.C. [T. & C.C.]) — considered

Pro-Sys Consultants Ltd. v. Microsoft Corp. (2013), [2014] 1 W.W.R. 421, 50 B.C.L.R. (5th) 219, 45 C.P.C. (7th) 1, 19 B.L.R. (5th) 177, 12 C.C.L.T. (4th) 171, 2013 SCC 57, 2013 CarswellBC 3257, 2013 CarswellBC 3258, 364 D.L.R. (4th) 573, 40 N.R. 201, 345 B.C.A.C. 1, 589 W.A.C. 1, [2013] 3 S.C.R. 477 (S.C.C.) — considered

R. v. Mohan (1994), 18 O.R. (3d) 160 (note), 29 C.R. (4th) 243, 71 O.A.C. 241, 166 N.R. 245, 89 C.C.C. (3d) 402, 114 D.L.R. (4th) 419, [1994] 2 S.C.R. 9, 1994 CarswellOnt 1155, 1994 CarswellOnt 66 (S.C.C.) — followed

Rainy Sky S.A. v. Kookmin Bank (2011), [2011] 1 W.L.R. 2900, [2011] 2 C.L.C. 923, [2011] UKSC 50 (U.K. S.C.) — considered

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo &*

Rizzo Shoes Ltd. (Bankrupt), Re 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour*) 98 C.L.L.C. 210-006, 36 O.R. (3d) 418 (note), 36 O.R. (3d) 418 (S.C.C.) — referred to

Scottish Co-operative Wholesale Society Ltd. v. Meyer (1958), [1959] A.C. 324, [1958] 3 All E.R. 66, [1958] 3 W.L.R. 404, 102 Sol. Jo. 617 (U.K. H.L.) — distinguished

Sefel Geophysical Ltd., Re (1988), 62 Alta. L.R. (2d) 193, 92 A.R. 51, [1989] 1 W.W.R. 251, 54 D.L.R. (4th) 117, 1988 CarswellAlta 303, 70 C.B.R. (N.S.) 97 (Alta. Q.B.) — considered

Singer v. Schering-Plough Canada Inc. (2010), 87 C.P.C. (6th) 276, 2010 ONSC 42, 2010 CarswellOnt 79 (Ont. S.C.J.) — considered

Telelobe Inc., Re (2005), 2005 CarswellOnt 549, 10 C.B.R. (5th) 120 (Ont. S.C.J. [Commercial List]) — considered

United States v. Ivey (1996), 1996 CarswellOnt 3586, 30 O.R. (3d) 370, 27 B.L.R. (2d) 243, 21 C.E.L.R. (N.S.) 92, 139 D.L.R. (4th) 570, 93 O.A.C. 152 (Ont. C.A.) — considered

VGI General Partner Inc. v. Ensis Management Inc. (2010), 2010 ONSC 3766, 2010 CarswellOnt 4754 (Ont. S.C.J.) — referred to

Web Offset Publications Ltd. v. Nagoya Venture Ltd. (1999), 1999 CarswellOnt 636, 89 O.T.C. 139 (Ont. Gen. Div.) — considered

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 123, 1991 CarswellOnt 142, 3 B.L.R. (2d) 113 (Ont. Gen. Div.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 121(1) — considered

s. 121(2) — considered

s. 135(1.1) [en. 1997, c. 12, s. 89(1)] — considered

Bankruptcy Code, 11 U.S.C. 1982
Chapter 11 — referred to

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

s. 248(2) — considered

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

s. 141(2) — considered

s. 238 "complainant" — considered

s. 241 — considered

s. 241(1) — considered

s. 241(2) — considered

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

Generally — referred to

s. 2 "claim" — considered

Insolvency Act, 1986, c. 45

s. 3 — considered

Sched. B1 — referred to

Pensions Act, 1995, c. 26

Generally — referred to

s. 75 — considered

Pensions Act 2004, 2004, c. 35

Generally — referred to

Pt. 2, Chapter 3 — referred to

s. 12 — considered

s. 43(7) — considered

s. 44(3) — considered

s. 45 — considered

s. 45(2)(a) — referred to

s. 45(2)(b) — referred to

s. 45(2)(c) — referred to

s. 45(2)(d) — referred to

s. 47(4) — considered

s. 49(3) — considered

s. 49(5) — considered

s. 49(6) — considered

s. 133 — considered

s. 133(3) — considered

s. 133(4) — considered

s. 133(5) — considered

s. 133(10) — considered

s. 137(2) — considered

s. 150 — considered

s. 150(5) — considered

s. 150(6) — considered

s. 154(1) — considered

s. 161(2) — considered

Taxation (International and Other Provisions) Act 2010, 2010, c. 8

s. 164 — considered

Regulations considered:

Pensions Act 2004, 2004, c. 35

Pension Protection Fund (Entry Rules) Regulations 2005, 2005 No. 590

Generally — referred to

Words and phrases considered:

Pension Preotection Fund

The Board of the PPF [Pension Protection Fund] is a statutory corporation. The 2004 Act [Pensions Act 2004, (UK) c. 35] requires it to hold, manage and apply the PPF. The PPF is funded by levies on pension schemes. If an insolvency event

occurs in relation to an employer of a particular scheme, the Board of the PPF investigates the scheme during an assessment period to determine whether the scheme qualifies for entry into the PPF. If the scheme qualifies, the PPF assumes responsibility for the scheme. What is to be assessed is whether the value of the assets of the scheme is less than the benefits that would be payable by the PPF and whether a scheme rescue is not possible. If the PPF assumes responsibility for the scheme, the scheme's pension assets will be transferred to the PPF.

Regulator

The Regulator [of the Pension Protection Fund] is a UK governmental agency. Its chairman is appointed by the Secretary of State and at least five other members are chosen by the Secretary of State after consulting with the chairman. The Regulator consists of an executive arm and a Determinations Panel, which is

separate from the executive arm and consists of a chairman and no fewer than six members who are not members of the Regulator or its staff. It is the Determinations Panel that may issue an FSD or a Contribution Notice. Its members are not judges.

transfer pricing

Transfer pricing is the act of assigning a monetary value, or price, to movements of resources or economic contributions that occur within a multinational enterprise across different taxing jurisdictions. Against the risk that companies attempt to use transfer pricing to increase operating income (and therefore taxable income) in jurisdictions with low income tax rates and correspondingly to decrease operating income in high-tax jurisdictions, tax authorities around the world have instituted regulations governing intercompany transfer pricing. These regulations centre on the arm's length principle. The arm's length principle necessitates that intercompany transactions be priced in a manner consistent with the way in which similarly situated uncontrolled parties bargaining at arm's length would price the transactions i.e., within an arm's length range

HEARING regarding claims by creditors of business under protection under *Companies' Creditors Arrangement Act*.

Newbould J.:

Nortel history and structure

1 On January 14, 2009, Nortel Networks Corporation ("NNC") was a publicly-traded Canadian company and the direct or indirect parent of more than 130 subsidiaries located in more than 100 countries, collectively known as the "Nortel Group" or "Nortel". NNC was the successor to a long line of technology companies headquartered in Canada dating back to the founding of Bell Telephone Company of Canada in 1883. NNC's principal, direct operating subsidiary, also a Canadian company, was Nortel Networks Limited ("NNL"), which in turn was the direct or indirect parent of operating companies located around the world.¹

2 From the mid-1980s, Nortel expanded substantially through the continued development of ground-breaking technology. The Nortel Group moved from developing and manufacturing traditional landline phone technology and equipment into digital, wireless and photonic technologies. At the same time, the Nortel Group expanded into Europe, Asia, Africa, the Middle East and Latin America.

3 Beginning around 2001, the burst of the dot-com bubble had a severe effect on the global economy and on the telecommunications industry in particular, including Nortel. Market forces led to a decline in Nortel's revenues and market share, and a decline in customer demand for Nortel's products. Subsequently, Nortel was faced with accounting issues which impacted Nortel's credit rating and its cost of financing and required Nortel to restate its financial statements

for the fiscal years 2000 to 2005. The rating downgrades affected Nortel's access to capital markets and cost of financing for some years. The fortunes of Nortel improved for a few years but for various reasons, including the financial meltdown in the fall of 2008, Nortel saw its business decline in the two profitable lines of business that it was operating. That and a lack of customer support caused Nortel to file for bankruptcy protection in January 2009.

4 On January 14, 2009 NNC, NNL and a number of other Canadian corporations filed for protection under the CCAA. On the same date, Nortel Network Inc. ("NNI"), the principal US subsidiary, and a number of other US corporations filed for protection under chapter 11 of the US Bankruptcy Code. On January 15, 2009 Nortel Networks UK Plan Limited ("NNUK") and all of the EMEA² debtors save the French subsidiary Nortel Networks S.A. ("NNSA") entered into administration under the UK insolvency laws and NNSA had a liquidator appointed under French secondary proceedings.

5 The initial intent was to attempt to restructure the business and go forward, but by June 2009 the decision was made to liquidate the business. The lines of business were sold for US \$2.8 billion and the residual intellectual property was sold for US\$4.5 billion, for total proceeds of US \$7.3 billion. A joint trial of this court and the Delaware Bankruptcy Court has been held to determine how the US \$7.3 billion is to be allocated among the Canadian debtors, the US debtors and the EMEA debtors. A decision is pending.

6 Prior to the insolvency, Nortel had four main product groups (also known as a Line of Business), and operated along business lines as a highly integrated multinational enterprise with a matrix structure that transcended geographic boundaries and legal entities organized around the world. Each entity, such as NNUK, was integrated into regional and product line management structures to share information and perform R&D, sales and other common functions across geographic boundaries and across legal entities. The matrix structure was designed to enable Nortel to function more efficiently, drawing on employees from different functional disciplines worldwide, allowing them to work together to develop products and attract and provide service to customers, fulfilling their demands globally.

7 As a result of Nortel's matrix structure, no single Nortel entity, either NNUK or any of the other EMEA debtors in Europe, or NNI or any of the other US debtors in the United States, or NNL or any of the other Canadian debtors in Canada, was able to provide the full line of Nortel products and services, including R&D capabilities, on a stand-alone basis.

8 R&D was the primary driver of Nortel's value and profit. Together with NNL, the principal companies that performed R&D were NNI, (a US company), NNUK, NNSA, (a French company) and Nortel Networks Ireland (an Irish company)³. These were known as Residual Profit Entities ("RPEs") due to their participation from 2001 in a residual profit pool in connection with Nortel's transfer pricing arrangements. Other operating companies performed sales and distribution functions and were known as Limited Risk Distributors or Entities ("LRDs").

9 R&D was performed at labs around the world. The advanced technology primary research which was intended to develop novel, cutting edge intellectual property technologies was performed mostly in NNL laboratories in Ottawa, which also did R&D for various lines of business. From 2000 to 2009 NNL accounted on average for just under half of all R&D expenditures, more in the latter years than the earlier years. NNI accounted for 38 to 42% and EMEA accounted for 16 to 20% in the earlier years and 11.7 % from 2005 to 2009. Between 2001 and 2008, NNUK's share of R&D was 5.5 %. The R&D was shared throughout the Nortel Group as needed by the lines of business and customer needs in the various regions and countries.

10 Because R&D was the primary driver of Nortel's value and profit, the residual profits of Nortel, after payment of fixed rates of return to all Nortel companies for sales and distribution functions, were paid to the RPEs under a Master Research and Development Agreement ("MRDA") in accordance with a residual profit split method ("RPSM") based on each RPE's percentage expenditure on R&D each year of the total R&D yearly expenditure of all RPEs.

11 Under the MRDA, each RPE, including NNUK, was granted an exclusive right to make and sell in its territory Nortel products using or embodying Nortel intellectual property developed by Nortel companies anywhere in the world and a non-exclusive right to do so in territories that were not exclusive to an RPE.

NNUK and the UK pension plan

12 NNUK was a wholly owned direct and indirect subsidiary of NNL. NNL acquired its NNUK business by acquiring the UK business of STC plc initially by a minority investment in 1987 and entirely in 1991. STC, and then NNUK, had a defined benefits or "balance of cost" plan under which employees made specified contributions and the employer was required to fund the balance of the cost of providing the benefits after taking into account the contributions paid by the employees and the investment performance of the plan's assets (the "UK Plan"). As sponsor, NNUK was responsible for funding any deficit in the plan and was entitled to take contribution reductions or holidays when the plan was in surplus. In December, 2002 an actuarial valuation of the UK Plan disclosed a deficit for the first time since 1988.

13 Under UK pension law, a pension plan (or scheme⁴) is managed by a trustee independent from the employer sponsor of the plan. The UK Plan was managed by its independent trustee, Nortel Networks UK Pension Trust Limited (the "Trustee"). The Trustee held the UK Plan's assets in trust to pay the benefits required by the UK Plan. The Trustee had the responsibility for the investment of the plan's assets. NNL did not have the responsibility or authority to dictate the asset mix (the split between bonds and equities, and the make-up of each) or the choice of investment managers.

14 When Nortel acquired STC in 1991, the UK Plan was in surplus and had been since 1988. There had been a contribution holiday in that STC since May 1, 1989 had not been making contributions to the UK Plan. This had been suggested by the Chairman of the Trustee, Mr. Ken Gardner, to STC. It was a common thing to do in the UK. The UK government discouraged the accumulation of surpluses because they could be used as a tax haven by employers and adverse tax consequences would be imposed if a pension plan's surplus grew too large.

15 Under UK pension laws, a triennial valuation of a pension plan's assets is required. The UK Plan actuary considered the contribution holiday at each triennial valuation and on each valuation until 2002, the actuary confirmed to the Trustee that a contribution holiday could be taken.

16 Following the global stock market crash in the early 2000s, NNUK agreed that a valuation of the UK Plan should be completed a year earlier than required (in 2002 instead of 2003) to determine its funding position. NNUK and the Trustee also agreed that yearly updates on the UK Plan's funding position would be done thereafter. Underlying this agreement was the realization the UK Plan might have entered into a deficit despite the fact the 2000 actuarial valuation had disclosed a surplus.

17 The valuation, conducted as at April 5, 2002 and dated December 19, 2002 disclosed a deficit in the plan for the first time since 1988. The deficit of £177 million was calculated on an on-going basis, i.e. assuming the business and the plan continued. Interim reviews of the UK Plan as at April 5, 2003 and as at April 5, 2004 indicated a deficit of £346 million and £315 million, respectively, on an on-going basis.

18 In October 2002, NNUK resumed contributions. From 2002 through 2005, NNUK contributed a total of £184 million, comprised of £33 million in 2002, £59 million in 2003, £46 million in respect of 2004 and £46 million for 2005.

19 From 2002 Nortel and the Trustee discussed funding the deficit in the UK Plan. The Trustee initially wanted to conclude a long-term funding arrangement with NNUK that would provide for the retirement of the deficit over a period of years. While NNUK affirmed its intention to remove the deficit, it could not commit to a long-term funding arrangement at that time in light of the uncertain state of the market, cease trade orders issued by the Ontario and US securities commissions that restricted Nortel's access to capital markets and other issues arising from the various restatements of NNC's consolidated financial statements, including a large class action settlement that was in the

process of being finalized. Concerns about liquidity and affordability of contributions constrained Nortel's approach in eliminating the deficit.

20 Under the *Pensions Act 2004*, (UK) c. 35 ("2004 Act"), if there is a deficit, the trustee and the employer sponsor are required, within a prescribed timeframe, to negotiate and agree to a recovery plan that sets out the steps to restore the plan to full funding and the time period over which it is to be achieved. The 2004 Act contemplates a robust, arm's length negotiation between the employer and the Trustee. This was different from the previous pension legislation in the *Pension Act 1995* (UK) c. 26, under which the employer had unilateral authority to set contribution levels.

21 In February 2005, the Trustee retained PricewaterhouseCoopers LLP to act as its financial advisor in the funding negotiations. The Trustee's legal advisor was Pinsent Masons LLP, a leading UK pensions firm.

22 As negotiations progressed, the Trustees became uncomfortable accepting a long-term proposal because they were worried by uncertainty regarding the nature and scope of their obligations and potential liability under the recently enacted 2004 Act. In the result, NNUK and the Trustee agreed to a 2005 schedule of payments which provided for an immediate contribution by NNUK to the plan of £10 million, annual contributions of £46 million to be made in quarterly installments from 2005 through 2007, and a further 2006 schedule of contributions by NNUK of £85 million from 2006 to 2008.

23 Eventually a Funding Agreement was made between NNUK and the Trustee dated November 21, 2006 that provided for the 2005 deficit to be paid over seven years from 2005 to 2012. As well, NNL signed a Funding Guarantee on the same date guaranteeing the obligations of NNUK under the Funding Agreement. There is a difference between the parties as to whether NNL has any liability under the Funding Guarantee and, if so, what the obligations of NNUK were that were guaranteed by NNL.

Project Swift

24 Project Swift resulted from an interest-free loan of some US \$950 million owing on the books of NNUK by NNL to NNUK which had been built up over several years. Because the loan was interest-free, the UK tax authorities had imputed interest to NNUK each year. NNUK had had previous tax losses and therefore had not had to pay tax on the imputed interest. However by 2007 the tax people in EMEA became concerned that the tax losses were running out and that tax may have to be paid in the future for the imputed income to NNUK. They therefore recommended what was known as Project Swift which resulted in a transfer to NNUK in December 2007 of a number of EMEA subsidiary corporations indirectly owned by NNL in return for a reduction in the loan owing by NNL to NNUK in an amount equal to the value of the subsidiaries transferred to NNUK.

25 Valuations of the subsidiaries were carried out by the parties to ensure that adequate value was provided to NNUK in return for the loan to be reduced. One of the subsidiaries intended to be transferred to NNUK was NNSA, the French Nortel subsidiary. However concerns arose as to the value of NNSA due to a tax audit by the French tax authorities. NNUK wanted that problem to be dealt with and a new valuation undertaken of NNSA before it was transferred to NNUK. In the result, an 8.83% minority interest in NNSA held by NNIF (a Netherlands company) was transferred to NNUK based on an evaluation of that interest, and the balance of the 91.17% of NNSA owned by NNL was not transferred in December, 2007 at the time of the other transfers and the amount of the loan owing by NNL to NNUK that was repaid was reduced by the value that had been ascribed to that interest in NNSA.

26 The issues at NNSA were not resolved by the time of the CCAA filing on January 14, 2009 and the 91.7% interest of NNL was never transferred to NNUK. The UKPC contends that this failure to transfer the remaining interest of NNSA to NNUK is an important consideration in the FSD, oppression and unjust enrichment claims.

27 One of the Trustee's concerns regarding Project Swift was that exchanging NNUK's loan for EMEA Nortel subsidiaries would detrimentally impact the amount of recoveries that would accrue to the UK Plan in the event NNUK

failed. As a result, the Trustee sought a guarantee from NNL to cover the value gap to the UK Plan if NNUK failed after Project Swift was implemented.

28 A USD\$150 million guarantee dated December 21, 2007 (the "Swift Guarantee") was signed by NNL. There is a difference between the parties as to whether NNL has any liability under the Swift Guarantee. The UKPC say further that issues regarding the Swift Guarantee are to be taken into account in the oppression and unjust enrichment claims.

Claims made by UKPC

29 The Trustee of the UK Plan and The Board of the Pension Protection Fund established under the 2004 Act (together the UK pension claimants or "UKPC") assert a number of claims in these CCAA proceedings against NNC and NNL.

30 They claim (i) under the 2004 Act for what it says NNC and NNL would have been required to pay under the FSD regime set up under the 2004 Act, (ii) under the 2006 Funding Guarantee by NNL, (iii) under the Swift Guarantee, (iv) for oppression, and (v) for unjust enrichment. NNC and NNL contend that there is no basis for any of these claims to succeed.

31 In this case the Monitor is acting under what is now referred to as a "super monitor" order of October 3, 2012 in which the Monitor was authorized to exercise any powers which may be exercised by a board of directors of any of the applicants, which includes NNC and NNL. This order occurred after NNC and NNL were left without any board of directors or management and it was necessary for the Monitor to be appointed to advance the interests of NNL and NNC in this CCAA proceeding. While I will refer to the Monitor, I do so in recognition that the Monitor is advancing the position of the Canadian debtors in this litigation.

Financial Support Direction ("FSD") claim

32 Prior to the 2004 Act, the *Pension Act 1995* (UK) imposed a minimum funding requirement i.e. that the assets of the scheme should not be less than the amount of its liabilities. After it came into effect in 1997, there was dissatisfaction with the statutory regime governing occupational pension schemes and in particular with the minimum funding requirement, which came to be recognized as inadequate to ensure pension schemes were sufficiently funded to meet their liabilities.

33 The 2004 Act came into existence as part of the UK government's efforts to ensure improved protection of pension scheme benefits, particularly those of members of defined benefit schemes. It introduced a new funding standard for occupational pension schemes. It also established The Board of the Pension Protection Fund ("PPF") and the Regulator. It also created the FSD regime.

34 The Board of the PPF is a statutory corporation. The 2004 Act requires it to hold, manage and apply the PPF. The PPF is funded by levies on pension schemes. If an insolvency event occurs in relation to an employer of a particular scheme, the Board of the PPF investigates the scheme during an assessment period to determine whether the scheme qualifies for entry into the PPF. If the scheme qualifies, the PPF assumes responsibility for the scheme. What is to be assessed is whether the value of the assets of the scheme is less than the benefits that would be payable by the PPF and whether a scheme rescue is not possible. If the PPF assumes responsibility for the scheme, the scheme's pension assets will be transferred to the PPF.

35 In the case of NNUK, an insolvency event occurred by reason of it entering into administration in 2009. The Board of the PPF has not yet determined whether it will assume responsibility for the NNUK pension scheme and thus the assessment period has not yet expired.

36 With the establishment of the PPF, there was a concern that employers might organize their affairs in a way that might end up requiring the PPF to fund the pension liabilities of the employer or that the trustees of pension plan might choose to invest in a higher risk portfolio than appropriate, with the same result. The FSD regime was seen as a way to prevent this "moral hazard" by enabling the Regulator to issue FSDs and Contribution Notices to target companies

associated with the employer. This was described by Lord Neuberger in *Bloom v. Pensions Regulator* (2013), [2014] A.C. 209 (U.K. S.C.) as follows:

It was perceived that the creation of the PPF might encourage some employers to arrange their affairs so as to throw the burden of pension scheme deficiencies upon the PPF, which would unfairly burden other schemes by increasing the amount of the levies. An example of such an arrangement is where a group of companies uses a single company (a "service company") to employ people who then work for other group companies. In such a case, the employees' pension rights could be regarded as unfairly prejudiced if, by comparison with the resources of other group companies, the service company had very limited resources to meet a section 75 debt.

The FSD regime was designed to mitigate such problems. In a nutshell, it enables the Regulator in specified circumstances (i) to impose, by the issue of an FSD to some or all of the other group companies (known as "targets"), an obligation to provide reasonable financial support to the under-funded scheme of the service company or insufficiently resourced employer, and (ii) to deal with non-compliance with that obligation by imposing, through a Contribution Notice, a specific monetary liability payable by a target to the trustees.

37 The Regulator is a UK governmental agency. Its chairman is appointed by the Secretary of State and at least five other members are chosen by the Secretary of State after consulting with the chairman. The Regulator consists of an executive arm and a Determinations Panel, which is separate from the executive arm and consists of a chairman and no fewer than six members who are not members of the Regulator or its staff. It is the Determinations Panel that may issue an FSD or a Contribution Notice. Its members are not judges.

38 If the Determinations Panel issues an FSD or a Contribution Notice, there is an appeal by way of rehearing as of right to the Tax and Chancery Chamber of the Upper Tribunal (the "Upper Tribunal"), a court of record created by Parliament. Decisions in the Tribunal are taken by legally qualified judges or members appointed by the Lord Chancellor. All members are required to take the judicial oath, are independent, and are specialists in the area of law that they cover.

39 The hearing before the Upper Tribunal is a new hearing and it approaches the issue before it afresh rather than by way of reviewing the decision of the Regulator or the Determinations Panel. The UKPC in their brief describe the hearing as being on a *de novo* basis. The Upper Tribunal may consider any evidence relating to the matter whether or not it was available to the Determinations Panel at the material time. It may be slow to disregard findings of fact by the Determinations Panel but it may do so in an appropriate case. It has a fresh discretion to exercise. An appeal lies from the Upper Tribunal to the UK Court of Appeal and then ultimately to the UK Supreme Court.

40 In this case, the Trustee and the Board of the PPF claim on the basis that the Regulator would have issued an FSD and ultimately a Contribution Notice to NNC and NNL requiring them to provide financial support to the UK Plan.

41 There are four requirements for the Determinations Panel (or Upper Tribunal on an appeal) to order an FSD or a later Contribution Notice. (i) The scheme must be an occupational pension scheme. (ii) The target companies (NNC and NNL) must be associated with the employer (NNUK). These two requirements are not contested. (iii) A test known as the "insufficiently resourced test" (IR test) must be passed. (iv) The Determinations Panel (or Upper Tribunal) must determine that it would be reasonable to issue an FSD or later a Contribution Notice. These last two requirements are contested.

42 Before an FSD or Contribution Notice can be issued to a target company, the Regulator must in each case first send a warning notice to the target. In this case, on September 4, 2009, the Regulator wrote to NNC advising that it was considering issuing a warning notice seeking an FSD against NNC and other members in the Nortel Group. On September 16, 2009 NNC advised the Regulator in writing of the stay of proceedings provided for in the Initial Order under the CCAA. In spite of that, on January 11, 2010, the Regulator issued a warning notice to NNC, NNL and 27 other companies in the Nortel Group.

43 On March 18, 2010, Justice Morawetz held that the proceedings started by the Regulator against NNC and NNL were in breach of the stay contained in the Initial Order and he declared that for the purposes of these proceedings all acts taken by the Regulator in the purported exercise of rights and in commencing any proceedings against any of the applicants without leave of the court were null and void and should be given no force or effect or otherwise recognized as creating or forming the basis of any valid or enforceable rights, remedies or claims against the applicants or any of their assets, property or undertaking in Canada. His order was upheld by the Court of Appeal on June 22, 2010, which agreed that the warning notice was a nullity.

44 It is only the Regulator that has the right to begin a claim in the FSD process provided for in the 2004 Act, although the Trustee and the PPF have a right to participate in the proceedings once commenced by the Regulator. The Regulator has not sought leave in the CCAA process to pursue an FSD claim in the UK under the 2004 Act, nor has it filed a proof of claim in the CCAA process. It is the Trustee and the Board of the PPF who have filed a proof of claim against NNC and NNL in this CCAA proceeding, asserting a contingent claim based on what they contend would have been achieved in the UK from the Determinations Panel or on review from the Upper Tribunal.

45 In spite of the order of Morawetz J., the Regulator proceeded in the UK before the Determinations Panel on an uncontested or default proceeding basis that was heard on June 2, 2010 and on June 25, 2010 the Determinations Panel issued a determination to issue FSDs to NNC and NNL. The FSDs were subsequently issued to NNC and NNL on April 1, 2011. The Regulator did not later send a warning notice to NNC or NNL that it would be seeking a Contribution Notice, a prerequisite for requesting the Determinations Panel to issue a Contribution Notice. No Contribution Notice was ever issued to NNC or NNL.

46 A number of defences to the FSD claim have been asserted. I now turn to them.

(a) Is the FSD claim an exercise of sovereign authority and one which will not be enforced by this Court?

47 The Monitor asserts that it has long been recognized that Canadian courts should not enforce claims emanating from the sovereign authority of a foreign state. The rule against enforcing foreign judgments grounded in penal, revenue or other public law is but one example of this general principle.

48 The Monitor refers to *United States v. Ivey* (1996), 30 O.R. (3d) 370 (Ont. C.A.) and other cases and emphasizes the factual difference between *Ivey* and this case. I have considerable difficulty with the argument of the Monitor in several respects, and considerable difficulty with some of the extreme assertions of the UKPC in their reply brief. In the end, I do not need to deal with this contention.

49 The Monitor in argument contended that an FSD claim is a long arm statute authorizing the UK to claim in other countries in global insolvencies, and if such a claim were recognized, every country involved in international insolvencies would have no choice but to do the same thing by creating a similar regime. I understand the argument but it would seem to me to be a policy issue for Parliament to deal with rather than the courts.

(b) Are these proceedings intended to impermissibly reorder and interfere with the rights of the creditors of NNL and NNC?

50 The Monitor contends that the FSD claim asserted in this proceeding is intended to interfere with the *pari passu* principle that creditors be treated equally. The Monitor also contends that the FSD claim is an attempt to reorder the rights of the creditors of NNC and NNL simply because of the insolvency of NNC and NNL and that under Canadian insolvency law no one is permitted to cause a reordering the rights of creditors. I do not accept these contentions of the Monitor.

51 The Monitor relies on a statement of Justice Farley in *Teleglobe Inc., Re* (2005), 10 C.B.R. (5th) 120 (Ont. S.C.J. [Commercial List]) that a claim under an order by the Superintendent of Corporations in Columbia that Teleglobe

Canada should repay to its Columbian subsidiary money obtained by it from its subsidiary in Columbia should not leapfrog over the claims of the creditors of Teleglobe Canada which was in CCAA protection.

52 I do not see the *Teleglobe* case as being of any application. It did not concern recognizing a claim but was an application for payment. In that case, the claim of the Columbian subsidiary was a claim in the Canadian CCAA proceedings and an application had been made to Farley J. to order the payment to be then made to the Columbian subsidiary which was also in insolvency protection in Columbia. The claim filed by the Columbian subsidiary was an unsecured claim and if it had then been paid it would indeed have leapfrogged in front of the other creditors of Teleglobe Canada. Farley J. stated:

8. ... it does not seem to me that it would be appropriate to stretch the doctrine of comity or the principles of *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.) or *Beals v. Saldanha*, 2003 SCC 72 (S.C.C.) in such a way that the claim of TCol is leapfrogged over the queue of the other unsecured creditors of TCan. What has to be appreciated is that TCan is also in insolvency and given the protection of the CCAA order for the benefit of its estate. This is not a situation where there is only a foreign insolvency — namely TCol — which would be a completely different situation — but there is also a Canadian insolvency — namely TCan. The Canadian insolvency court must protect the rights of all creditors, foreign or domestic; however, it would be contrary to the doctrine of equal treatment of creditors to prefer — or advance — the interest of foreign creditors over the interests of domestic creditors.

53 If the claim of UKPC is a proper claim in the CCAA proceeding, I do not see how it would be any different from any other foreign creditor with a claim. There would be nothing impermissible about it as somehow ignoring the *pari passu* principle of equal distributions to creditors. Moreover, the claim would not be caused by the insolvency of NNC or NNL but rather by the establishing of grounds under the 2004 Act for the issuance of an FSD and then a Contribution Notice.

(c) Does the UKPC lack status to bring the FSD claim?

54 The Monitor asserts that only the Regulator has the power to initiate an FSD proceeding and that neither the Trustee nor the Board of the PPF have any power to direct the Regulator to commence an FSD proceeding. If the Trustee and PPF have no status to commence FSD proceedings in the UK, it is said that they can have no status to be the claimants in this proceeding. It was open to the Regulator to seek leave of this Court to recommence FSD proceedings against NNL and NNC or to simply file a proof of claim in this claims process. The Regulator has exercised its discretion not to do either.

55 The UKPC assert that the decision of Morawetz J. in declaring the warning notice a nullity and the decision of the Court of Appeal in upholding that order made clear that the UKPC has standing. I do not agree. Neither Morawetz J. nor the Court of Appeal purported to rule on such matters. Morawetz J. said the claim of the Trustee has to be considered a contingent claim. He did not at all discuss whether the Trustee had standing to make the claim or otherwise deal with the merits of the claim. The Court of Appeal stated that the order of Morawetz J:

...should not operate so as to preclude the UK Trustee and/or the Pension Protection Fund from seeking to assert, by way of amendment to the Proof of Claim, if necessary, a claim in the Companies' Creditors Arrangement Act process for pension contribution shortfalls, including for the relief they would have been able to establish in the UK Financial Support Direction process.

56 By saying that the UKPC can seek to assert a claim can in no way can be taken as a judgement by the Court of Appeal on the status or right of the UKPC to make such a claim. In the vernacular, the Court of Appeal was saying no more than "you can give it your best shot". I would note that the Court of Appeal seems to have been under the misapprehension that the Trustee and the PPF were the parties to establish a case before the Determinations Panel rather than the executive arm of the Regulator that has the exclusive right to commence an FSD claim, which makes it clear

that they were not giving any considered thought to the status of the Trustee or PPF to make a claim in this CCAA proceeding.

57 However, the 2004 Act provides in section 49(3) that any amount specified in a Contribution Notice is to be treated as a debt due from the target to the trustee of the pension scheme. It also provides in section 49(5) that during the assessment period the rights of a trustee with respect to money owing to them by virtue of a Contribution Notice are exercisable by the Board of the PPF and in section 49(6) that any money received by the Board of the PPF during the assessment period is to be paid to the trustee of the scheme. It seems clear therefore that it would be the Trustee of the NNUK pension scheme that would have the economic interest in any FSD proceeding rather than the executive arm of the Regulator who would be responsible for pursuing the claim before the Determinations Panel and the Upper Tribunal.

58 If the executive arm of the Regulator were to file a proof of claim in this proceeding, it would be seeking to establish a claim that would, if successful, result in a claim payable to the Trustee. The Regulator could not itself claim to be a creditor, contingent or otherwise, of NNC or NNL. So far as standing is concerned, the Regulator would be in no better position than the Trustee in making the claim. In light of the Trustee being the party with the economic interest in the claim in this proceeding, I conclude that the UKPC has standing to file the claim.

59 This is not to say, however, that there may not have been some benefit in the executive arm of the Regulator being the claimant in this proceeding. Issues in the FSD claim include whether the Regulator would proceed to assert a contested FSD claim against NNC or NNL before the Determinations Panel, whether if an FSD were issued by the Determinations Panel the Regulator would accept a settlement and in what amount, and whether the Regulator would request the Determinations Panel to issue a Contribution Notice against NNC or NNL and in what amount. These would be discretionary matters for the Regulator to consider, and its presence in this proceeding may have shed some light on what its thinking would have been.

(d) What is the contingency to be measured and is it a provable claim?

60 Under the 2004 Act, the Regulator must choose a date on which the insufficiently resourced test is applied. In this case, the Regulator chose June 30, 2008. The 2004 Act at the time stipulated that the relevant time for the insufficiently resourced valuation date had to fall within two years prior to the Determinations Panel's decision to issue the FSD. Thus the Determinations Panel had until June 30, 2010 to decide whether to issue an FSD to NNC or NNL. It did so on June 25, 2010.

61 However, Morawetz J. in his order of March 18, 2010 [2010 CarswellOnt 1597 (Ont. S.C.J. [Commercial List])] declared that the Warning Notice issued to NNC and NNL by the Regulator on July 11, 2010 was null and void as being contrary to the stay in the Initial Order and that all acts taken by the Regulator without leave of the court should be given no force or effect or otherwise recognized as creating or forming the basis of any valid claim. The 2004 Act now stipulates that the relevant time for the IR valuation date must fall within two years prior to the issuance of a Warning Notice. No new Warning Notice has been issued by the Regulator and, if one were, the date on which the IR test would have to be performed would have to be within two years of the issuance of the Warning Notice, long after the June 30, 2008 date that had been chosen by the Regulator to perform the IR test.

62 The Monitor contends that even if the UKPC has status to make this FSD claim, there must still be a valid FSD proceeding underpinning the claim being advanced by the UKPC. As no valid Warning Notice has been issued by the Regulator, there is no preceding two year period yet during which the IR test must be satisfied. Therefore it is contended that without knowing the date on which the IR test is to be satisfied, there is no valid FSD claim that can be asserted by the UKPC.

63 UKPC contend that the Monitor's position contains a misunderstanding of the nature of the contingent claim being made. As a contingent claim, what has to be determined is what the chances were, as of the date of NNC and NNL's CCAA filing on January 14, 2009, that an FSD and Contribution Notice would have been issued by the Determinations

Panel or the Upper Tribunal. This determination is not dependent on an actual Warning Notice having been issued, or a relevant Time (i.e. an IR valuation date) having been selected by the Regulator, by January 14, 2009 or any other date. This is because, as at the date NNC and NNL filed for CCAA protection, they were also contingently exposed to a liability based on NNUK being insufficiently resourced at dates including but not limited to June 30, 2008.

64 I accept this position of the UKPC. It is then necessary to first consider what standard should be applied to assess the contingency and then consider what the steps are in an FSD claim leading to a Contribution Notice being issued and whether they can be measured in a way that meets the standard to be applied.

(i) *Standard to be applied*

65 Pursuant to section 2 of the CCAA, a Claim is defined as:

... any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*.

66 Section 2 of the BIA defines a "Claim" as:

... any claim or liability provable in proceedings under this Act by a creditor.

67 Section 121 of the BIA defines a claim as:

Claims Provable

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Contingent and unliquidated claims

121. (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

Determination of provable claims

135. (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

68 *AbitibiBowater Inc., Re*, [2012] 3 S.C.R. 443 (S.C.C.) recently dealt with the subject of contingent claims in an insolvency. In that case Justice Deschamps for the majority of the Court stated:

26 These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation.

69 Deschamps J. also reiterated the test for a contingent claim to be that it must not be too remote or speculative. She stated:

34 Unlike in proceedings governed by the common law or the civil law, a claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred (for the common law, see *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79, at paras. 17-18; for the civil law, see arts. 1497, 1508 and 1513 of the Civil Code of Québec, S.Q. 1991, c. 64). Thus, the broad definition of "claim" in the BIA includes contingent and future

claims that would be unenforceable at common law or in the civil law. As for unliquidated claims, a CCAA court has the same power to assess their amounts as would a court hearing a case in a common law or civil law context.

36 The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative: *Confederation Treasury Services Ltd. (Bankrupt)*, Re (1997), 96 O.A.C. 75. In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process. (Underlining added).

70 Exactly what makes a claim too remote or speculative, or what is a sufficient certainty, is not easily discerned. *Confederation Treasury Services Ltd., Re* [1997 CarswellOnt 31 (Ont. C.A.)] referred to by Deschamps J. held that a test for a valid contingent claim requiring a need for probability of liability, i.e. establishing on a balance of probabilities, arising from the court proceedings in question imposed too high a threshold. How much below that one goes to determine whether a claim is too remote or speculative must depend on the facts of the case.

(ii) Application of the "too remote or speculative" standard

71 The Monitor contends that whether a Contribution Notice would ultimately be issued in this case and in what amount is too remote and speculative. UKPC say it is not. I have come to the conclusion that the Monitor is correct. Even assuming that the IR test were met, it would be speculative in the extreme to conclude that a Contribution Notice could or would be issued. In many respects, to put a percentage chance on what the executive arm of the Regulator, the Determinations Panel or the Upper Tribunal would do in regards to decisions to be taken would be uninformed guess work. My reasons for coming to this conclusion that the FSD claim is too remote or speculative to be admitted as a claim follow.

72 There are several steps in an FSD claim proceeding leading to a binding Contribution Notice. They include (i) whether the Regulator would seek leave of this Court to issue a Warning Notice that it is considering asking the Determinations Panel to issue an FSD, and whether the Court would grant leave permitting the Regulator to proceed to a hearing of the Determinations Panel; (ii) what date the Regulator would choose to determine the IR test; (iii) whether the Determinations Panel would find that the IR test has been met such that it would be open to the Determinations Panel to issue an FSD; (iv) whether the Determinations Panel would determine that it was reasonable to issue an FSD; (v) whether if the Determinations Panel decided that it was reasonable to issue an FSD what the Upper Tribunal on an appeal would decide with respect to steps (iii) and (iv); (vi) if the Upper Tribunal upheld the decision of the Determinations Panel to issue an FSD, whether the target would be able to come to some settlement with the Regulator on the level of financial support to be provided to the underfunded pension plan; (vii) assuming no agreement, whether the Regulator would issue a Warning Notice that it was considering asking the Determinations Panel to issue a Contribution Notice and what amount the Regulator would seek from the Determinations Panel; (viii) whether the Determinations Panel would determine that it was reasonable to issue a Contribution Notice; (ix) what amount the Determinations Panel would determine should be required in the Contribution Notice to be paid; (x) whether the Upper Tribunal would uphold a decision of the Determinations Panel to issue a Contribution Notice and, if so, in what amount.

73 With respect to the date that the Regulator would likely choose to undertake the IR test, the UKPC say that evidence of the date the Regulator actually chose (June 30, 2008) is compelling evidence of the date the Regulator would have likely chosen in a hypothetical regulatory action against NNC and>NNL. The Monitor concedes that if the UKPC have standing to assert a claim and if the claim can be asserted in the absence of an actual Warning Notice, it would be reasonable to assume that the Regulator would have selected June 30, 2008 as the date for the IR test, being the only date for which valuation evidence is available.

74 The Monitor says that the threshold question of whether the IR test has been met is not a contingency issue as it involves applying the IR test on a retrospective basis as of June 30, 2008 and does not depend on future events unfolding

and thus is a question to be determined in this Court on a balance of probabilities. The UKPC have not contended otherwise. For the purposes of considering whether an FSD or Contribution Notice is too remote or speculative, I will assume that the date for the IR test is June 30, 2008 and that the IR has been met.

75 The Regulator did not seek leave from this court to issue a Warning Notice after the Warning Notice that it did deliver to NNC and NNL was declared by Morawetz J. to be null and void. It just proceeded without regard to that order. It is unknown so far as any evidence in this case is concerned whether it would seek leave to issue a new Warning Notice. So far as to whether leave would be granted, I note that Mr. Legge Q.C., the expert witness for the Monitor on UK law said in his report that he has been asked to assume that such leave would be given. I will make the same assumption.

76 The next contingency would be whether the Regulator would issue a Warning Notice and then seek to have the Determinations Panel issue an FSD. In light of the Regulator having taken those steps, it would not be too remote or speculative to think that the Regulator would proceed that way if it sought and obtained leave to do so in what Mr. Barrack referred to as this hypothetical exercise of considering the contingency.

77 Whether, assuming that the IR test has been met, the Determinations Panel would conclude that it was reasonable to issue an FSD, or whether the Upper Tribunal would do so on a rehearing, are certainly contingencies that must be assessed.

78 Whether the Determinations Panel (or on review the Upper Tribunal) would issue an FSD would depend on whether it was reasonable to do so. The 2004 Act provides in section 43(7) that the Determinations Panel must have regard to such matters as it considers relevant, including a number of particular matters, as follows:

43(7) The Regulator⁵, when deciding for the purposes of subsection (5)(b) whether it is reasonable to impose the requirement of a financial support direction on a particular person, must have regard to such matters as the Regulator considers relevant including, where relevant, the following matters-

- (a) the relationship which the person has or has had with the employer (including, where the employer is a company within the meaning of subsection (11) of section 435 of the Insolvency Act 1986 (c. 45), whether the person has or has had control of the employer within the meaning of subsection (10) of that section),
- (b) in the case of a person falling within subsection (6)(b) or (c), the value of any benefits received directly or indirectly by that person from the employer,
- (c) any connection or involvement which the person has or has had with the scheme,
- (d) the financial circumstances of the person, and
- (e) such other matters as may be prescribed.

79 It is agreed by the experts on both sides that this list is not exhaustive. The section states that the Determinations Panel must have regard to such matters as it considers relevant. Mr. Ham Q.C., the expert witness on UK law for the UKPC, said, and in this Mr. Legge concurred, that the issue of reasonableness is to be determined "in the round". That is an attractive phrase but gives little guidance to a foreign judge in considering what matters the Determinations Panel would consider relevant.

80 There have been only four cases before the Determinations Panel dealing with an FSD⁶ and none by the Upper Tribunal. Mr. Ham testified that the Determinations Panel is not particularly expert. There has been no judicial guidance at all from the Upper Tribunal or higher appellate authority on the issue of reasonableness under section 43(7).

81 Mr. Ham in his report asserted that there was a "significant body of case law" on what would be considered to be reasonable. However on cross-examination he acknowledged that there is going to be very little guidance to be taken

from the reasonableness determinations in the few existing FSD cases because these cases are highly fact-specific and independent. I accept the opinion of Mr. Legge that very little reliance can be placed on the decisions thus far reached by the Determinations Panel. Mr. Legge also pointed out that apart from the uncontested Nortel decision, the other cases involved service companies that had few if any assets and the reasonableness factors would be applied differently to them. Commonly such groups have assets in another jurisdiction as a way of avoiding tax in the UK

82 One of the factors listed in section 43(7) is "the value of any benefits received directly or indirectly" by the target (in this case NNC or>NNL) from the employer (NNUK). The UKPC contends that there have been benefits received by>NNL from>NNUK such as an interest free loan, a contribution holiday to the UK pension plan when it was in surplus and from alleged defects in the transfer pricing agreement made by>NNUK with other companies in the Nortel Group. The Monitor contests all of these assertions of the UKPC but goes on to assert that there were other offsetting benefits that have to be taken into account such as (i) a £700 million infusion of cash into>NNUK in January 2001 by>NNL paid for by>NNL; (ii) extremely valuable research and development done and paid for by>NNL that was to the benefit of>NNUK and (iii) very high rates of return paid to>NNUK for its distribution functions. The Monitor contends that as a whole there were no net benefits flowing from>NNUK to>NNC or>NNL.

83 This issue of offsetting benefits is no small matter considering the integrated way in which Nortel operated. Significant benefits flowed to>NNUK from the intercompany arrangements of the Nortel Group, which would not have been available to>NNUK as a stand-alone entity. These included access to R&D and technology on an exclusive basis in its territory on a royalty-free basis without incurring substantial up-front costs, rights to sell Nortel technology developed anywhere in the world, diversified territories and customers from which>NNUK could derive revenue, opportunities to derive revenues from intercompany sales, tax efficiencies, and access to liquidity through financing, recapitalization, and treasury services by>NNL.>NNUK could not have operated as a stand-alone entity.>NNUK's fortunes were tied to>NNL's continued existence.

84>NNUK was a regular recipient of intercompany financing. For example, between approximately 2000 and 2003,>NNUK was a net borrower of over \$1 billion from>NN Ireland, Nortel Matra Cellular (predecessor to>NNSA),>NN Australia,>NN Singapore,>NN Europe Sales, H.O.C. (a Hungarian financing subsidiary) and>NNI. The loans from>NN Ireland and>NN Singapore, a relatively small amount of this total, were interest-free. I was pointed to no evidence that>NNUK made any cash outlay for any interest on these loans, and in light of the way in which Nortel operated its cash management system, I would not assume that it did.

85 The £700 million infusion of cash into>NNUK in January 2001 by>NNL at no cost to>NNUK this was by way of a capital infusion. Dr. Reichert, a transfer pricing expert called by the Monitor points out that external financing was primarily obtained through debt issuances by Nortel entities in Canada and the United States, and these entities bore the interest costs of this financing. An examination of Nortel's financial data for 2001-2008 indicates that>NNL bore 82% of the external financing costs, and>NNI bore 10% of the costs. However, other Nortel entities including>NNUK benefited from the debt financing as it was a source of capital for the entire Nortel Group. Although it had access to cash from>NNL when cash was needed,>NNUK never paid a dividend back to>NNL. Dr. Reichert concluded that>NNL effectively relieved>NNUK of the burden of interest bearing financing despite>NNL having significant interest costs on its external debt capital.

86 The evidence disclosed that the rate of return to>NNUK on its sales and distribution function was 23.6% in the 2001-2005 period, and a 15% markup on excess SG&A expenses from 2006 onwards. Dr. Reichert testified that these returns were far higher than market. He said that in his entire career as a transfer pricing economist, he had never seen a routine return to distribution anywhere close to those figures. Dr. Felgran, the transfer pricing expert called by the UKPC, did not testify on this issue at trial but in his deposition testified that in his 20 years of experience, he would expect to see routine returns to distribution somewhere in the range of 1-5%, and confirmed that he has never seen routine returns in excess of 20%. Dr. Reichert estimated that>NNUK had been overcompensated in relation the market pricing

by some US\$231 million just for the period 2001 to 2005. This is much greater than the interest not paid on the loan from NNUK to NNL estimated to be US\$135⁷ million that the UKPC says should be considered a benefit to NNL.

87 The UKPC says that there is no room for this argument of the Monitor of offsetting transfers of benefits to NNUK as offsetting benefits are not listed as a factor in section 47(3). It contends that it is "emphatically not" a requirement that the Regulator can demonstrate that a net benefit flowed from a UK employer to a target. It points to statements of the Determinations Panel in three cases. I do not read them as dealing generally with offsetting benefits but rather dealing with UK employer service companies and services provided by them to a target and what was paid for the service by the target.

88 Be that as it may, if one could establish that offsetting benefits were provided to NNUK by NNL, one might ask why that could not be argued by NNL as a factor that the Determinations Panel or Upper Tribunal could take into account in considering whether it was reasonable to issue an FSD or Contribution Notice. Mr. Ham said on his cross-examination that it would be incumbent on the Regulator to consider the benefits coming back to the employer, but whether he is right or wrong on this is unknown. There is no guidance on this from the few cases dealt with by the Determinations Panel and absolutely no guidance from any judicial authority in the UK on the point, either from the Upper Tribunal or higher appellate authority.

89 Should these factors raised by the Monitor be considered and weighed in the balance in determining whether an FSD or Contribution Notice would be reasonable? In my view, and contrary to the assertion of the UKPC, these factors should be considered and they should add considerable weight to the side of the scales that militates against an FSD or Contribution Notice being reasonable. But that is not the issue. The issue is whether I am in a position to make a determination that the Determinations Panel or Upper Tribunal would think these issues should be considered and weighed in the balance and what effect the factors would have on their decision. I am not in a position to make such a determination other than to speculate.

90 As stated, the UKPC contend that the transfer pricing regime established in the Nortel Group was faulty and that the faults caused benefits to be provided by NNUK to NNL. There was much competing expert evidence led on this issue before me. It is not an easy subject. Mr. Ham, the UK expert on English law, stated with reference to the procedures under the 2004 Act that the Determinations Panel strives to be quick and that the duration of hearings is nearly always measured in days rather than weeks. The contested hearing on the Lehman case took two days. The uncontested Nortel case took one day. One may ask whether it was intended that complicated issues of transfer pricing involving competing experts were intended to be dealt with by a Determinations Panel with no expertise at all in either transfer pricing or the law of transfer pricing. Again, there is no judicial guidance at all on such an issue, either in the Upper Tribunal or higher appellate authority.⁸

91 Assuming that an FSD were issued by a Determinations Panel or the Upper Tribunal, a key contingency would be whether the executive arm of the Regulator would ask the Determinations Panel to issue a Contribution Notice to NNC or NNL and in what amount. If it decided to seek a Contribution Notice, the Regulator would first have to provide a warning notice to NNC and NNL. It is no easy matter to conclude that that the Regulator would take these steps.

92 What the regulator would decide would likely involve matters of policy taken by the executive arm of Regulator, which is a UK governmental agency. That could well involve value judgments, particularly in a situation as this in which to a great extent the Regulator would be seeking payment effectively from Canadian employees of Nortel who have extremely large claims for deficiencies of \$3 billion. While it is not known how much of any recovery from Canada would actually go to the PPF rather than former employees of NNUK, it could be a considerable portion.

93 What is known is that in spite of the order of Morawetz J. of March 18, 2010 declaring the warning notice sent by the Regulator to NNC and NNL to be contrary to the stay in the Initial Order and declaring that all steps taken by the Regulator without leave were null and void and of no force and effect, the Regulator proceeded to a hearing of the Determinations Panel on June 2, 2010 and on June 25, 2011 the Determinations Panel issued a notice that it intended to

issued FSDs to NNC and NNL. These were sent by the Regulator to NNC and NNL on April 1, 2011. They directed NNC and NNL to secure financial support within the meaning of section 45 of the 2004 Act within six months.

94 Although neither NNC nor NNL took steps to comply with the FSDs, the Regulator took no steps to send a warning notice to NNC or NNL that it was considering asking the Determinations Panel to issue a Contribution Notice to either NNC or NNL, a prerequisite of pursuing a Contribution Notice against them.

95 The UKPC say that the Regulator did not proceed to seek the issuance of a Contribution Notice because of the stay of proceedings in the CCAA proceedings and the fact that any Contribution Notice would not be enforceable. I cannot accept this submission. First, the Regulator could have sought leave in the CCAA process to pursue a claim in the UK for an FSD and a Contribution Notice but it did not do so⁹. Second, there is no evidence at all as to why the Regulator took no steps to seek a Contribution Notice. There is nothing more than the assertion by the UKPC. Third, the argument runs counter to what the Regulator did regarding seeking FSDs against NNC and NNL. It proceeded to do so in the face of the earlier declaration of Morawetz J. that any such steps were a nullity and incapable of being enforced, and it later issued the FSDs and sent them to NNC and NNL.

96 Thus it would be speculative indeed to attempt to put odds on the chances that the Regulator would want to proceed to seek a Contribution Notice from either NNC or NNL.

97 The issue becomes cloudier when one considers whether it would be reasonable for the Determinations Panel to issue a Contribution Notice setting an amount to be paid by the target. The factors to be considered are set out in section 47(4) and are the same as the factors in section 43(7) plus the addition of a factor "whether the person [the target] has taken reasonable steps to secure compliance with the financial support direction". This would bring into play whether NNC or NNL had any capacity to secure compliance with the financial support direction.

98 An FSD when issued does not state what steps are to be taken by the target to comply with it other than that the target is to provide financial support to the employer's pension scheme. Section 45 of the 2004 Act sets out the meaning of financial support. It is quite difficult to discern what a company under CCAA protection in Canada could do. Section 45 provides:

45. Meaning of "financial support"

(1) For the purposes of section 43 (financial support directions), "financial support" for a scheme means one or more of the arrangements falling within subsection (2) the details of which are approved in a notice issued by the Regulator.

(2) The arrangements falling within this subsection are-

(a) an arrangement whereby, at any time when the employer is a member of a group of companies, all the members of the group are jointly and severally liable for the whole or part of the employer's pension liabilities in relation to the scheme;

(b) an arrangement whereby, at any time when the employer is a member of a group of companies, a company (within the meaning given in section 736 of the Companies Act 1985 (c. 6)) which meets prescribed requirements and is the holding company of the group is liable for the whole or part of the employer's pension liabilities in relation to the scheme;

(c) an arrangement which meets prescribed requirements and whereby additional financial resources are provided to the scheme;

(d) such other arrangements as may be prescribed.

99 Subsection 2 (a) could not apply as all companies in the Nortel Group are not jointly and severally liable for NNUK's pension liabilities and it is inconceivable that they would be permitted to agree to that in their insolvent conditions in the UK, the USA. or in Canada. There are arrangements prescribed under subsections 2(b) (c) and (d) but it is difficult to conceive that they could apply to NNC or NNL. Regulations 13 and 14 provide:

Prescribed arrangements

12. The requirements prescribed for the purposes of section 45(2)(b) and (c) are that-

- (a) the party or parties to the arrangement consent to the jurisdiction of the courts of England and Wales, and
- (b) where there is more than one party to the arrangement, those parties enter into a legally enforceable agreement.

14. An arrangement is prescribed for the purposes of section 45(2)(d) if-

- (a) the party or parties to the arrangement consent to the jurisdiction of the courts of England and Wales, and
- (b) where there is more than one party to the arrangement, those parties enter into a legally enforceable agreement.

100 Would it be reasonable to expect NNC or NNL under CCAA protection to consent to the jurisdiction of an English court, or perhaps more importantly, would the Determinations Panel or the Upper Tribunal hold it reasonable for NNC or NNL to agree to that? The Monitor, who represents NNC and NNL under a super-Monitor order, also has a fiduciary duty to the creditors of NNC and NNL who are suffering a shortfall in their benefits.

101 There is absolutely no guidance on this issue of the reasonableness of issuing a Contribution Notice from either a Determinations Panel or the Upper Tribunal and the consideration of "whether the person [the target] has taken reasonable steps to secure compliance with the financial support direction". It too would involve uneducated guess work as to what might be ordered.

102 Lastly, what amount might be sought by the Regulator or ordered by a Determinations Panel or Upper Tribunal would also be uneducated guess work. Counsel for the UKPC could not state what amount would be asked for by the Regulator or ordered by a Determinations Panel or Upper Tribunal. The reason for this is said to be that it is not known how the \$ 7.3 billion will be allocated amongst the Canadian, US and EMEA estates. Taken that fact, it begs the question as to what amount the Regulator would request, if it decided to request a Contribution Notice, and what amount a Determinations Panel or Upper Tribunal would order. That issue, again, would involve uneducated guess work.

103 Mr. Ham in his report gave evidence as to what the Regulator might do in this case. That evidence may not be admissible as it goes to the ultimate issue. In any event, whether or not it is admissible, it is in large part simply argument to support the UKPC's case and I disregard it. Mr. Ham is qualified to express an opinion on what the English law is regarding the 2004 Act, but he should not be expressing any opinion on what the Regulator might do in applying the Act. I agree with the statement of MacFarland J. (as she then was) in *Web Offset Publications Ltd. v. Nagoya Venture Ltd.*, [1999] O.J. No. 587 (Ont. Gen. Div.):

Vickery has deposed that he is an attorney licensed to practice law in the State of New York and, in my view, that is sufficient to enable him to state the law of the State of New York for the benefit and assistance of the court. Such an expert however, must confine his evidence to a statement of what the law is and how it applies generally. Such an expert is not to express his opinion on the very facts in issue before the court. It is the sole function of the court to apply the law as the expert has stated it to the facts as the court finds them. See *Hunt v. Hunt* (1958), 14 D.L.R. (2d) 243 and 246.

104 I do not fault Mr. Ham particularly. He was asked to express his views and he did so. But he should not have been asked to do so.

105 Having said that, one submission Mr. Ham made in his report was that although it would be difficult before the allocation dispute was determined to ascertain the respective financial positions of NNUK and NNC/NNL, "the Regulator might decide that it was fair to put the UK Plan into the position it would have been in had the assets and liabilities of the integrated business been distributed equally between those participating in the business".

106 Apart from the fact that this statement as to what the Regulator might do is sheer guess work, it is asserting the position taken by the UKPC in the allocation trial that the \$7.3 billion proceeds of the asset sales of the Nortel Group should be distributed on a pro rata basis so that every creditor receives the same percentage of their claim. I am in no position to try to come to some judgment as to the probability that the executive arm of the Regulator would seek such a remedy in this FSD claims process that could alter the outcome of the allocation trial so far as NNUK and NNC/NNL were concerned or as to the probability of the Determinations Panel or the Upper Tribunal going down that route.

107 I conclude that the claim of the UKPC under the 2004 Act is too remote and speculative to constitute a claim in this CCAA process.

(e) Reason for the Nortel failure and Issues raised by the UKPC to support its FSD claim

108 I will deal with the allegations of the UKPC as to the benefits they allege were received directly or indirectly by NNC or NNL and whether in my view they should support the issuance of an FSD or Contribution Notice and what affect the other factors raised by the Monitor should have. I will do so in light of the evidence called and arguments made by the parties. If the claim were not too speculative or remote, I would have been inclined to dismiss it. But I again say it is not my view that counts, but rather the views of the Determinations Panel or Upper Tribunal.

(i) Reason for Nortel failure

109 I think it worthwhile to first consider the circumstances of the UK Plan and the reasons for the deficit in it as calculated by the plan's actuary. The first deficit appeared in the report of December 19, 2002 and was made as of April 5, 2002. It was a deficit of £177 million. Prior to that, NNUK had a contribution holiday because of surpluses in the plan. Payments were then made by NNUK, first on an ad hoc basis. Mr. Stocker, the actuarial expert called by the Monitor, has concluded that these ad hoc payments were higher than would have been paid under a typical UK recovery plan at the time. There is no basis not to accept that conclusion and I accept it. Payments were then made under a 2005 funding agreement with the Trustee. The next actuarial valuation was dated April 4, 2006 and made as of April 5, 2005 and it indicated the deficit had increased to £356 million. The 2006 Funding Agreement was then made by NNUK with the Trustee providing for the deficit to be reduced by 2012. At the next annual review as of April 2007 the deficit had been reduced to £172 million. However by July 2008 the actuary calculated the deficit to be £479 million.

110 Mr. Stocker has analyzed the reasons for the deficits and why they grew or reduced. His analysis has not been questioned. His conclusion is that the main sources of the deficit were the low investment returns of the UK Plan's assets and the changes to actuarial assumptions, mainly in 2008, used to value the liabilities of the UK Plan to its retirees. The reasons for the decrease of the deficit from 2006 to 2007 were the contributions made by NNUK pursuant to the 2006 Funding Agreement, investment gains and a negative change in financial assumptions. At that stage, NNUK was ahead of the timetable for the elimination of the deficit by 2012 as set out in the 2006 Funding Agreement. The dot com bubble burst and the adverse markets in the early 2000s contributed to the investment losses that occurred up to 2005 and the financial meltdown in 2007-2008 contributed to the large investment losses disclosed in the July 2008 actuarial study.

111 The change to actuarial assumptions regarding mortality experience, which increased the UK Plan's actuarial liabilities as people were living longer, and the investment losses of the UK Plan under the investment responsibility of the Trustee were outside of NNUK's control. They were not caused by NNL, NNC or NNUK setting out to arrange

their affairs so as to throw the burden of pension scheme deficiencies upon the PPF, which was the "moral hazard" risk that led to the 2004 FSD regime in the first place.

112 The failure of the Nortel business affected all members of the Nortel Group. From 2001 to 2008 the number of employees of Nortel world-wide dropped from in excess of 90,000 to approximately 30,000. NNUK was not permitted to fail to the benefit of NNC, NNL or any other member of the group. All failed at the same time due to the same economic and business circumstances. Is it reasonable to have an FSD and Contribution Notice issued in these circumstances that will negatively affect the former employees of other members such as NNC or NNL in order to profit the UK former employees, or more likely, the PPF? The Monitor says it would not be. I share that view.

113 The 2006 Funding Agreement made by NNUK with the Trustee was a negotiation in which the Trustee was advised by outside legal and financial advisors. The Trustee felt that it fulfilled its fiduciary duties to the plan members in arriving at the terms under which the deficit was to be retired. In the negotiations, a balance had to be struck taking into account the funding requirements and the ability of the plan sponsor NNUK to afford the deficit repair payments to be made. Mr. Davies, the chairman of the Trustee, agreed in his evidence that the Regulator had made it very clear to the pension industry that the parties should find such an appropriate balance and the Trustee was of the same view.

114 During the negotiations leading to the 2006 Funding Agreement, representatives of the Trustee, NNUK and NNL met with the Regulator. The parties reviewed with the Regulator their respective negotiating positions and the proposed agreement. After hearing the parties' positions, the Regulator did not consider it necessary to intervene in the negotiations. Although the Regulator would not provide the guidance and comfort the Trustee was seeking as the 2004 Act did not formally apply, a representative of the Regulator told Nortel informally following the meeting that it was doing exactly as the Regulator would have expected it to do.

115 In his report Mr. Stocker referred to an analysis by the Regulator in its Orange Book that indicated that funding levels for most UK pension plans fell during 2008. The Regulator commented that the worsening funding levels were linked to adverse market conditions since mid-2007 and that recovery plan lengths for the plans might reflect the difficulties experienced by plan sponsors during the turbulent market conditions. The Nortel UK Plan was not alone in its experience.

(ii) Contribution holiday

116 The UKPC say that the contribution holiday under which employer contributions by NNUK were not made was a benefit to NNL and NNC and should weigh in favour of an FSD and Contribution Notice. I have difficulty with this concept. First, I have difficulty with it being a benefit if the payments were not required to be made. Second, if it were a benefit, it would be a benefit of NNUK, not of NNC or NNL.

117 The Monitor concedes that significant contributions to the UK Plan could not have been made without the concurrence of Nortel's global management and that to the extent that any funding decisions made with respect to the UK Plan are considered to have been improper, NNL's degree of involvement in those funding decisions would be a factor militating in favour of the issuance of an FSD. I understand that concession but in my view no funding decision regarding the UK Plan was improper.

118 In the period 1989-2002, it was accepted practice in the UK for employer sponsors of defined benefits plans to suspend contributions to a balance of costs plan if the plan was in surplus. This was part of the *quid pro quo* for the employer being responsible for eliminating deficits. Requiring employers to make contributions despite a surplus in the plan would be economically irrational, as it could divert funding from their profit and income-earning activities at a time when the employer had already over contributed to the plan. Further, the UK government discouraged the accumulation of surpluses because they could be used as a tax haven by employers and by regulations adverse tax consequences would be imposed if a pension plan's surplus grew too large.

119 When Nortel acquired STC in 1991, the UK Plan was in surplus and had been since 1988. Mr. Gardener, the chairman of the Trustee of the plan at that time, testified that it was normal practice in those circumstances to have a contribution holiday and it was he who recommended it to the board of STC. As a result, STC suspended its contributions with effect from May 1, 1989. The UK Plan actuary considered the contribution holiday at each triennial valuation. On each valuation until 2002, the actuary confirmed to the Trustee that a contribution holiday could be taken. From 1988 until the early 2000s, while the contribution holiday was still in effect, the Trustee continued to advise plan members that the UK Plan was in a well-funded position. The Trustee also approved benefit improvements, including discretionary improvements, under the plans. This, along with other factors, had the effect of reducing the surplus.

120 It is difficult to see how in these circumstances the Trustee can now take the position in effect that the contribution holiday should not have been taken and was a benefit that should weigh in favour of an FSD and Contribution Notice. It does not appear to be reasonable.

121 So far as the benefit said to be obtained by the contribution holiday from 1989 to 2009, Mr. Bowie, the actuarial expert called by the UKPC, put the figure at £350 million. The actuarial expert Mr. Stocker called by the Monitor accepted as reasonable the plan actuary's estimate of £292 million. He disagreed with Mr. Bowie's figure because Mr. Bowie calculated the amount using the most conservative economic basis of growth in the plan's assets, which was not used in the industry in the UK Plan. Mr. Bowie agreed that he never recommended to clients this economic basis of forecasting. I accept Mr. Stocker's opinion on this, as well as his criticism of the effect the figure would have been to 2009 and to 2013 calculated by Mr. Bowie.

122 So far as who might have received the benefit of the contribution holiday, assuming it can be regarded as a benefit, there is no evidence that anyone other than NNUK used the funds available due to the contribution holiday. The cash may have been used by NNUK for other of its purposes. If cash was transferred in some way, there is no evidence of who the recipient may have been. Cash in Nortel was managed on a global basis and inter-company relationships or agreements might be revolved, reinstated or extinguished at any time depending on what was most advantageous from a global cash and tax management perspective. Cash went where it was needed.

(iii) Interest free loan

123 The UKPC say that the interest-free loan was a benefit to NNC or NNL to be taken into account in considering an FSD or Contribution Notice.

124 The fact that the books of NNUK reflected a loan to NNL is no proof that NNL used the cash for its own purposes. Cash was moved throughout the Nortel Group as required. The loan reflected allocations to NNUK under the MRDA derived from the profit split method used by the MRDA to allocate total Nortel residual profits to the participants. Pursuant to the MRDA, transfer pricing adjustments for the participants, which included NNUK, were administered by NNL. Article 3(d) provides:

(d) NNL agrees to administer this Agreement and the determinations under the RPSM as contemplated in this Agreement with respect to its interest and the interests of the Participants, and in particular, to compute the amount of any R&D Allocation to, and payment due from, each Participant on a periodic basis. Each Participant will be supplied with a copy of the calculations required under the RPSM as set forth in Schedule A. Any payment to, and payment from, a Participant will be reflected in the intercompany accounts of the affected Participant as a payable or a receivable, whatever the case may be and may be netted pursuant to the standard NNL practice for managing inter-company accounts.

125 The board of NNUK was a strong board which understood its fiduciary obligations to NNUK. The directors were of the view that the intercompany loans and their interest free nature were in the best interests of NNUK. They received independent legal advice from leading UK pension solicitors that:

Given the importance to NNUK of its parent company NNL and, as we understand it, the other members of the group, we would not have thought that it should be difficult for the directors of NNUK to conclude that the making of the loans is in the best interest of NNUK.

126 This issue is discussed more fully under the oppression claim part of these reasons. The point is that what was of benefit to Nortel was also a benefit to NNUK.

127 The UKPC contend that any benefit to any subsidiary in the Nortel Group was a benefit to NNC and NNL. There is a certain circularity to this argument that if NNUK loaned money to any particular subsidiary in the Nortel Group that must have been an indirect benefit to NNL and NNC because benefiting a subsidiary would be a benefit to the parent NNC and to the operating parent NNL. If it benefited the parent, it also benefited NNUK, which was part of the Nortel Group and depended on a strong Nortel for its own existence. This is not a situation such as the *Lehman* case before the Determinations Panel. The UKPC rely on reasoning of the Determinations Panel in that case:

As the ultimate parent company of the group LBHI obtained, directly and indirectly, substantial benefits from LBL's operations in supporting the Lehman group generally. Everything that the subsidiaries benefited from ultimately benefited LBHI, albeit the benefit might be indirect and diluted.

128 The UKPC left off the final sentence of the paragraph: "However, we consider that the value of the benefits received by LBHI from LBL were considerable". It is not clear that the Determinations Panel thought that the benefits received from LBHI were entirely indirect. However, the UK *Lehman* case was a service company providing services to the entire Lehman organization. Benefits provided to the rest of the Lehman group did not benefit in any way the UK service company. That is to be contrasted with NNUK which was an operating company operating in the matrix organization of Nortel and which benefited in so many ways from being part of the Nortel Group, as discussed. The stronger the Nortel Group, the stronger NNUK.

129 While it may have been a benefit to whatever company used the cash from the loan not to pay interest on it, and thus an indirect benefit to NNL and NNC, it was also a benefit to NNUK to make the loan. I would not view this factor as being very strong in favour of an FSD or Contribution Notice.

(iv) Transfer pricing

130 The UKPC contend that the Nortel transfer pricing arrangements failed to compensate NNUK for the true contributions that it was making to the Nortel Group. In particular they contend that the transfer pricing failed to properly compensate NNUK for its restructuring costs and its pension costs.

131 Transfer pricing is the act of assigning a monetary value, or price, to movements of resources or economic contributions that occur within a multinational enterprise across different taxing jurisdictions. Against the risk that companies attempt to use transfer pricing to increase operating income (and therefore taxable income) in jurisdictions with low income tax rates and correspondingly to decrease operating income in high-tax jurisdictions, tax authorities around the world have instituted regulations governing intercompany transfer pricing. These regulations centre on the arm's length principle. The arm's length principle necessitates that intercompany transactions be priced in a manner consistent with the way in which similarly situated uncontrolled parties bargaining at arm's length would price the transactions i.e., within an arm's length range.

132 Nortel employed a residual profit split method (or RPSM) to allocate operating profit among the entities of the Nortel Group. The residual profit split method is designed to allocate operating profit to the activities and/or assets that cause it. The RPSM was contained in the MRDA to which NNUK and the other residual profit entities were parties. Schedule A to the MRDA contained the details as to how the residual profits of the Nortel Group were to be allocated. It recited the fact that in 2002 Nortel made a submission to the tax authorities in Canada, the United States and the United Kingdom and that the RPSM was adopted at the request of the tax authorities as the most appropriate method

for determining the arms' length compensation for each of the participants for the R&D activity to be provided pursuant to the MRDA. The RPSM was prepared by Horst Frisch, a highly regarded and leading transfer pricing firm in the United States.

133 Transfer pricing is technical to be sure. There are guidelines that assist the authorities and regulations enacted to be followed. The Organization for Economic Cooperation and Development ("OECD") has established OECD Transfer Pricing Guidelines for multinational Enterprises and Tax Administrations ("the OECD Guidelines"). They were first published in 1995 and revised in 2010. They carry formal legal force insofar as they are incorporated into a country's legislation and regulations. Section 164 of *Taxation (International and Other Provisions) Act*, the UK's transfer pricing regulations, directly references the OECD Guidelines as does the Canadian CRA's information circular pertaining to international transfer pricing.

134 The OECD Guidelines provide in section 1.64 and 1.65 that an examination of a controlled transaction should be based on the transaction actually undertaken by the associated enterprises as it has been structured by them except in two exceptional cases. The first circumstance arises where the economic substance of a transaction differs from its form. The second circumstance arises where, while the form and substance of the transaction are the same, the arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner. In short, so long as the agreement is economically rational, and form and substance cohere, then the agreement stands and the role of the transfer pricing expert is to price the transaction as agreed.

135 Restructuring costs and pension costs were provided for in the MRDA and treated in accordance with it. Dr. Reichert, the transfer pricing expert called by the Monitor, reviewed both the restructuring costs and pension costs as dealt with in the RPSM contained in the MRDA. He concluded that neither of the exceptional cases referred to in the OECD Guidelines existed and thus in accordance with those guidelines the MRDA should stand and was dispositive of the issues. In his reports Dr. Felgran, the transfer pricing expert called by the UKPC, made no reference to the MRDA and said on his deposition that he did not do so as he did not find it useful. I accept the opinion of Dr. Reichert that the MRDA is dispositive of the transfer pricing issues raised by the UKPC.

136 Regarding restructuring costs, Nortel as a group wrote off US\$5.5 billion for restructuring costs from 2001 to 2008. Approximately 80 % of this amount, or US\$4.5 billion was written off in 2001 and 2002 after the dot com bubble burst. The expert evidence of Dr. Felgran is that an extra US\$662 million should have been allocated to NNUK for restructuring costs and of that US\$262 million should have been borne by NNL with the remainder borne by the other RPE's.

137 The MRDA is explicit that restructuring costs are to be borne individually by each RPE, including NNUK, and are not to be shared. The UKPC contend that they should have been shared by all RPEs as NNUK paid a disproportionate share of the overall restructuring costs.

138 The evidence of Dr. Reichert and Dr. Felgran conflicts. I much prefer the evidence of Dr. Reichert for several reasons, including the fact that the evidence of Dr. Felgran in parts lacked substance and appeared superficial.

139 In his analysis of restructuring costs, Dr. Felgran ignored the MRDA. He did not follow the OECD Guidelines and start with the arrangement agreed to by the parties in the MRDA and then consider whether one of the two exceptions existed. On his deposition he said that one starts with the economic substance and then looks to see if the legal form follows the economic substance. That is the opposite of what the OECD Guidelines call for.

140 Dr. Felgran stated, and the UKPC emphasize in their argument, that while regional management had a certain level of autonomy in restructuring, final or ultimate decision-making for closing facilities and reducing head count were controlled by NNL. I accept Dr. Reichert's opinion that this is irrelevant and that Dr. Felgran's approach is contrary to the very purpose of a transfer pricing analysis which is to determine how the parties would interact absent the existence

of control. The question should be assuming these entities are uncontrolled, and in light of their functions, risks, and assets, how should profit be allocated? Section 9.28 of the OECD Guidelines defines "control" as "the capacity to take on risk" and that "As far as risks over which neither party has significant control are concerned, control would not be a helpful factor in the determination of whether their allocation between the parties is arm's length." In this case, the vast majority of the reconstruction costs occurred in 2001 and 2002 following the dot-com collapse and I accept Dr. Reichert's opinion that these costs were really outside the control of the parties within the meaning of the OECD Guidelines.

141 Dr. Felgran asserted that the Nortel Group restructuring costs were designed to benefit the entire group including the RPEs which would take the greater share of profits. Therefore he said they should have been considered part of Nortel's ordinary, usual and recurring operating costs for transfer pricing purposes. He relied on the opinion of a US accounting expert who stated that auditors in considering the consolidated 2002 financial statements would likely have considered the accounting for these charges and that in his opinion NNC appropriately treated the costs in accordance with GAAP as normal operating expenses.

142 These expenses were referred to as "special charges" in the 2001 to 2006 Form 10-K filings of Nortel that contained the consolidated financial statement, and "exceptional" in the 2001 to 2006 audited NNUK financial statements. In the 2001 and 2002 10-K statements Nortel explained that it underwent an unprecedented period of business realignment in those years. Apart from that, there is a fundamental error in this assertion of Dr. Felgran. What he has done is look at events after the time when the arrangements were made by the parties in the MRDA. As Dr. Reichert explained, Chapter 9 of the OECD Guidelines explicitly frames the issue of restructuring costs and benefits as a question of *ex ante* risk allocation by way of an intercompany contract, rather than an *ex post* examination of who should bear the realization of a risk (i.e., restructuring costs).

143 In Dr. Reichert's view, the criterion of "ordinary, usual, and recurring" used by Dr. Felgran is not the right question and does not appear anywhere in the transfer pricing guidance or regulation. The proper question is what the parties' arrangement called for regarding the risk of restructuring, and whether that arrangement was commercially rational and consistent with its substance. The question should not be whether an expense is an operating expense under GAAP, but whether the restructuring costs give rise to the revenue associated with the intangible. The residual profit split method in the MRDA did not provide for a sharing of operating expenses. Rather, the parties agreed to incur costs individually in exchange for a share of the residual profits. In accordance with the OECD Guidelines, Dr. Reichert's view was that the agreement of the parties should govern.

144 Dr. Reichert also examined what third parties did in contractual arrangements and settings similar to the Nortel RPSM. Dr. Felgran did not conduct such a study. Dr. Reichert identified 162 joint development agreements. He concluded from this evidence that the third party agreements were consistent with the parties' allocation of risk in the MRDA.

145 Dr. Reichert also pointed out that the primary source of the restructuring costs was the optical business of NNUK. Under the cost sharing agreement amongst the parties before the MRDA, NNUK realized most or all of the economic benefits from its optical business during its boom years pre-2001. Yet Dr. Felgran asserts that NNUK should be entitled to require the other parties to the MRDA to share the restructuring costs.

146 In sum, I would not find that the treatment of restructuring costs in the MRDA was contrary to transfer pricing principles. I accept the opinion of Dr. Reichert to the opposite effect.

147 The UKPC contend that not all of the pension costs were properly shared by the participants to the MRDA. The net periodic pension costs were included as an expense within the RPSM formula and thus the transfer pricing model factored in such items and had the economic effect of sharing those costs among the RPEs. The UKPC contend however that not all pension costs are required by US GAAP to flow through the income statement on an annual basis and that some costs are deferred and recorded in the balance sheet as Other Comprehensive Income ("OCI"). They contend that

this OCI was not included within the RPSM formula and was thus a cost for which NNUK was not compensated under the transfer pricing arrangements.

148 Dr. Felgran's argument derives from accounting treatment of pension costs, a subject in which he is not an expert. He understood that under US GAAP accounting standards, net periodic pension costs were written for going concern enterprises and assumed that assets necessary to settle pension obligations would be afforded long periods of growth. He referred to concerns about Nortel's longevity being raised at least as early as 2006 and the opinion of Mr. Bowie, the actuary called by the UKPC, that an economic basis for calculating the future pension obligations would have been appropriate given NNUK's weak financial position.

149 Dr. Reichert is of the view that Dr. Felgran has impermissibly looked at the situation by rationalizing on an *ex post* basis. I agree. There was no thought of Nortel insolvency at the time of the MRDA.

150 Dr. Felgran stated that in order for transfer pricing models to reliably reflect arms-length equivalent dealings, true economic costs must be properly measured and compensated. The reference to economic costs was a reference to Mr. Bowie's statement. But funding a plan on an economic basis (the most conservative growth of asset assumption) was not used by pension plans at the time and Mr. Bowie never recommended to his clients to do so.

151 Dr. Reichert's opinion is that there was no basis to include a balance sheet item in allowable pension costs for transfer pricing purposes and in his experience, balance sheet items that pertain to future periods are never included in the determination of operating profit for the residual profit split method. Dr. Felgran pointed to no case in which that had occurred. I accept Dr. Reichert's opinion on this.

152 Dr. Reichert also looked at the 162 comparable arrangements for pension treatment. None of them identified pension-related balance sheet items as a cost that uncontrolled parties agreed to share. He concluded that the behaviour chosen by the parties to the MRDA was consistent with third party behaviour, and thus the arm's length principle and that it should be respected. He concluded that Dr. Felgran's assertion that in order for transfer pricing models to reliably reflect arm's-length equivalent dealings, true economic costs must be properly measured and compensated, was unsupported and not proven.

153 In this case, the RPSM in the MRDA required operating profits to be accounted for in accordance with US GAAP, which do not include an economic measure of pension costs. Dr. Reichert's opinion, which I accept, is that the treatment of pension costs in the MRDA was commercially rational and did not impede tax authorities.

154 The Monitor says that the UKPC has cherry picked its issues and not considered other related issues. In this I think the Monitor is right.

155 The evidence disclosed that the rate of return to NNUK on its sales and distribution function was 23.6% in the 2001-2005 period, and a 15% markup on excess SG&A expenses from 2006 onwards. These returns were paid under the MRDA. Dr. Reichert, the transfer pricing expert called by the Monitor, testified that these returns were far higher than market. He said that in his entire career as a transfer pricing economist, he had never seen a routine return to distribution anywhere close to those figures. Dr. Felgran, the transfer pricing expert called by the UKPC, did not testify on this issue at trial but in his deposition testified that in his 20 years of experience, he would expect to see routine returns to distribution somewhere in the range of 1-5%, and confirmed that he has never seen routine returns in excess of 20%. Dr. Reichert estimated that NNUK had been overcompensated in relation the market pricing by some US\$231 million just for the period 2001 to 2005.

156 Dr. Reichert has accepted the primacy of the MRDA in accordance with the OECD Guidelines. However, if one were not to do that and rather do what the NNUK's expert Dr. Felgran did, it would be logical to consider the high rates of return paid to NNUK on its sales and distribution function. The over compensation, for example, of US\$231

million is much greater than the interest not paid on the loan from NNUK to NNL estimated to be US\$135¹⁰ million that the UKPC says should be considered a benefit to NNL.

157 I do not find that the treatment of pension costs in the MRDA was contrary to transfer pricing principles. I accept the opinion of Dr. Reichert to the opposite effect.

(v) Conclusion

158 My view is that issuing an FSD or Contribution Notice to NNC or NNL would not be reasonable. However, whether the Determinations Panel or Upper Tribunal would agree is another matter which I have found to be too remote and speculative to determine.

(f) Was NNUK Insufficiently Resourced?

159 The Insufficiently Resourced Test ("IR test") prescribed by section 44(3) of the 2004 Act has two components:

- (a) Is the value of the employer's resources less than 50% of the estimated section 75 debt? and
- (b) If so, is the value of the target's resources greater than the difference between the value of the employer's resources and 50% of the estimated section 75 debt?

160 A target can be any company that is an associate of NNUK. In this claim, the targets are NNC and NNL. The IR test is a threshold test. It must be passed in order for an FSD to be issued.

161 Taking June 30, 2008 as the relevant date, NNUK would be insufficiently resourced if at that date the value of its resources were less than 50% of the estimated section 75 debt. The section 75 debt is defined in the *Pension Act 1995* (UK) and is the amount required to buy an annuity that would be sufficient to pay the scheme's pension liabilities at the relevant date. For example, if the capital amount necessary to fund the scheme's pension liabilities was estimated at June 30, 2008 to be £100 million, the employer NNUK would be insufficiently resourced if its resources were valued at less than £50 million, say only £40 million. In that case, if the resources of the target NNC or NNL were sufficient to fund the shortfall, i.e. were at least £10 million, the insufficiently resourced test would be met and NNC or NNL could be issued an FSD or a later Contribution Notice if the Determinations Panel or Tribunal considered it to be reasonable to do so. If the resources of NNC or NNL were not at least £10 million, no FSD or later Contribution Notice could be issued as the IR test would not have been met.

162 The Monitor contends that NNUK was not insufficiently resourced at June 30, 2008 because the value of its resources at the relevant time was at least 50% of the estimated section 75 debt. If the Monitor is not successful on this point, it does not contest that the value of the resources of NNC or NNL would be sufficient to bring the total value of their resources and of NNUK's resources up to 50% of the estimated section 75 debt, and that in that case the IR test would be met.

163 For purposes of the insufficiently resourced test, the executive arm of the Regulator is to estimate the section 75 debt at the relevant date, here being June 30, 2008. It is a different exercise than the scheme actuary certification of the section 75 debt at the insolvency date. The scheme actuary's certification cannot be challenged under the statute. However, I accept Mr. Legge's evidence that the Regulator's estimate of the section 75 debt for the purposes of the IR test can be challenged and that whether the IR test has been met is a matter of fact for the Determinations Panel or Upper Tribunal.

164 In this case, the Regulator estimated the section 75 debt as at June 30, 2008 to be £1.777 billion or US\$3.534 billion. The threshold of 50% of the estimated debt on the Regulator's estimate is therefore £888.5 million or US\$1.767 billion. The Regulator relies on the scheme actuary, Mr. Neil Mobbs, for this estimate.

165 Mr. Mark Stocker, an actuarial expert called by the Monitor, testified that there is an uncertainty in the estimate of Mr. Mobbs for a number of reasons and that the threshold of 50% of the estimated debt could be overstated by as much as £250 million, which if the case would make the threshold of 50% of the estimated debt to be £1.527 billion or US\$1.518 billion. This presumably would have to be decided as a factual matter at the Determinations Panel or Upper Tribunal.

166 I will proceed on the assumption that the estimate of the Regulator of the section 75 debt at June 30, 2008 is correct and that the threshold to be used to determine if NNUK was insufficiently resourced is £888.5 million or US \$1.767 billion.

167 The valuation exercise is not to value the shares of NNUK but rather to value the resources of NNUK. The 2004 Act does not itself define what the "resources" are, but the regulations do. Regulation 7 says that the resources constitute "all those aspect of the entity that would be taken into account when arriving at the entity value". The "entity value" is defined in regulation 2 as "the fair value of the entity" and "fair value" is defined as "the amount for which an asset could be exchanged, or a liability settle, between knowledgeable, willing parties in an arm's length transaction".

168 Regulation 9 states that the value of the resources is to be calculated in accordance with the regulation. It provides for a three stage process. The first stage is to calculate the net assets based on the entity's accounts (net book value), add pension liabilities or subtract pension deficits and then add subordinated liabilities. The second stage is to add to stage one any identifiable fair value difference between the fair value of an asset or liability and the value of that asset or liability as recorded in the entity's accounts (adjusted book value). The third stage is to calculate the difference between the entity value and the aggregate of the entity's net assets as set out in the entity's accounts and add that to the amount of the second stage calculation. If after the first or second stage the entity and the Regulator agree that the IR test has not been met, the third stage calculation need not be carried out.

169 The entity value is to be a notional open market valuation involving an arm's length transaction between a willing seller and willing buyer who are knowledgeable. It should be assumed to be a sale that takes place in the real world. The no hindsight principle is applicable to the valuation in that events after the date of valuation are not to be taken into account in the valuation unless they were foreseeable expectations at the time and would have affected what a reasonable purchaser would pay. However improbable it is that there would ever be a sale of the asset in the real world, for example because of restrictions attached to the asset, the sale must be treated as capable of being completed, the purchaser then holding the asset subject to the same restriction (the *Crossman* principle). Both experts on English law agree on these principles.

170 In the case of NNUK, its profits were calculated under the MRDA to which it and NNL, NNI and other companies in the Nortel Group that did research and development work were parties. The MRDA was not assignable, but it is agreed that because of the *Crossman* principle, it was to be treated as assignable by NNUK to a purchaser in the valuation exercise but not further assignable by that purchaser.

171 The opinion evidence of Mr. Soren Reynertson was the evidence relied on by the UKPC to contend that the value of NNUK's resources was less than the threshold of 50% of the estimated section 75 debt of £888.5 million or US \$1.767 billion. The Monitor challenges Mr. Reynertson's qualifications to be an expert witness and says that even if he is qualified, his opinion should be given little weight.

172 In *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.), Justice Sopinka stated that an expert witness must be someone who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.

173 Mr. Reynertson describes himself as an investment banker. He admittedly has had no education or training as a valuator, is not accredited by any professional association of valuers, has not taken any course work with a view to being accredited, has never published or taught on the subject of valuation, and has never practised in the field of valuation. The focus of his career has been primarily working with distressed companies and their creditors. He said that

in his practice, he does not refer to textbooks and that he relies on his experience in having bought, sold, financed and restructured business for the past 20 years.

174 Mr. Reynertson does have experience in restructuring transactions. I accept him as an expert in so far as his experience may provide cogent support for his opinions. I must say, however, that I have considerable difficulty with much of his evidence. In the end, I do not accept his evidence that the value of NNUK's resources was less than 50% of the estimated section 75 debt and I find that the insufficiently resourced test has not been met.

175 In this case, Mr. Reynertson was instructed to give his opinion on the stage three calculation on the assumption that there would be no agreement between NNUK and the Regulator as to the use of book values or adjusted book values in the first and second stage. It was Mr. Ham's view that in a case such as this it is a certainty that there would be no agreement with the Regulator that would excuse the need for a stage three calculation. Whether he is right or wrong is a matter of conjecture. Mr. Legge's view is that the Regulator should be reasonable if it accepts the net book value or adjusted net book value as a reflection of the true reflection of the minimum value of the entity.

176 Mr. Reynertson valued NNUK separately from its subsidiaries.

177 For NNUK, the valuation methodology used by Mr. Reynertson was a revenue multiple method in which he looked at the market capitalization of NNC (the number of outstanding common shares times the trading price per share) and allocated to NNUK a portion of that market capitalization equal to NNUK's proportionate share of global revenues. He arrived at a value of US\$453.1 million for NNUK. He then applied a 35% risk downward adjustment, to get a "Base Case of US\$294.5 million and an "Adjusted Case" without the discount of US\$453.1 million.

178 For the subsidiaries of NNUK, Mr. Reynertson valued them on a liquidation value basis on the theory that no purchaser would pay more than liquidation value for them. He arrived at a "Base" value for all of the subsidiaries of US\$316.2 and an "Adjusted" value of 343.5, the difference being caused by the different assumed liquidation costs of either 10% or 15%.

179 Mr. Reynertson then added cash and cash equivalents for NNUK and net intercompany assets and arrived at a total "Base" value of US\$1.393 billion for NNUK and its subsidiaries and an "Adjusted" value of US\$1.579 billion. These values were either US\$374 million or US\$188.2 million less than the threshold figure for 50% of the section 75 debt of US\$1.767 billion resulting in NNUK being insufficiently resourced by those amounts.

180 I will deal first with the revenue multiple method used by Mr. Reynertson to value NNUK. Mr. Berenblut was called by the Monitor to give opinion evidence. He is a highly qualified business valuator. His evidence was that it is well understood that a revenue multiple approach as used by Mr. Reynertson is inappropriate as a principal valuation methodology and should only be used as a secondary methodology. Revenue multiples should normally be afforded little, if any, weight. In the case of Nortel, his evidence was that because of the RPSM used to allocate profits, NNUK's operating profit (and hence its cash flows) was a significantly different proportion of its revenues than was the case for NNC. His opinion was that the revenue of a particular entity in the Nortel Group was not a reasonable indicator of its profitability because operating profits were not directly proportional to sales revenues. His view was that the value to revenue model used by Mr. Reynertson was not appropriate for determining the value of NNUK.

181 Mr. Reynertson agreed that the profitability of a business is what ultimately determines its value and that a revenue model can be useful to the extent it is a reliable indicator of what the profits will be. On his deposition, he said that for NNUK, he could not say if there was a historical correlation between its revenue and profitability but acknowledged that revenue was not a key metric in allocating profits under the RPSM used by Nortel. He also said that going forward there would be no correlation between revenues within NNUK and its allocation of profits under RPSM. The fact that there may be some uncertainty in the future regarding research and development spending, and thus the allocation of profits under the RPSM, does not detract from the fact that Mr. Reynertson could not say there was going to be some correlation between NNUK's revenues and profits.

182 I accept Mr. Berenblut's opinion that the revenue model should not have been used by Mr. Reynertson as the basis for his valuation for NNUK. The use of such model to value NNUK casts serious doubt on Mr. Reynertson's opinion.

183 Mr. Berenblut's opinion is that when a market approach to value is being used, which is one of the standard approaches to value used by valuers, two multiples that are used if an appropriate comparable can be located, and in his view NNC is an appropriate comparable, and which are more appropriate than revenue multiples are a value-to-operating profit multiple and a value-to-book multiple.

184 Mr. Berenblut did these calculations. In 2007 NNUK's operating profits (excluding those of its subsidiaries) were approximately 28% of NNC's total operating profits. Using all other assumptions used by Mr. Reynertson, including Mr. Reynertson's valuation of the subsidiaries on a liquidation basis, Mr. Berenblut arrived at a value of all of NNUK's resources at US\$3.3 billion, far in excess of the threshold IR test of US\$1.767 billion. The result of using a comparison of book values of NNC and NNUK, using all of Mr. Reynertson's other assumptions, resulted in a value for all of NNUK's resources of US\$3.1 billion, again far in excess of the threshold IR test of US\$1.767 billion.

185 I accept this evidence of Mr. Berenblut. He is a qualified valuator, something that Mr. Reynertson is not, and there is no expert evidence to contradict his views on this. It was put to Mr. Berenblut on cross-examination that he should not have used just one year's results in this comparative exercise, but he did not agree. I accept his explanation for the reason given by him. The acceptance of these values alone means that the IR test has not been met.

186 These valuations by Mr. Berenblut using Mr. Reynertson's valuation method for the NNUK subsidiaries but changing only the value of NNUK by using profit and book value comparisons rather than a revenue comparison alone indicate that Mr. Reynertson's analysis for his IR test is unreliable and not to be accepted. Mr. Reynertson is not a business valuator. His evidence of the use of a revenue model was not based on any experience he said he had used or seen used in the marketplace, which experience is the only basis upon which he was qualified to give opinion evidence.

187 Mr. Reynertson also deducted 35% from his values for NNUK. He said he was doing this to reflect three factors. The first was that he assumed that at least some portion of customers of NNUK would judge it advantageous after a sale of NNUK's business to be a customer of the larger Nortel Group. The second was that after such a sale, the Nortel Group's growth prospects would have been greater than NNUK's and therefore revenue comparability might not be the same. The third is an assumption by Mr. Reynertson that a buyer would discount the value of NNUK based on a contingency that there might be a challenge to the MRDA, noting the current litigation in the allocation proceeding indicates that the rights under the MRDA are controversial.

188 Mr. Reynertson said the 35% figure was a subjective judgment call of his based on his experience. He said that he had worked on a number of transactions over the years where there had been illiquidity discounts, minority discounts and the like. It was not a mathematical calculation but his judgment. He said he could look at no transaction in particular that would lead to that figure.

189 Mr. Reynertson's assumption about litigation over the MRDA being one of the factors leading to his figure of 35% involves hindsight information not available at the time of the notional valuation date of June 30, 2008. The allocation litigation was much later and should have played no role in his notional valuation. How much of the 35% was attributed to that factor was not said except it was one of three factors. Regarding continuing revenues at NNUK, he also acknowledged that since NNUK would remain a fully integrated member of the Nortel global business after the notional sale, the Nortel Group would be incentivized to maintain sales support, marketing and customer relationships so that customers would be just as confident about Nortel as they were before the sale. While I accept that Mr. Reynertson has had experience in the marketplace with discounts, it is hard in the circumstances to know what weight, if any, should be given to unsupported subjective views.

190 Mr. Reynertson valued the subsidiaries of NNUK on a liquidation basis, calculating liquidation values and deducting any liabilities the subsidiaries had and liquidation costs. He did this on the assumption that a buyer would

have assumed the subsidiaries could not have continued to operate as going concerns as the Nortel Group would have likely set up a separate set of distribution entities post-sale to compete with their former subsidiaries. Thus the buyer would have assumed that the subsidiaries would have to be liquidated to realize value.

191 There are a number of concerns regarding this analysis.

192 Mr. Reynertson admitted that the notional sale transaction he posited is destructive of value. Yet this is not what English valuation principles permit. The *Crossman* principle for example requires that any restriction on alienation which may significantly reduce value is to be ignored. *Marks v. HMRC*, [2011] UKF.T.T. 221, was a tax valuation case in which the open market standard was applicable. One of the two business being valued, a retail business, had no right to sell the French Connection brand manufactured by the other business, both owned by the same person. It was argued that a buyer of the retail business would have no right to sell the brand and would have to find alternative goods to sell, which would have lowered the value of the retail business. It was held, however, that the owner of the business could be a buyer of the business in the notional sale and that he would value it on the basis that the business would continue as before. This was the method chosen by the tax court to ensure value was not destroyed on a notional open market valuation by assumptions used that would destroy value.

193 Mr. Reynertson assumed that a buyer would suppose that Nortel would establish a new distribution network throughout Europe and put the subsidiaries out of business. He himself believed that is what likely would have happened in a notional sale at that time. There are problems with this. One obvious problem is to explain where Nortel would have found the money to build a new distribution network and whether it would have been better for Nortel to continue to employ the NNUK distribution subsidiaries to distribute their products. When it was put to Mr. Reynertson that Nortel had spent hundreds of millions of dollars to set up the network, he said he could not say how much was spent by Nortel to build its distribution network in Europe and Africa but agreed it would have been sizeable. He admitted that he had no basis for knowing what the cost of setting up a new distribution network would be or what profits it would yield for the Nortel Group. He admitted that he was simply speculating that Nortel would set up a competing distribution network.

194 This speculation of Mr. Reynertson that Nortel would set up a competing distribution network is directly contrary to the contention of UKPC that Nortel could not be considered to be a special purchaser in the notional sale of NNUK's business because given the onset of the credit freeze and its impending global insolvency, it could not afford to do so. I have difficulty with accepting Mr. Reynertson's speculation as to what a purchaser would assume regarding Nortel setting up a competing distribution system. Grounding for his speculation is far from apparent.

195 There is another aspect to what would happen in a notional sale. The evidence is that a purchaser would want some assurance that the business it was buying would remain as it was and not have to compete with NNUK or its parent. Mr. Berenblut testified that as a matter of valuation principles, it would be assumed that a non-competition covenant would be given if the vendor or its principals had the ability to compete with the purchaser. In this he is well supported by leading valuation texts. Mr. Reynertson agreed that in the real world that would happen. However he said he was instructed by Mr. Ham that he could not assume such a non-competition clause because that would be adding to or embellishing the asset to be sold.

196 Mr. Ham in his reply report said that it seemed to him that Mr. Berenblut's assumption of a non-competition covenant would amount to an embellishment of the asset being valued, improperly inflating its value. However, on cross-examination this position was softened. Mr. Ham acknowledged that the notional sale would contain the normal and customary terms in a sale of that type and that it is a factual issue for the valuers to decide as to what the terms of the notional sale would be¹¹. This could include a parent providing support for the transaction going forward because it would be in its interests to see its subsidiary get enhanced proceeds of the sale. Mr. Reynertson agreed that from a valuation perspective, this support would be given in a notional sale of NNUK's resources.

197 Mr. Legge's evidence was essentially to the same point. He said that the asset in the hypothetical sale should be the same asset in fact owned by the vendor, and that it is a question of fact and valuation for the tribunal. He said that while the same asset has to be sold in the notional sale, what is done in the market is a question of fact.

198 It seems to me that in so far as a non-competition covenant is concerned, for NNL or any other hypothetical vendor to say they will not do anything to change the business being sold from what it was prior to the sale is not embellishing the asset being sold and it is clear from the evidence as a matter of fact that such a term would be provided. It would be in NNUK's interest to ask its parent to do that and in its parent's interest as well to do that. It also seems that it is consistent with the *Crossman* principle and the assumption caused by it in this case that the MRDA can be sold or assigned, something which under the MRDA could not happen, in order to fetch a market price not destructive of value. It is also consistent with the *Marks* case in which assumptions were made to have a market value not less than the value of the business as it existed at the time of sale. I find that such a covenant would be given and that it would be a reasonable term that would not change the asset being sold, being the distribution business of NNUK.

199 Mr. Berenblut did not agree that the subsidiaries should be valued on a liquidation basis. He calculated the results if the distribution subsidiaries of NNUK are valued at the valuation date not on liquidation values but using Mr. Reynertson's inappropriate revenue comparison basis with NNL. That results in a value of resources of NNUK of US\$2.3 billion. If the comparison to NNL is based on what Mr. Berenblut considers to be the better comparable, the operating profits method, it results in a value of resources of NNUK of US\$3.010 billion. If the comparison to NNL is based on the book value of the NNUK subsidiaries rather than their liquidation value, the resulting value of resources of NNUK is US\$2.1 billion. All of these amounts result in the failure of the IR test. I accept the validity of Mr. Berenblut's calculations. They establish that if the value of the NNUK subsidiaries is based not on a liquidation basis, the IR test has not been passed even if Mr. Reynertson's values for the parent NNUK are used.

200 Mr. Berenblut also did other calculations to determine if the IR test had been met. He concluded that it was not met. He first calculated the net book value of NNUK. Net book value, or the asset approach to value, is one of three accepted valuation approaches. He acknowledged that what he did was undertake the first stage of the three stage requirements of Regulation 9 that sets out how the value of resources of an entity is to be calculated. That net book value was US\$2.2 billion which, with pension liabilities of US\$451 million added, resulted in a value of resources of NNUK of US\$2.7 billion at the valuation date, far in excess of the threshold for the IR test to be met. Mr. Berenblut noted that because NNUK was required to prepare its financial statements under US GAAP and carry assets on its balance sheet at the lower of cost or realizable value, it meant that the realizable values as verified by its auditors KPMG were at least as much as its book values.

201 The UKPC in their written argument attack Mr. Berenblut's opinion regarding the June 30, 2008 book value analysis. Most of it is argument derived from snippets of accounting information without any expert valuation analysis. It appears to be a lawyer's analysis of accounting information without expert valuation evidence backing it. For example, an attack is made on a said lack of firm evidence that the NNUK auditors did an impairment analysis of the balance sheet as at June 30, 2008 in considering the goodwill figure on it. Mr. Berenblut's opinion, which I accept, is that the auditors of the NNUK December 31, 2007 financial statements had to be satisfied that there was no impairment of the assets in order to provide their audit opinion and that as their audit opinion was dated August 4, 2008 they had to be satisfied that nothing material had occurred since the end of 2007 that would affect the audited financial statements. The goodwill in question was acquired goodwill when NNUK acquired a business in late 2007, and it would be surprising that there would have been impairment in it in such a short time.

202 I accept Mr. Berenblut's opinion that valuing the resources of a company by using net book value is an accepted valuation method and that the net book value of NNUK was US\$2.2 billion¹².

203 To test the reasonableness of this conclusion, Mr. Berenblut used a market approach based on the market capitalization of NNC and compared NNUK to NNC based on its percentage of operating profits to NNC's operating

profits. The resulting value of resources for NNUK was US\$3.3 billion, which provided confirmation for him that the value of resources of NNUK of US\$2.7 billion based on net book value was a conservative estimate of NNUK's value of resources at the valuation date. He also did a comparison of NNUK to NNC based on its percentage of book value to NNC's book value. The resulting value of resources for NNUK was US\$3.1 billion. I accept Mr. Berenblut's opinion that his use of a comparison of operating profits and book values to the market capitalization of NNC is a valid valuation technique and accept his resulting value of resources of NNUK at US\$2.7 billion as being conservative.

204 The UKPC is critical of Mr. Berenblut because he did not undertake the second and third stage of Regulation 9 and contends that this should have been done as there was no agreement by the Regulator to the valuation of NNUK's resources by using only the first or second stage of Regulation 9. Mr. Berenblut's response to this is that because the realizable values if NNUK as verified by its auditors can be no lower than the net book value calculated under stage one, there is no point in doing stages two or three as the IR test has failed, i.e. cannot be met, on the net book value alone. Both sides acknowledge that stage two makes no difference as no fair value adjustments have been requested to the accounts that set out the net book value for stage one. Mr. Berenblut's view was that since the entity value difference contemplated in stage three can only be a positive adjustment to the amount resulting from the first two stages, there is no need to go to step three if the IR tests have already not been met in the first two stages.

205 There is no evidence as to whether the Regulator would agree to stopping after stage one or two, i.e. what its views would be as to whether the IR test had failed by virtue of the adjusted book value of NNUK being more than 50% of the estimated section 75 debt¹³. Thus whether it can be said that Mr. Berenblut was required to undertake the third stage set out in Regulation 9 is unknown. In the end, I do not think it matters. Even if Mr. Berenblut's evidence of the net book value was not sufficient to satisfy Regulation 9, his evidence regarding the invalidity of Mr. Reynertson's approach in using a revenue based comparison to NNC, which I have accepted, and his evidence of the effect of a profit and net book value comparison with NNC, which I have also accepted, means that it has not been established that NNUK was insufficiently resourced at June 30, 2008.

206 In the result, I find that the UKPC has failed to establish that the IR test has been met. Thus there would be no basis for an FSD to be issued against NNC or NNL.

The Funding Agreement and the Funding Guarantee

207 The 2005 triennial valuation for the UK Plan was finalized by the plan's auditor on April 4, 2006. It disclosed an ongoing deficit of £356 million (the "2005 Deficit"). Under the 2004 Act, NNUK and the Trustee were required to negotiate and agree to a recovery plan that set out the steps to restore the plan to full funding and the time period over which it was to be achieved.

208 Eventually a Funding Agreement was made between NNUK and the Trustee dated November 21, 2006 that provided for the 2005 Deficit to be paid over seven years from 2005 to 2012. This seven year period was a compromise between a five year period proposed by the Trustee and a ten year period proposed by NNUK. As well, NNL signed a Funding Guarantee on the same date guaranteeing some of the obligations of NNUK under the Funding Agreement.

209 The Funding Agreement is not an entirely easy document to read. It provided for NNUK to pay off the 2005 Deficit by April 5, 2012. Part of the complexity of the Funding Agreement was caused by the need for the statutorily required 2008 triennial valuation and how the deficit reduction payments were to be adjusted to reflect the deficit disclosed by the new valuation. In simple terms, payments to reduce the deficit in an agreed amount were to be made by NNUK to April 5 2008, and adjusted payments to reflect the deficit revealed by the 2008 valuation were to be made by NNUK from April 6, 2008 until April 6, 2012, so long as the deficit was measured "using actuarial methods and assumptions consistent with the actuarial methods and assumptions" used by the actuary in arriving at the 2005 Deficit. Any larger deficit caused by a "full" 2008 valuation not using those measurements was to be funded by NNUK in accordance with a recovery plan over a period of time to be negotiated.

210 The reason for the two different 2008 valuations was that NNL agreed in the Funding Guarantee to guarantee certain of the payments required by the Funding Agreement but was only prepared to agree to pay that part of the deficit measured in the 2008 valuation using actuarial methods and assumptions consistent with the actuarial methods and assumptions used by the actuary in arriving at the 2005 Deficit. NNL was not prepared to guarantee any larger deficit disclosed by the 2008 valuation because in its mind to do so would have exposed it to an indeterminate liability for indeterminate reasons.

211 The Funding Agreement also provided for current contributions to be made by NNUK, and there is no issue that these contributions were paid to the commencement of its administration in January 2009.

212 The payments up to April 2008 to reduce the 2005 Deficit were paid as agreed. What is at issue in these proceedings are the obligations from April 2008 under clause 3.3 of the Funding Agreement, which provides that:

[NNUK] shall make further Past Service Deficit Contributions to the Scheme in the period between 6 April 2008 and 5 April 2012 on the following basis:

(a) Past Service Deficit Contributions in quarterly instalments equal to 1/16th (6.25%) of the value of the April 2008 Deficit shall be paid; and

(b) such Past Service Deficit Contributions will be paid to the Scheme by quarterly cash instalments in arrears, payable on 4 January, 4 April, 4 July and 4 October of each year, beginning from 4 July 2008 until the April 2008 Deficit is reduced to zero or until this Agreement otherwise terminates,...

213 The 2008 Deficit is the deficit as at April 5, 2008 measured by the valuation "using actuarial methods and assumptions consistent with the actuarial methods and assumptions".

214 The relevant provisions of the Funding Guarantee are:

Section 1.1

"Guaranteed Obligations" means the payment obligations and liabilities of [NNUK] to the [Trustee] under or in connection with clauses ... 3.3 ... of the Funding Agreement ...";

215 Section 2.1 of the Funding Guarantee provides that the guarantee is triggered if: (a) a "Trigger Event" occurs; and (b) a "Demand" is subsequently delivered; and

Section 1.1 defines "Trigger Event" as:

[NNUK] failing to pay any amount payable by it to the Beneficiary when contractually due pursuant to the terms of clauses ... 3.3 ... of the Funding Agreement within a period of 10 Business Days following receipt of a written notification from the Beneficiary that such payment is overdue.

216 Before January 14, 2009, NNUK made every payment as it fell due under the Funding Agreement. Accordingly NNL did not incur any Funding Guarantee obligations with respect to that period.

217 As a result of NNUK being under administration, the UK Plan was placed in an assessment period in accordance with chapter 3 of the 2004 Act. During the assessment period, the PPF is to determine whether the UK Plan has sufficient assets to provide the level of funding the PPF guarantees. The Board of the PPF has not yet made any decision and the assessment period has not yet terminated.

218 The Monitor contends that as a result of the assessment period continuing, no amounts are payable by NNUK under the Funding Agreement because the 2004 Act prevents any payments of contributions during the assessment period and any payments actually made are void. Section 133 of the 2004 Act provides in part:

133 Admission of new members, payment of contributions etc

(3) Except in prescribed circumstances and subject to prescribed conditions, no further contributions (other than those due to be paid before the beginning of the assessment period) may be paid towards the scheme [i.e., the UK Plan] during the assessment period.

(4) Any obligation to pay contributions towards the scheme during the assessment period ... is to be read subject to subsection (3) and section 150 (obligation to pay contributions when assessment period ends).

(10) Any action taken in contravention of this section is void.

219 The UKPC contends that the prohibition against making contributions during the assessment period provided for in section 133(3) of the 2004 Act should be construed as applying only to future current service contributions and not to contributions for past deficits. Mr. Ham said in his supplemental report of March 14, 2014 that he considered this position to be "well arguable" on the basis that the purpose of section 133(3) was to prevent further liabilities accruing in a scheme during the assessment period so as to protect the PPF, although he agreed on cross-examination that no one to his knowledge has asserted this position to date. This argument was contrary to his evidence on his deposition in which he testified in effect that neither current service contributions nor past service contributions could be paid as a result of section 133(3). He said that both of those would be revived at the end of the assessment period. His view is that the obligation to make contributions revives at the end of the assessment period if the scheme emerges from the assessment period without the PPF assuming responsibility for it.

220 The Monitor relies on a regulation made under the 2004 Act to support its interpretation of section 133(3), which exempts prescribed circumstances from the prohibition against making contributions. Regulation 14(a) made in 2005 provides an exemption for "contributions" payable to the scheme that relate to the employer's liability for a section 75 wind-up debt:

14. During an assessment period in relation to an eligible scheme, the prescribed circumstances in which further contributions may be paid to the scheme by an employer in relation to the scheme are where those contributions relate to-

(a) all or any part of that employer's liability for any debt due from him to the scheme under section 75 of the 1995 Act which has not yet been discharged;

221 Pursuant to section 75 of the *Pensions Act 1995* (UK), upon a scheme's employer suffering an insolvency event, a statutory debt is imposed on the employer in an amount equal to the scheme's funding deficit calculated on a "buy-out" basis at that date, i.e. the amount that it would cost to go into the insurance market and purchase annuities to secure the members' benefits. The scheme's actuary must issue a certificate quantifying the estimated Section 75 debt. There is no dispute that NNUK's entry into administration on January 14, 2009 qualified as an insolvency event triggering the imposition of a section 75 debt on NNUK measured as at that date. The UK Plan's actuary, Mr. Mobbs, has still not issued his formal section 75 debt certificate.

222 Mr. Ham agreed on his cross-examination that if section 133(3) prohibited only current service contributions and not contributions for past deficits, there would have been no need to specify a section 75 debt as an exception to section 133(3) and regulation 14(a) would be redundant. The UKPC acknowledges this redundancy, but says that regulations made contemporaneously with primary legislation cannot control the meaning of the legislation.

223 The Monitor refers to a case of *PNPF Trust Co. Ltd. v. Taylor* [[2010] EWHC 1573 (Eng. & Wales H.C. [T. & C.C.])], a decision of Mr. Justice Warren in which reference by Mr. Ham in argument in that case was made to a regulation under the 2004 Act as supporting his position. Justice Warren stated in para. 746 that the answer to the particular issue would depend not only on the language of the 2004 Act but also on the regulations, but he was careful to say in para.

751 that the regulations would not be determinative of the meaning of the statute although its effect was critical. I take it from all of this that under English law timely regulations reasonably contemporaneous with the legislation under which they are made can be looked at as guidance but cannot be determinative of the meaning of the legislation. I think it fair to say that regulation 14(a) is consistent with the interpretation of section 133(3) advanced by the Monitor.

224 The UKPC also contend that section 137(2) of the 2004 Act assists in their interpretation of section 133. That section gives to the Board of the PPF the powers of the Trustee during an assessment period. It states:

During the assessment period, the rights and powers of the trustees...of the scheme in relation to any debt (including any contingent debt) due to them by the employer, whether by virtue of section 75 of the Pensions Act 1995 or otherwise, are exercisable by the Board...

225 The UKPC contend that the words "or otherwise" can be explained if past service deficit contributions to be paid to a scheme remain payable notwithstanding section 133, i.e. if section 133(3) does not prevent their payment during an assessment period. I do not see why the words "or otherwise" necessarily would include past deficit amounts. It could include other payments of the kind articulated by the Monitor such as missed payments for amounts owing before the assessment period. I accept Mr. Legge's view that the words "or otherwise" is a catch-all phrase¹⁴. The section was not aimed at defining what payments may continue to be paid during an assessment period but rather to give the trustee's powers to the PPF during the assessment period over any debt owed to the trustee.

226 I was not referred to the principles of statutory construction in England, and I take it therefore that they are the same as in this country. Today in Canada there is only one principle or approach to statutory interpretation, namely, the words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the statute and the intention of Parliament. See *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21.

227 I take the plain language of section 133(3) and (4) to mean to mean in its ordinary sense that no contribution of any kind can be paid into the scheme during the assessment period. That includes both contributions for past deficits and for current funding obligations. Therefore NNUK has not been under any requirement to pay any contributions since it went into administration.

228 The UKPC contend, however, that even if payments for past deficits may not be paid during the assessment period, NNUK remains liable to pay them and that NNL is in breach of its obligations under the Funding Guarantee.

229 Section 133(3) says that no contributions may be paid during the assessment period. Mr. Ham said in his supplemental report that while a contribution payment made contrary to section 133(3) is void, the obligation to make that payment is not made void and that if the scheme emerges from an assessment period without the PPF assuming responsibility for it, the obligation will revive pursuant to section 150 of the 2004 Act. In this I think Mr. Ham is wrong so far as contributions for past deficits are concerned.

230 Apart from the fact that the odds of the PPF not assuming responsibility for the UK Plan are low indeed (the Monitor says it is clear that the PPF will assume responsibility for the plan taken the size of the deficit, said by the UK Plan actuary to be at least £2.12 billion), I do not read section 150 as saying the contribution payments not made during the assessment period will revive. Section 150(5) and (6) provide for the making of regulations dealing with benefits that could not accrue to members during the assessment period because of section 133(5) that prevented that accrual, and regulations dealing with contributions that would have been payable by an employer during the assessment period but for section 133.

231 The only regulation made under section 150 dealing with this is regulation 20 of the Pension Protection Fund (Entry Rules) Regulations 2005 being regulation SI 2005/590. That regulation applies when an assessment period comes to an end by virtue of the PPF no longer being involved in a scheme and permits a member of the scheme with active

service during the assessment period to afterwards have benefits accrue so long as the member pays the contributions for that member's period of active service during the prior assessment period. If the member pays those contributions, contributions shall also become payable to the scheme by the employer in respect of that period of the member's employment during the assessment period.

232 Thus there is no provision in section 150 or the regulations for past deficit payment contributions reviving after the assessment period ends where the PPF does not assume responsibility for the scheme.

233 Mr. Ham did not state what happens to the contribution payments not made if the UK Plan is taken over by the PPF other than to say that in his view the liability of NNUK to make the schedule of contributions is not extinguished by section 133.

234 Mr. Legge in his report said that during the assessment period, the only liability of NNUK is its section 75 liability. In his evidence, he said that the effect of the section 75 debt is to replace the employer's schedule of contributions because if that were not the case, the employer would be paying twice over as the section 75 debt payments are effectively past service contributions not paid. He also testified that while the 2004 Act does not say that the schedule of contributions are over once there is a section 75 debt, or upon the scheme entering the PPF, it would be very peculiar if the two liabilities could coexist because both relate to funding the scheme and are in substance the same thing. Because the section 75 debt is calculated on a buyout basis, it is going to be more than the schedule of contributions.

235 I understand the logic of the argument and it makes sense that two different obligations for the same amount could not be imposed on NNUK. However, the 2004 Act does not state that the contributions that cannot be paid during the assessment period cease to exist once the assessment period is over or are overtaken by the section 75 debt. Any payment by NNUK of the section 75 debt could be credited to the contributions required to be paid by NNUK, which Mr. Legge agreed was the practice, and presumably vice versa.

236 I agree with the UKPC that section 133(3) does not say that the employer, in this case NNUK, is not under any liability to make the payments. Section 133(4) says that any obligation is subject to subsection (3), i.e. the obligation to pay cannot be called upon during the assessment period. It does not say that the obligation is extinguished. Nor does section 133(10) extinguish the liability. It merely says that any action, i.e. a payment contrary to subsection (3), is void.

237 The Monitor relies on section 3.6(b) of the Funding Guarantee to say that it has no liability under the guarantee. That section provides:

3.6 No Double Recovery or Greater Recovery

(b) For the avoidance of doubt, nothing in this Agreement entitles the Beneficiary [the Trustee] to recover from the Guarantor [NNL] any amount which the Company [NNUK] is not liable to pay as part of, or for failing to perform, the Guaranteed Obligations and any limitations on the Company's liability under the Funding Agreement will equally apply to the Guarantor's liability under this Agreement.

238 I do not see this section as assisting NNL. It is aimed, as the heading says, to the quantum of recovery, and states that nothing in the agreement entitles the Trustee to recover "any amount" which NNUK is not liable to pay under the Funding Agreement. NNUK remains liable for those payments to be made under the Funding Agreement guaranteed by NNL. It is just not free to make them during the assessment period while the Board of the PPF considers whether to assume responsibility for the UK Plan.

239 The UKPC contends that an indemnity in clause 2.3 of the Funding Guarantee renders NNL liable for payment. That section states:

2.3 (a) In addition to its guarantee under Clause 2.1 (and subject at all times to Clauses 2.2 and 3.6), [NNL] indemnifies the Beneficiaries against any loss or liability properly suffered by the Beneficiaries if any of [NNL's] payment obligations under the guarantee contained in Clause 2.1 become unenforceable, invalid or illegal.

(b) The amount of the loss or liability under this indemnity will be equal to the amount the Beneficiaries would otherwise have been entitled to recover (including, but without limitation, pursuant to clause 9 had such guarantee obligations not become unenforceable, invalid or illegal (as the case may be).

(c) For the avoidance of doubt, nothing in this indemnity shall entitle the Beneficiaries to recover (i) any sum from [NNL] that relates to a Guaranteed Obligation that has ceased to exist or (ii) any amount which [NNUK] is not liable to pay as part of, or for failing to perform, the Guaranteed Obligations.

240 Clause 2.3(a) provides that NNL indemnifies the Beneficiaries against *loss suffered by the Beneficiaries* if NNL's (not NNUK's) payment obligations under the guarantee become unenforceable, invalid or illegal. "Beneficiaries" is not a defined term. "Beneficiary" is defined as Nortel Networks UK Plan Pension Trust Limited, i.e. the Trustee. NNL's payment obligations under the guarantee are to pay amounts that are to be paid by NNUK under the Funding Agreement, under which NNUK agreed in clause 3.3 to make payments in cash to the Scheme, i.e. to the pension plan. Whether the cheque would be payable to the Scheme or to the Trustee would make no difference as the money is to go to the Scheme. If those payments were not made, the Trustee would suffer no loss.

241 If NNL's payment obligations under the guarantee become unenforceable, invalid or illegal, an indemnity by NNL requiring it to pay its unenforceable obligations makes no sense. I read the reference to "Beneficiaries" in clause 2.3(a) to be to the individual members of the Trustee and clause 2.3(a) to be protection for those individual members against their personal liability should they be liable for entering into the agreements with NNL if NNL becomes not liable under its guarantee because of any unenforceability, invalidity or illegality.

242 In any event, it has not been argued that NNL's payment obligations have become unenforceable, invalid or illegal. What is at issue is whether NNL has any payment obligation in the first place. Therefore even if the interpretation put forward by the UKPC and Mr. Ham were correct and that the indemnity was another obligation by NNL to make payments into the scheme, which is not an interpretation I share, the clause would have no application.

243 In any event, I do not know what benefit the indemnity could have except perhaps to give the Trustee some right of set-off. If the obligation of NNL is unenforceable, it is unenforceable and would not give rise to a claim to enforce it.

244 The Monitor contends that the question whether NNUK may be required in the future to pay contributions after the assessment period terminates is irrelevant because the assessment period, and thus the prohibition against NNUK paying further contributions to the UK Plan, did not end before the Funding Guarantee expired on June 30, 2012. The Funding Guarantee provides that no demand may be made under it after the expiry date. Therefore the Monitor contends that NNL has no liability under the Funding Guarantee.

245 In order for NNL to be liable under the Funding Guarantee, a Trigger Event must have occurred. Clause 1.1 defines "Trigger Event" as:

[NNUK] failing to pay any amount payable by it to the Beneficiary when contractually due pursuant to the terms of clauses ... 3.3 ... of the Funding Agreement within a period of 10 Business Days following receipt of a written notification from the Beneficiary that such payment is overdue.

246 There would be no issue of NNL being liable but for the assessment period and the prohibition under section 133(3) of the 2004 Act from paying contributions. In one sense, it can be said that these contributions are not "payable...when contractually due" because section 133(3) has prohibited their payment. The question is whether that was the intent of

the guarantee. I think that other provisions of the guarantee, namely clause 2.6(g), indicate a different intent and that if the amounts were not payable because of the insolvency of NNUK, the guarantee was enforceable.

247 It is clear that the Funding Agreement and the Funding Guarantee were negotiated in 2006 against the backdrop of the 2004 Act. It is referenced throughout the Funding Agreement. A potential insolvency of NNUK and the effect of an assessment period on NNUK's obligations would have been something known to the advisors of both sides. Mr. Poos of Nortel was aware that insolvency was one of the factors that could have caused the discontinuance of funding under the Funding Agreement.

248 Clause 2.6(g) of the Funding Guarantee is at the end of a long list of a Waiver of Defences clause which contains the usual provisions that would prevent a change in the underlying obligation of the debtor from releasing the guarantor, such as an extension of time granted to the debtor, etc. Clause 2.6 provides in part:

2.6 Waiver of defences

Subject to Clauses 2.2 and 3.6, the obligations of the Guarantor under this Clause will not be affected by any act, omission or thing which, but for this provision, would reduce, release or prejudice any of its obligations under this Clause. This includes:

(g) any unenforceability, illegality, invalidity or non-provability of any Guaranteed Obligation due in any such case to the insolvency, bankruptcy, reorganisation, or liquidation of the Company.

249 The entering into administration by NNUK was an insolvency event under the 2004 Act. It is section 133 of the 2004 Act that has prevented NNUK from making the contributions called for in the Funding Agreement. By virtue of clause 2.6 of the Funding Guarantee, the obligations of NNL are not to be affected by the unenforceability of a guaranteed obligation of NNUK due to the insolvency of NNUK. That would include the unenforceability of the obligation to make contributions to the Trustee under the Funding Agreement caused by section 133(3) of the 2004 Act. If the parties had wanted to exclude that section from the clause they could have done so. Without any carve out of the effect of section 133(3) of the 2004 Act, the language of clause 2.6 must be taken to include the effects of that section and prevent those effects from reducing, releasing or prejudicing the obligations of NNL under the Funding Guarantee.

250 I conclude therefore that NNL has a liability under the Funding Guarantee.

Quantum of Funding Guarantee

251 If there is liability under the Funding Guarantee, the parties differ markedly as to what that amount is. It arises from different actuarial views of what is to be done to calculate the April 2008 deficit measured "using actuarial methods and assumptions consistent with the actuarial methods and assumptions" used by the UK Plan actuary to calculate the deficit in 2005.

252 The UK Plan actuary in 2005 was Mr. Daniel Harrison of Watson Wyatt Limited. He retired and was replaced by Mr. Neil Mobbs of the same firm. Neither gave evidence at the trial. Mr. Ronald Bowie of Hymans Robertson LLP was called as an expert actuary witness by the UKPC and Mr. Mark Stocker of Buck Consultants Limited was called as an expert actuary witness by the Monitor. Both Mr. Bowie and Mr. Stocker are highly qualified and experienced actuaries.

253 In the UK a triennial valuation of a pension scheme is required by statute to be done by the scheme's actuary and certified. That was done as at April 5, 2005 and it disclosed a deficit of £356 million. The Funding Agreement provided that the 2005 Deficit was to be paid off by NNUK in seven years by April 5, 2012. When the Funding Agreement was agreed in 2006, it was known that the next triennial valuation would have to be done as at April 5, 2008 and that the 2005 Deficit would need to be adjusted to reflect the 2008 valuation of the plan's deficit

254 NNL agreed in the Funding Guarantee to guarantee that NNUK would pay off the 2005 Deficit of £356 million over seven years and recognized that while that deficit figure would change in the 2008 valuation, it was not prepared to

guarantee the entire amount that would be disclosed by the statutory valuation in 2008 but only something representing some adjustment of the 2005 deficit.

255 The Funding Agreement therefore provided for two valuations to be carried out in 2008. The one valuation was to be a full or "deep dive" valuation provided for in clause 8.2 of the Funding Agreement and to be certified by the UK Plan actuary as provided for in the 2004 Act. Under clause 8.2 of the Funding Agreement, it was to be carried out using actuarial methods and assumptions to be agreed between NNUK and the Trustee. It was not guaranteed by NNL.

256 The other valuation was the April 2008 Deficit, which is the valuation in dispute, and which was guaranteed by NNL in the Funding Guarantee. It was provided for in clause 3.3 of the Funding Agreement. The April 2008 Deficit was to be calculated on a different basis from the valuation under clause 8.2. The April 2008 Deficit was defined as the Current Deficit which was defined as:

the Deficit [£356 million], as reduced by all contributions, other than Current Service Contributions made to the Scheme after 6 April 2005...measured as at the next Valuation using actuarial methods and assumptions consistent with the actuarial methods and assumptions used by the Actuary to calculate the Deficit.

257 That is, this deficit was to be measured using actuarial methods and assumptions consistent with the actuarial methods and assumptions used by Mr. Harrison in calculating the deficit of £356 million as at April 5, 2005.

258 The meetings between NNUK and the Trustee to agree on the actuarial methods and assumptions for the full or clause 8.2 valuation began in late November 2008 but were not concluded by the time that NNUK went into administration on January 15, 2009. Therefore there was never a completed clause 8.2 valuation.

259 Mr. Mobbs, however, had prepared three different valuations of the Current Deficit required by clause 3.3, being deficits of £479 million, £545 million and £619 million. The UKPC claim that the correct deficit is the £545 million figure which when reduced by contributions made by NNUK after April 5, 2008 comes to £491.75 million.

260 The Monitor claims that the correct deficit is £390 million which when reduced by contributions made by NNUK after April 5, 2008 comes to £339.75 million.

261 The dispute is really a dispute as to the meaning of the agreement and a dispute amongst actuaries as to what using actuarial methods and assumptions consistent with the actuarial methods and assumptions used by Mr. Harrison in 2005 means. It is a technical subject to be sure and one on which any judge would want to tread carefully. Both experts had many good points to make, supported by graphs, charts and technical terms, and the cross-examinations were little different. Mr. Bowie in his report said that the deficit in question to be measured is subject to conjecture due to being "ill defined" in the Funding Agreement. I think that to be a fair comment.

262 Mr. Bowie's evidence was that Mr. Mobbs calculations in 2008 were consistent with the methods and assumptions used by Mr. Morrison in 2005. Mr. Stocker testified that they were not. In the end, and with no disrespect to Mr. Bowie, I prefer the view of Mr. Stocker that supports the figure contended for by the Monitor. His conclusion was consistent with the conclusion of Mercers, an actuary firm retained to advise NNUK on the issue.

263 The UKPC contend that it was the UK Plan actuary who was responsible for "drawing up" the revaluation in 2008. I do not think this is correct. The UK Plan actuary was responsible under the Funding Agreement for doing and certifying the clause 8.2 valuation as required by the 2004 Act. But the Funding Agreement did not say that anyone in particular was to calculate the valuation required by the definition of Current Deficit that is now in dispute. That definition simply said that the revised deficit was to be measured by the same actuarial methods and assumptions consistent with the actuarial methods and assumptions used by Mr. Harrison in 2005.

264 Thus I do not think it can be said that there is any onus to displace what Mr. Mobbs, the UK Plan actuary in 2008, did in arriving at his three different valuations.

265 The two key assumptions affecting the calculation of a deficit are (i) financial assumptions and (ii) mortality assumptions. The financial assumptions made by Mr. Mobbs in 2008 have not been challenged by the Monitor. Mr. Stocker was asked by the Monitor to consider whether the mortality assumptions used by Mr. Mobbs in 2008 were consistent with the mortality assumptions used by Mr. Morrison in 2005. Mr. Stocker's view was that mortality assumptions used by Mr. Mobbs were not consistent with the 2005 mortality assumptions.

266 This is explained in some detail in his report and it is not necessary to describe all of that detail. In essence, Mr. Stocker said that while the financial assumptions should and were updated by Mr. Mobbs, the mortality assumptions should not have been changed.

267 He stated that there are four main factors that were commonly used in 2008 when setting a mortality assumption: (i) the underlying standard mortality table; (ii) the allowance for mortality improvements up to the valuation date (including any underpin to the assumed rate of annual improvement); (iii) the age rating to apply to the standard mortality table; and (iv) the allowance for future mortality improvements after the valuation date (including any underpin to the assumed rate of annual improvement).

268 Mr. Stocker was critical of Mr. Mobbs in that while he used the same baseline actuarial table used in 2005, his assumptions for 2008 did not simply project forward the baseline from 2005 to 2008, but rather Mr. Mobbs derived a new baseline table from analysis of the UK Plan's experience up to 2008. The disparity of the different values arrived at by Mr. Mobbs in 2008 was caused by different assumptions used by Mr. Mobbs for future mortality improvements.

269 Mr. Stocker's opinion is that many UK pension plans ask their actuary to calculate the plan's updated funding position on an actuarial basis that is consistent with the previous valuation basis. He stated that in doing so, he would update the financial assumptions such as interest rates and inflation from the previous valuation but he would use exactly the same demographic assumptions such as mortality assumptions. The reason for updating the financial assumptions is that the calculation of the plan's liabilities would need to be assessed against the current market value of the plan's assets, and so there is a need to maintain comparability between these two figures. The market value of the assets will be affected by expectations of price inflation and government bond yields, and these indicators also affect the financial assumptions used for the liability calculation.

270 Mr. Stocker's evidence in his report and on cross-examination was that it would be appropriate for the plan actuary to take into account any new developments and the plan's recent experience when doing a full valuation as required by the 2004 Act and clause 8.2 of the Funding Agreement. His view was that it would not have been typical actuarial practice to take them into account when setting a mortality assumption consistent with the 2005 valuation as required by clause 3.3 of the Funding Agreement.

271 His evidence was that a mortality assumption consistent with the 2005 valuation would have used the 2005 baseline mortality table, using the same standard table but bringing the medium cohort (a technical term) improvement projections up to 2008. This was the approach recommended by Mercers, the NNUK actuary, who estimated the resulting deficit at £390 million. Mr. Stocker agreed with that figure.

272 Mr. Bowie in his report and evidence said that Mr. Stocker had ignored the updated plan's experience from 2005 to 2008 and that it would be unusual for an actuary to adopt an assumption that he or she knew to be materially inconsistent with empirical evidence. He said that what Mr. Stocker did in choosing a mortality assumption in 2008 which disregarded the information available in 2008 could not be considered consistent with the principle of incorporating the plan membership experience established in 2005.

273 There is an important document that assists in the interpretation of the meaning of the definition of Current Deficit and the phrase "consistent with the actuarial methods and assumptions used by" the plan's auditor in 2005. That document was an interim annual review of the UK Plan done by Watson Wyatt as at April 5, 2006. The review stated

that it was an "Ongoing assessment following a consistent methodology as adopted at the previous formal investigation". That assessment updated the financial assumptions and kept the non-financial assumptions unchanged.

274 This annual review is dated June 23, 2006. It was no doubt provided to NNUK. It is a few months before the Funding Agreement of November 21, 2006 was made. I see it as a critical part of the factual matrix. It is not, as contended by the UKPC, a subjective understanding of the November 21, 2006 Funding Agreement. It is evidence of what the parties were aware of when the Funding Agreement was made. While an annual review did not normally involve an update of mortality assumptions due to the prohibitive cost, that does not detract from the fact that the parties were told by the plan actuary that a review that did not change the mortality assumptions was consistent with the 2005 valuation. I agree with the Monitor that this informs the parties understanding of what was meant by "consistent actuarial assumptions" as found in the Funding Agreement.

275 Regarding this annual review, Mr. Bowie said that it was not appropriate to look at it because the legislation makes no reference to any need for these annual update calculations to be made on a consistent methodology and assumptions as the previous valuation. That may be, but the fact of the matter is that this 2006 annual review stated expressly that it was an assessment following a consistent methodology as adopted at the previous formal investigation.

276 Mr. Bowie was of the view that what Mr. Mobbs did in 2008 with his revisions to the mortality assumptions were well within actuarial practice at the time and in line with that typically adopted for funding valuations. He referred to a chart that he had prepared which showed the mortality assumptions for the valuations prepared by Mr. Mobbs and by Mr. Stoker as compared to the life expectancy assumptions of 30 of the largest UK pension plans. He stated that Mr. Stoker's view of a consistent mortality assumption was materially out with the range used by the other plans participating in the 2008 survey. However, the valuations by the other large UK pension plans were done for normal or full valuations, not for a valuation within the dictates of clause 3.3 of the Funding Agreement.

277 There is some evidence that Mr. Mobbs was not just doing a valuation of the Current Deficit as required by clause 3.3 by attempting to determine what assumptions were consistent with the 2005 valuation, but rather was taking a cue from the Trustee to help in negotiations with NNUK. A minute of the working party of the trustees dealing with actuarial issues and Mr. Mobbs dated July 24, 2008 to discuss the work of Mr. Mobbs stated that the assumptions to be used by him had been "agreed for use" at an earlier meeting held on May 20, 2008. The result of the use of those assumptions resulted in a deficit of £479 billion. The minute stated that Mr. Davies, the chairman of the Trustee, would set up a meeting with NNUK on August 11 or 14, 2008 to discuss the results of the work of Mr. Mobbs.

278 Mr. Davies unfortunately was somewhat less than forthcoming about this minute, querying what was meant by the phrase "agreed for use". However, a further note of Mr. Mobbs dated August 5, 2008 stated again that the approach to calculating the Current Deficit was put forward by Mr. Mobbs and agreed by the Trustee at its meeting on May 20, 2008. The minute of July 24 went on and stated that the working party discussed the assumptions and which ones could be challenged by NNUK and stated that the valuation basis should be acceptable, i.e. the basis for the valuation of the deficit at £479 billion should be acceptable to NNUK. Mr. Davies however asserted that the valuation was only an interim valuation and that one could not draw from the minutes that the assumptions were what the Trustee thought was fair and would be put to NNUK.

279 The note of Mr. Mobbs of August 5, 2008 stated that it had been prepared by the Actuary and agreed by the Trustee and that it was intended to be provided to NNUK "to facilitate agreement over the application of clause 3.3 of the Funding Agreement". It went on to contain three different valuations of the Current Deficit, being £479 billion, £545 billion and £619 billion. I can only conclude from this evidence that the Trustee and Mr. Mobbs thought that the £479 billion was the right calculation and that the other two figures were put forward for negotiating purposes and did not represent what even Mr. Mobbs thought was required by clause 3.3 of the Funding Agreement.

280 All of this leaves a question as to what Mr. Mobbs was about. Why in these circumstances the UKPC say that the correct figure is the middle figure calculated by Mr. Mobbs of £545 billion is quite unclear.

281 In the end, I find that the adjusted 2005 Deficit, referred to in the Funding Agreement as the 2008 Current Deficit and to be calculated in accordance with the definition of Current Deficit, is £390 million which when reduced by contributions made by NNUK after April 5, 2008 comes to £339.75 million.

Claim on the Swift Guarantee

(a) English principles of construction of an agreement

282 The Swift Guarantee is governed by English law. The UKPC say that properly interpreted, NNL is liable under the guarantee.

283 This involves understanding English law in so far as it governs the interpretation of contracts. I will review it briefly, but can say that the law is remarkably close to Canadian common law save for a debate in English law, as yet unsettled, as to whether a mistake in an agreement can be corrected by way of interpreting the agreement rather than in an action for rectification.

284 In its recent decision in *Marley v. Rawlings*, [2014] UKSC 2 (U.K. S.C.), at para. 19 the President of the UK Supreme Court, Lord Neuberger, summarized the current state of UK law regarding contractual interpretation as follows:

19. When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any parties intentions.

285 In *Rainy Sky S.A. v. Kookmin Bank*, [2011] 1 W.L.R. 2900 (U.K. S.C.) Lord Clarke stated that the exercise of construction was a unitary exercise in which the court must consider the language used and what a knowledgeable reasonable person would have understood the parties to have meant, and if there were two possible constructions, the one consistent with business common sense could be preferred. If the language was unambiguous, the court could not rewrite it to conform to business common sense. He stated:

21. The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.

23. Where the parties have used unambiguous language, the court must apply it. This can be seen from the decision of the Court of Appeal in *Co-operative Wholesale Society Ltd v. National Westminster Bank plc*, [1995] 1 EGLR 97. The court was considering the true construction of rent review clauses in a number of different cases. The underlying result which the landlords sought in each case was the same. The court regarded it as a most improbable commercial result. Where the result, though improbable, flowed from the unambiguous language of the clause, the landlords succeeded, whereas where it did not, they failed. The court held that ordinary principles of construction applied to rent review clauses and applied the principles in *The Antaios (Antaios Compania Naviera SA v Salen Rederierna AB)* [1985] AC 191. After quoting the passage from the speech of Lord Diplock cited above, Hoffmann LJ said, at p 98:

"This robust declaration does not, however, mean that one can rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument

and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement."

286 As to the background of the contract, or the factual matrix, English law excludes evidence of negotiations and declarations of subjective intent. In *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 W.L.R. 896 (U.K. H.L.) Lord Hoffman stated:

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. ...

287 In *Chartbrook Ltd. v. Persimmon Homes Ltd.*, [2009] 1 A.C. 1101 (U.K. H.L.), it was argued that the law should be changed to permit evidence of pre-contractual negotiations. Lord Hoffman reviewed in some detail the principles of construction and concluded that the rule excluding pre-contractual negotiations should not be departed from. He stated:

41. The conclusion I would reach is that there is no clearly established case for departing from the exclusionary rule. The rule may well mean, as Lord Nicholls has argued, that parties are sometimes held bound by a contract in terms which, upon a full investigation of the course of negotiations, a reasonable observer would not have taken them to have intended. But a system which sometimes allows this to happen may be justified in the more general interest of economy and predictability in obtaining advice and adjudicating disputes. It is, after all, usually possible to avoid surprises by carefully reading the documents before signing them and there are the safety nets of rectification and estoppel by convention...

41. The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it.

288 There were other statements made by Lord Hoffman in *Chartbrook* which have given rise to the debate as to whether a mistake can be corrected in English law by construing the agreement without a rectification action. The comments were *obiter* as rectification was ordered. What Lord Hoffman said was:

22. In *East v Pantiles (Plant Hire) Ltd* (1981) 263 EG 61 Brightman J stated the conditions for what he called "correction of mistakes by construction":

"Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction."

23. Subject to two qualifications, both of which are explained by Carnwath LJ in his admirable judgment in *KPMG LLP v Network Rail Infrastructure Ltd* [2007] Bus LR 1336, I would accept this statement, which is in my opinion no more than an expression of the common sense view that we do not readily accept that people have made mistakes in

formal documents. The first qualification is that "correction of mistakes by construction" is not a separate branch of the law, a summary version of an action for rectification. As Carnwath LJ said (at p. 1351, para 50):

"Both in the judgment, and in the arguments before us, there was a tendency to deal separately with correction of mistakes and construing the paragraph 'as it stands', as though they were distinct exercises. In my view, they are simply aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended."

24. The second qualification concerns the words "on the face of the instrument". I agree with Carnwath LJ (at pp 1350-1351) that in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.

25. What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion, both of these requirements are satisfied.

289 In *Marley v. Rawlings*, *supra*, another rectification case, Lord Neuberger took up the debate as to whether it was possible to correct a mistake by construction of the document. He said it was not necessary to decide "this difficult point", as follows:

36. This contention raises a point of some potential importance and difficulty. In *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912H-913E, Lord Hoffmann set out the principles which the court should apply when interpreting documents in five propositions. Most of the content of that passage is unexceptionable, although, in one or two places, the language in which the propositions are expressed may be a little extravagant; thus, the words "absolutely anything" in his second proposition required some qualification from Lord Hoffmann in *Bank of Credit and Commerce*, para 39.

37. However, the second sentence of Lord Hoffmann's fifth proposition in *Investors Compensation* is controversial. That sentence reads, so far as relevant, "...if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had".

38. Lord Hoffmann took that approach a little further in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, paras 21-25. Having observed that the exercise of interpretation involves "decid[ing] what a reasonable person would have understood the parties to have meant by using the language which they did" and referring to the "correction of mistakes by construction", he said this:

"[T]here is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant."

39. In a forcefully expressed article, "*Construction and Rectification after Chartbrook* [2010] CLJ 253, Sir Richard Buxton has suggested that Lord Hoffmann's approach to interpretation in these two cases is inconsistent with previously established principles. Lewison on *The Interpretation of Contracts* (fifth ed (2011), para 9.03, footnote 67, in an illuminating chapter dealing with mistakes) suggests that Sir Richard has made out "a powerful case for the conclusion that the difference between construction and rectification has reduced almost to vanishing point", if Lord Hoffmann's analysis is correct.

40. At first sight, it might seem to be a rather dry question whether a particular approach is one of interpretation or rectification. However, it is by no means simply an academic issue of categorisation. If it is a question of

interpretation, then the document in question has, and has always had, the meaning and effect as determined by the court, and that is the end of the matter. On the other hand, if it is a question of rectification, then the document, as rectified, has a different meaning from that which it appears to have on its face, and the court would have jurisdiction to refuse rectification or to grant it on terms (eg if there had been delay, change of position, or third party reliance). This point is made good in relation to wills by the provisions of section 20(2) and (3).

41. In my judgment, unless it is necessary to decide this difficult point, we should not do so on this appeal. Interpretation was not the basis upon which the courts below decided this case and it was not the ground upon which Mr Ham primarily relied. Furthermore, and no doubt because of those points, only limited argument was directed to the issue of whether the issue was one of interpretation or of rectification. For the reasons developed below, I consider that this appeal succeeds on the ground of rectification, so I shall proceed on the basis that it fails on interpretation.

290 Before leaving this analysis of English law, it should be noted that Lord Hoffman in *Chartbrook* emphasized that English courts do not easily conclude that a mistake was made in an agreement. He stated:

14. It is agreed that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The House emphasised that "we do not easily accept that people have made linguistic mistakes, particularly in formal documents" ... but said that in some cases the context and background drove a court to the conclusion that "something must have gone wrong with the language". In such a case, the law did not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had.

15. It clearly requires a strong case to persuade the court that something must have gone wrong with the language and the judge and the majority of the Court of Appeal did not think that such a case had been made out...

(b) Analysis

291 With these principles in mind, I turn to the construction to be given to the Swift Guarantee. No claim in rectification has been made by the UKPC.

292 The Swift Guarantee by NNL arose because the Trustee of the UK Plan was concerned that if NNL failed sometime after the Project Swift transaction, the consideration received by NNUK, being the subsidiaries transferred to it, would probably not be worth the amount that the loan from NNUK to NNL was being reduced by the Project Swift transaction. Ultimately a guarantee in the amount of USD\$150 million was signed by NNL in favour of the Trustee.

293 The language of the Swift Guarantee is important. The obligation of NNL is to arise upon or after the date of the occurrence of an "insolvency event", defined to be:

Insolvency Event means,

- (a) a court making a winding up order or an order for the dissolution or liquidation of [NNUK];
- (b) [NNUK] being dissolved by virtue of or pursuant to any statutory provision or otherwise; or
- (c) [NNUK] passing a resolution for its winding up

following and as a consequence of which the Scheme commences winding up without, for the avoidance of doubt, another body corporate whether before, in contemplation of or after the occurrence of such an event entering into an agreement with the [Trustee] and [NNUK] or its liquidator to perform the obligations of [NNUK] under the Scheme.

294 The Monitor contends that none of these conditions have been met. It says that NNUK has entered into administration which is not covered by (a) as a court order for winding-up or dissolution or liquidation of NNUK is different from voluntary administration. Nor has the Scheme commenced winding-up following and as a consequence of any of (a), (b) or (c).

295 The UKPC contend that the clear commercial purpose of the Swift Guarantee was to protect the UK Plan in the event that NNUK entered an insolvency process because the Trustee had been warned by its advisors that the UK Plan would be worse off in such a scenario after the Project Swift transaction than it had been before the transaction. The UKPC rely on a statement of Mr. Ham, their expert on English law, that as a matter of English insolvency law and practice, it is much more common for insolvent companies to go into administration first rather than to go directly into liquidation.¹⁵ Accepting that and taking it as part of the factual matrix that would be known to the parties or their legal advisors, it is still necessary to construe the Swift Guarantee to discern what was intended by it.

296 The UKPC contend as an alternative to their primary argument that the words "or administration" should simply be read into paragraph (a) of the definition of "Insolvency Event" so that it reads as follows, with the consequence that an administration of NNUK would trigger an "Insolvency Event":

"(a) a court making a winding up order or an order for the dissolution or liquidation or administration of [NNUK];

...

following and as a consequence of which the Scheme commences winding up..."

297 It is said that this addition of the word administration into the definition can be by way of implication or as a correction of an obvious error given the unitary nature of the exercise of construction under English law. I see no basis to imply that the word "administration" should be added to the clause. I was provided with no English law as to the test to imply a term in an agreement and assume the test is the same as that in our common law. The evidence does not permit it to be said that "it goes without saying" that the word should be added or that the addition of the word is necessary to give business efficacy to the guarantee. Nor do I see the evidence as revealing that something clearly has gone wrong with the language used, even assuming as a matter of English law that a mistake can be rectified by construction rather than by rectification.

298 The UKPC rely on an internal e-mail sent by Mr. Simon Freemantle, an employee of NNUK, to a number of Nortel personnel on December 17, 2007, including Mr. Michael McCorkle, the interim treasurer of NNL. Mr. Freemantle was negotiating the Swift Guarantee with Mr. Davies, the then Chair of the Trustee. In his e-mail, Mr. Freemantle stated:

Good news this morning. The Trustee Chair called and after a brief discussion we have agreed on a \$150m NNL guarantee which kicks in upon NNUK Administration — actual wording now to be agreed between the lawyers but David and I have agreed in principle.

299 Three days earlier, Mr. Freemantle had reported internally that the matter in dispute was that the Trustee had wanted the guarantee to be for \$600 million and he had told Mr. Davies in a difficult call that he could not agree to any more than \$150 million.

300 Mr. Davies said in his evidence that the dispute three days earlier was between the Trustee wanting a guarantee for \$600 million and Mr. Freemantle saying that the guarantee should be limited to \$100 million. He said he was authorized to agree to \$150 million if Mr. Freemantle would agree to that figure. He recalled the conversation with Mr. Freemantle three days later on December 17, 2007 referred to in the e-mail. He testified that it wasn't a particularly long call, that he wasn't sure who made the first move as it involved negotiations and that they agreed at \$150 million. He said that they did not discuss any particular type of insolvency proceedings and that at all stages they just talked generally about insolvency.

301 It is highly questionable whether the e-mail or Mr. Davies' evidence is admissible under English law. It is evidence of negotiations that preceded the written guarantee. Even if the evidence is admissible, it does not seem to make things clear. Mr. Freemantle used the word "Administration". Mr. Davies says that they just talked generally about insolvency. In light of the fact that the call was to discuss the different positions on the size of the guarantee, it is unlikely that they got into a discussion of what insolvency events were to be covered in the guarantee.

302 Moreover, Mr. Freemantle's e-mail stated that the actual wording was to be agreed between the lawyers. That suggests that there was no discussion with Mr. Davies about what the wording was to be. Also, the wording of the guarantee was then negotiated between the lawyers after the negotiations between Mr. Freemantle and Mr. Davies.

303 The Monitor relies on an internal Nortel e-mail between Nortel lawyers regarding the form of the Swift Guarantee after it had been settled between the lawyers acting for the Trustee and NNUK. The e-mail stated:

Bill, you will see the final language when we send the draft of the guarantee through, but in the meantime, and hopefully to provide some reassurance for Gordon, the definition of an insolvency event in the guarantee is limited. The trigger event is the liquidation or dissolution of NNUK. The liquidation of NNUK may be compulsory by way of court order (following petition from NNUK creditors) or voluntary by way of resolution of NNUK's shareholders i.e. NNL. As drafted and agreed, the guarantee does not include more protective forms of insolvency such as voluntary arrangements, receiverships or administrations.

The draft has been agreed in principle by the lawyers, Pinsents are now awaiting authorisation from the Trustees to confirm their agreement.

304 This e-mail contains evidence of the subjective intention of Nortel lawyers, to whom it was left to draft the guarantee, and in my view it is not admissible as evidence of what the Swift Guarantee should be taken to mean. It is, however, admissible in so far as the argument of UKPC is concerned that something clearly went wrong with the drafting of the guarantee. If this were a rectification case, the evidence would be admissible in an attempt to establish the intention of one side of the agreement. UKPC say that the English way to interpret the guarantee is an approach that permits the guarantee to be rectified by way of interpretation as discussed by Lord Hoffman in *Charterhouse*. The evidence was that the drafting of the guarantee was to be left to the lawyers, and this e-mail is considerable evidence that from the point of view of NNUK that if the interpretation of the guarantee contended for by the Monitor is correct, there was no error in the drafting.

305 There is other evidence that the drafting was not in error if it has the meaning that the Monitor contends it has. Mr. Michael McCorkle, the interim treasurer of NNL, was involved in the Swift Guarantee process and was responsible for ensuring that the guarantee was acceptable to Nortel's treasury department. Mr. Freemantle who was negotiating the guarantee with the Trustee reported to him. Mr. McCorkle's evidence was that the thing he had in mind regarding the negotiations was that the guarantee would not alarm rating agencies or cause problems with Nortel's existing financiers and future access to capital markets. He said that he was only willing to recommend a guarantee upon an ultimate wind-up or bankruptcy of NNUK, and not something potentially less terminal, such as administration proceedings.

306 Mr. David Davies, the chairman of the Trustee at the time, reviewed the final wording of the guarantee. He testified that he must have been satisfied that it was not mistaken and that it reflected the intention of the transaction.

307 I would not add the words "or administration" to paragraph (a) of the definition of Insolvency Event on the basis that something went wrong with the drafting. The evidence does not support such a conclusion.

308 The UKPC's primary argument is that the correct approach to the construction of the definition of insolvency event is that the order made by the English court placing NNUK into administration is "an order for the liquidation" of NNUK because as a result of the administration order NNUK's business has been liquidated.

309 Paragraph (a) in the definition of insolvency event includes both a winding up order and an order for liquidation. UKPC says that when referring to liquidation in the legal sense, one refers to a winding up order rather than an "order for liquidation". Therefore the UKPC contends that the words "order for liquidation" must mean something different from or at the very least are broader than the words "a winding up order". While I do not think either expert on English law said that expressly, it would seem to make sense as an order for winding up a company is an order to liquidate. So the reference in the paragraph to an order for liquidation might well encompass an order other than a winding up order. An example perhaps of an order for liquidation could be in a receivership after a receiver had been appointed in which a court authorized the receiver to liquidate the assets.

310 The question in this case is whether it can be said that an order appointing an administrator was "an order for liquidation". When NNUK went into administration at the same time that the CCAA and chapter 11 proceeding were commenced in Canada and the United States, the intention was not to liquidate but rather try to restructure the business. The administration order was not initially made for the purposes of liquidation. However, NNUK has now been liquidated and all of its assets have been sold. That this was to happen was clear from at least June 2009 so far as the whole Nortel Group is concerned.

311 An administrator under English law must perform his functions with a cascade of objectives, including liquidating the assets if in the best interests of the creditors. This was discussed by Lord Justice Rimer in [Key2Law \(Surrey\) LLP v. De'Antiquis](#), [2011] EWCA Civ 1567 (Eng. & Wales C.A. (Civil)) in which he reviewed the regime for administration of companies in England. In particular, he reviewed Schedule B1 to the *Insolvency Act 1996* (UK) c. 45 and section 3 which deal with the duties of an administrator. It provides:

3. (1) The administrator of a company must perform his functions with the objective of-

- (a) rescuing the company as a going concern, or
- (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
- (c) realising property in order to make a distribution to one or more secured or preferential creditors.

(2) Subject to sub-paragraph (4), the administrator of a company must perform his functions in the interests of the company's creditors as a whole.

(3) The administrator must perform his functions with the objective specified in sub-paragraph (1)(a) unless he thinks either-

- (a) that it is not reasonably practicable to achieve that objective, or
- (b) that the objective specified in sub-paragraph (1)(b) would achieve a better result for the company's creditors as a whole.

(4) The administrator may perform his functions with the objective specified in sub-paragraph (1)(c) only if-

- (a) he thinks that it is not reasonably practicable to achieve either of the objectives specified in sub-paragraph 1(a) and (b), and
- (b) he does not unnecessarily harm the interests of the creditors of the company as a whole.

312 Rimer LJ concluded that the primary objective of an administration is the rescue of the company as a going concern, although often that is not possible. In a high proportion of cases it is recognized before and after the appointment of the administrator that the rescue of a company is not practicable and the business is sold, in whole or in parts. He stated:

It can therefore perhaps be said that the primary objective of an administration appointment is the rescuing of the company as a going concern, an objective which has in mind the saving of the company's undertaking, or a substantial part of it, and in due course the return of the company to its management. This might in some cases require the use of a company voluntary arrangement or a scheme of arrangement. Accepting the existence of such objective, it must also be recognised that in practice a high proportion of appointments of administrators have been and will be made in cases in which it is apparent both before and after the appointment that a rescue of the company in this sense is not reasonably practicable and that the alternative objective that is foreseen as being achievable is the paragraph 3(1)(b) objective. The achievement of that objective will usually involve the sale of the company's business and undertaking, either in whole or in parts. Moreover, this objective must be pursued even if a rescue of the company is perceived as practicable but the administrator nevertheless thinks that the paragraph 3(1)(b) objective would achieve a better result for the company's creditors as a whole.

313 See also *Kaupthing Singer & Friedlander Ltd. (In Administration)*, Re, [2010] EWHC 316 (Eng. & Wales H.C. [T. & C.C.]) at para. 17.

314 Thus the appointment of an administrator can lead to the liquidation of the company. Could the reference to an order for liquidation in subsection (a) of the definition of Insolvency Event include an order appointing an administrator? In my view it could and should, for the following reasons.

315 The commercial reality is that NNL did not want to be called upon under the guarantee if NNUK survived or went through some insolvency process that did not end up in liquidation. Mr. McCorkle said that he was only willing to recommend a guarantee upon an ultimate wind-up or bankruptcy of NNUK. Mr. Gordon Davies, a very senior legal officer in Nortel responsible for obtaining the approval for the guarantee from the board of NNL, thought that the guarantee should not apply if the UK Plan was sold to a third party. He understood that the trigger for the guarantee was limited to liquidation or dissolution.

316 The concluding language of the definition of an Insolvency Event in the guarantee was protection against NNL being called on the guarantee if the pension plan were taken over by someone else. It provides:

without, for the avoidance of doubt, another body corporate whether before, in contemplation of or after the occurrence of such an event entering into an agreement with the [Trustee] and [NNUK] or its liquidator to perform the obligations of [NNUK] under the Scheme.

317 The concern not to run into problems with covenants in other loan agreements made by Nortel was met by not having the word "administration" in the definition of Insolvency Event. But the commercial reality is that what Nortel was prepared to agree to in order to be liable on the guarantee has come to pass. There has been a liquidation of the assets.

318 I have been referred to various English cases dealing with the interpretation of insolvency type clauses in legislation or commercial contracts. Each case of course depends on its facts, none of which are akin to this case.

319 In *Key2Law*, *supra*, a regulation with the words "bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor" was held not to include administration proceedings. Whether "with a view to liquidation" is different from "an order for liquidation" is perhaps debatable. I side with Lord Justice Rimer who in that case referred to the interpretation of the language sufficiently challenging as to lead to despondency if not despair. I think the same can be said of the Swift Guarantee.¹⁶

320 In *Kaupthing Singer & Friedlander Ltd. (In Administration)*, *supra*, the phrase "the rights and claims of the Bondholders will, in the event of the winding up of the Issuer, be subordinated" was interpreted to cover a liquidation under an administration order. The issue was whether the words "winding up" meant only a voluntary or compulsory liquidation. Justice Blair referred to a recent statement by Lord Steyn that there has been a shift from literal methods of interpretation towards a more commercial approach, that the standard of the reasonable commercial person is hostile to

technical interpretations and undue emphasis on niceties of language and that the tendency should therefore generally speaking be against literalism. He concluded that the commercial intent was that the bonds were to be subordinated in the event that the company had insufficient assets to pay its creditors, which was the result from the liquidation of its assets while under administration. He concluded that it must have been the intention of the parties that in such a process, the claims of the Bondholders would be subordinated in the same manner as would have been the case in the winding up of a company by way of voluntary or compulsory liquidation. A distinguishing fact is that in this case that the definition of insolvency includes detailed provisions as to what is included, whereas in *Kaupthing*, that was not the case.

321 Taking into account the commercial purpose of the Swift Guarantee and the statement of Lord Clarke in *Rainy Sky S.A.* that language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement, I conclude that the words "order for liquidation" in the definition of Insolvency Event in the Swift Guarantee cover an order for administration under which a liquidation of the assets of NNUK has occurred. If a liquidation did not occur, an administration order would not be an insolvency event.

322 An Insolvency Event as defined means an order for liquidation "following and as a consequence of which the Scheme commences winding up".

323 The Monitor contends that even if a liquidation order could encompass an insolvency order under the Swift Guarantee, there still has been no Insolvency Event because the Scheme has not commenced winding up and did not do so before the expiry date of the Swift Guarantee of June 30, 2012.

324 It is clear that the UK Plan will be wound up. On February 2, 2009 the administrators of NNUK gave notice to the Regulator and to the PPF under section 122 of the 2004 Act that after a review of the activities of the business, it was considered that a scheme rescue was unlikely. On April 30, 2009 the Board of the PPF advised the administrators that the notice given by them became binding on April 27, 2009. As a result, under section 161(2) of the 2004 Act, if the Board of the PPF assumes responsibility for the UK Plan, the scheme will be treated as having been wound up immediately afterwards. If the Board of the PPF does not assume responsibility for the UK Plan, under section 154(1) of the 2004 Act the scheme must be wound up.

325 The UKPC contend that there can only be one insolvency event, as is stated by the words "Insolvency Event", rather than two events. What is required for an Insolvency Event to have occurred is that: (a) one of the "events" listed in paragraphs (a)-(c) of the definition has occurred, and (b) at some point "following and as a consequence" of that, the UK Plan will enter winding up, even if it has yet to do so. Thus the UKPC say that the insolvency event, the order for liquidation, occurred before the expiry date of June 30, 2012.

326 The UKPC also say that it would make no commercial sense for the parties to have required the wind up of the UK Plan by a certain date as it is out of the hands of NNUK and the Trustee. It is dependent on the decision of the Board of the PPF as to when to decide whether to assume the liabilities of the UK Plan.

327 I accept the position of the UKPC. It is an interpretation open on the language used in the definition of Insolvency Event and makes commercial sense. The fact that the wind up of the UK Plan has not yet occurred makes no difference to the liability of NNL.

328 The Monitor contends that before there can be liability on the Swift Guarantee, a demand must be made and that an actuarial certificate is required before that can be done. This contention arises from clause 3 of the Swift Guarantee. Clause 3.1(a) provides that after an Insolvency Event occurs, the Trustee shall forthwith instruct the plan actuary to calculate the "Buy Out Deficit" and produce a certificate that certifies the Buy Out Deficit in writing. The Buy Out Deficit is defined as the difference between the Schemes' liabilities and assets. This amount is needed because the amount guaranteed is the lesser of US\$150 million and the Schemes' Buy Out Deficit less certain amounts.

329 Clause 3.1(d)(i) provides that a demand may only be issued once the actuary's certificate has been provided to NNL, as follows:

3.1(d) Following the occurrence of the Insolvency Event, the Beneficiary may issue a Demand once:

(i) the Actuary's Certificate has been provided to the Guarantor in accordance with Clause 3.1(b);

330 The UKPC says that it has been known for years that the section 75 Debt dwarfs US\$150 million. Therefore the claim filed by UKPC made clear that NNL's liability under the Swift Guarantee was obviously US\$150 million and that it would be absurd to defeat the claim because the actuary's certificate has not yet certified the section 75 Debt.

331 In this case, the UKPC filed a proof of claim on September 30, 2009. While they could have moved for a lifting of the stay of proceedings to serve a demand but did not do so, I accept their argument that filing of a proof of claim was a method of demanding under the guarantee. The question is therefore whether the demand was premature. In my view, it was premature as there had not been an actuary's certificate. That is a requirement of clause 3.1 of the Swift guarantee before a demand can be made. Why that has not happened is a matter of debate in this case. However, there is no basis advanced that would permit that requirement to be overlooked. It is a condition precedent to a demand being made and it is of no fault of NNUK or NNL that the actuary's certificate had not been provided.

332 The UKPC contend that clause 3.1(d) that states that a demand may be issued once the actuary's certificate had been provided to the guarantor is permissive and is directed to a situation in which the guaranteed obligation is in doubt and needs to be established. They contend that the guarantee does not provide that no demand may be issued in other circumstances where there is no doubt as to the amount of the guaranteed obligation.

333 I cannot read the guarantee in that way. Clause 3.1 provides for the establishment of the guaranteed obligation and first requires in (a) that upon an Insolvency Event, the Trustee shall forthwith instruct the actuary to calculate the buyout deficit, and it acknowledges that it may take several months for the actuary to complete the relevant calculations. Clause 3.1(b) then provides for the actuarial report to be provided to the guarantor who under clause 3.1(c) may have questions. Clause 3.1(d) then provides that the Trustee may issue a demand once the actuary's certificate has been provided to the guarantor under clause (b).

334 Clause 3.2 then provides that any payment due from the guarantor shall be due within 10 days following the service of "a Demand under this Agreement" on the guarantor. The only provision for a demand in the agreement is the demand referred to in clause 3.1(d). It is not possible to read any other potential for a demand into the agreement. Without such a demand after the actuary's certificate, there is no method in the guarantee to establish what the guaranteed amount is or when it is due.

335 No further demand either in the form of a demand or the filing of a proof of claim was made before the expiry date of the Swift Guarantee of June 30, 2012.

336 The UKPC make an alternative argument regarding the Swift Guarantee. They contend that if an administration is not an Insolvency Event, a wind up order would be, and as a wind up on NNUK is inevitable, there is a contingent claim for US\$150 million that at the date of filing under the CCAA on January 12, 2009 was clearly not too remote or speculative to be recognized as a valid claim.

337 The Monitor says that this cannot be the case because the Swift Guarantee expired on June 30, 2012 and thus there is no future event which can impact the claim. I note that the UKPC acknowledged in their reply brief at page 122 that an Insolvency Event must happen before the expiry date and that if it does not the guarantee will not apply. That being the case, I accept the position of the Monitor that there cannot be a contingency claim on the basis of some future wind up of NNUK.

338 I accept the argument of the Monitor that the demand was premature because there was no actuarial certificate at the time of the demand and that as there was no other demand before the Swift Guarantee expired, there can be no liability of NNL under it. In the circumstances I see no result but that the Monitor's disallowance of the claim on the Swift Guarantee must be upheld.

Rule in Ex Parte James

339 The UKPC contend that if either the Funding Guarantee or the Swift Guarantee is held to be unenforceable, they should nevertheless be accepted as valid claims by virtue of the rule in *Condon, Re*. The rule is directed to a court officer acting in an inequitable way. It derives from the case of *Condon, Re* (1874), 9 Ch. App. 609 (Eng. Ch. App.).

340 In *Condon, Re*, an execution creditor had realized on his execution prior to the bankruptcy of the debtor. Under threat of legal proceedings he paid the proceeds of the execution to the trustee in bankruptcy, mistakenly believing that the trustee was legally entitled to demand them. Later, the execution creditor sued the trustee in bankruptcy for the return of the sum paid and was met with the defence that the money, having been paid under a mistake of law, was irrecoverable. This defence was rejected by the English Court of Appeal for the reasons given by James L.J. at p. 614:

With regard to the other point, that the money was voluntarily paid to the trustee under a mistake of law, and not of fact, I think that the principle that money paid under a mistake of law cannot be recovered must not be pressed too far, and there are several cases in which the Court of Chancery has held itself not bound strictly by it. I am of opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The Court, then, finding that he has in his hands money which in equity belongs to someone else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people.

341 In my view, the rule in *Condon, Re* has no application in this case.

342 First, it is directed to a court officer acting as such. In this case the Monitor is acting under the "super monitor" order of October 3, 2012 in which the Monitor was authorized to exercise any powers which may be exercised by a board of directors of any of the applicants, which includes NNC and NNL. If NNL were still able to act and defend its interests, as is the usual situation in a CCAA proceeding, it would be quite open to NNL to defend the claims on the guarantees by arguing that there was no liability under them. I see no reason why the Monitor in this case cannot advance these defences in its capacity as acting in the place of the board of directors of NNL.

343 Second, the rule prevents a trustee in bankruptcy, as an officer of the court, from claiming or retaining money or property in circumstances where it is inequitable for it to do so. See *Appleby Estates Ltd., Re* (1984), 53 C.B.R. (N.S.) 10 (Ont. C.A.) at para 18. In *M.C.C. Precision Products Ltd., Re*, [1972] 2 O.R. 825 (Ont. S.C.) at paras. 31, 33, Houlden J. (as he then was) stated that: "[...] I do not think that the rule in *Condon, Re* [*Ex parte James*] has ever been applied to a situation where the trustee has not received property or is asserting a claim to property, which is claimed by some other person..."

344 As in those cases, this is not a situation in which the Monitor has received property or is asserting a claim to property. This is not a case in which NNL has been enriched by NNUK assets that are to be distributed to its creditors, such as in *Sefel Geophysical Ltd., Re* (1988), 70 C.B.R. (N.S.) 97 (Alta. Q.B.). Nothing has come into the hands of the Monitor to enrich it and thus the rule has no application. See Houlden, Morawetz and Sarra 2013-2014 *Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell) at F§73.

345 Third, if the Trustee of the UK Plan has no valid claim under one of the guarantees, the rule in *Condon, Re* could not operate to make the claim valid. That is not the purpose of the rule and there would be no inequity in the Monitor on behalf of NNL defending the claim.

346 I have held that the Swift Guarantee is unenforceable because of its terms. I would not make the claim under it valid by virtue of the rule in *Condon, Re*.

Oppression

347 The UKPC claim in oppression against NNL under section 241 of the Canada Business Corporations Act. They raise a number of matters which they say constituted an unfair disregard of the interests of the Trustee, a creditor of NNL under the Funding Guarantee and the Swift Guarantee.

(a) Standing to be a complainant

348 The Monitor says that the UKPC has no standing to be a complainant. A complainant is defined in section 238 of the CBCA to mean:

- (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
- (b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
- (c) the Director, or
- (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

349 I see no basis for the Board of the PPF to be a complainant. The Trustee is a creditor of NNL and asserts that it should be recognized as a complainant. It is well established that a creditor may be a complainant. It is a discretionary matter under (d) as to whether in any case a creditor can be a proper person to make an application under the CBCA. See *People's Department Stores Ltd. (1992) Inc., Re*, [2004] 3 S.C.R. 461 (S.C.C.), at paras 48 - 51.

350 The difficulty in this case in recognizing the Trustee as a complainant is that the Trustee is not complaining that the affairs of NNL, of which it is a creditor, have been disregarded. It complains that the affairs of NNUK have been disregarded. NNUK is wholly owned by NNL and is thus an affiliate of NNL. However, I have not been provided with any case that has recognized a valid complaint by a creditor or security holder of a CBCA corporation because of oppressive conduct that has affected only an associated corporation that is not the CBCA corporation of which the complainant is a stakeholder.

351 Section 241 of the CBCA provides:

241. (1) A complainant may apply to a court for an order under this section.

(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

- (a) any act or omission of the corporation or any of its affiliates effects a result,
- (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
- (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

352 There is authority that at least in so far as a corporation governed by the Ontario Business Corporation Act is concerned, the oppressive conduct must affect the OBCA corporation in which the complainant is a stakeholder. In *PMSM Investments Ltd. v. Bureau* (1995), 25 O.R. (3d) 586 (Ont. Gen. Div. [Commercial List]), Farley J. held that the oppression in question must affect the interests of the complainant in the OBCA corporation and not in an affiliate of the OBCA corporation. He stated:

It would seem to me that the meaning of this section is clear in that while the activities of affiliates (OBCA or non-OBCA companies) of the corporation (an OBCA company) may be taken into account to see if there has been inappropriate behaviour, it must be such behaviour as affects (is oppressive or unfairly prejudicial to or that unfairly disregards) "the interests of any security holder, creditor, director or officer of the corporation [OBCA company]". That is, what is affected inappropriately must be the interests of those persons *qua* their interests specifically in the OBCA company in question.

353 See also Kevin Patrick McGuinness, *Canadian Business Corporations Law*, 2nd ed. (Markham: LexisNexis Canada, 2007) at para. 13.84.

354 The UKPC point to a difference in the language of the OBCA and the CBCA. The OBCA, which was the statute dealt with by Farley J. in *PMSM Investments*, contains the words "that is oppressive of the interests of a....creditor...of the corporation", whereas the words "of the corporation" are not contained in the language of section 141(2) of the CBCA. Section 248(2) of the OBCA provides:

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

(Underlining added)

355 I see the reference to "any security holder, creditor, director or officer of the corporation" in section 248(2) of the OBCA as descriptive of the persons to be protected rather than as descriptive of the interests of such persons to be protected. In that regard I differ a little from Farley J. in *PMSM Investments* who seems to have concluded solely from the words "of the corporation" that what is affected must be the interests of those persons *qua* their interests specifically in the OBCA corporation in question. I agree with his conclusion that the interests that must be affected are the interests of those persons *qua* the OBCA corporation in which they are a stakeholder, but I would not base it on existence of the words "of the corporation". The section refers to the interests of a security holder etc. of the corporation, not to the interests of a security holder in the corporation.

356 I agree with the result of the decision of Farley J. in *PMSM Investments*. The reason has to do with our basic corporate governance principles. For both CBCA and OBCA corporations, the directors and officers owe fiduciary duties to the corporation for which they are directors or officers. See *People's Department Stores Ltd. (1992) Inc., Re* at paras 34 and 35. See also *BCE Inc., Re*, [2008] 3 S.C.R. 560 (S.C.C.) at para. 36. They owe their fiduciary duty to the corporation and only the corporation. See *BCE* at para. 66.

357 For that reason, if the directors or officers of a corporation cause the corporation to act in an oppressive manner that harms the corporation and affects the interests of the stakeholders in that corporation, there are statutory remedies, such as the bringing of a derivative action in the name of the corporation to remedy the harm caused to the corporation, or the bringing of an oppression remedy to give relief to a complainant necessary as a result of the harm caused to the complainant. So far as reasonable expectations that are at the heart of the oppression remedy are concerned, the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation. See [BCE](#) at para. 66.

358 Does the absence of the words "of the corporation" in section 241(2) of the CBCA make a difference from the result of the jurisprudence under section 248(2) of the OBCA? In this case I think not. The purpose of both sections is the same, to prevent harm to a corporation governed by the legislation and to give a remedy to stakeholders in the corporation for the harm done to that corporation. The purpose of the oppression remedy is to protect complainants from prejudicial acts that affect the corporation in which they are a shareholder, creditor etc.

359 The UKPC rely on the case of *Manufacturers Life Insurance Co. v. AFG Industries Ltd.* (2008), 44 B.L.R. (4th) 277 (Ont. S.C.J.) at para. 24. I do not see that it assists the UKPC. In that case, the actions of the defendant, a US corporation which was the parent of the Canadian corporation, detrimentally affected the assets of the Canadian corporation to the detriment of the complainant who was a creditor of the Canadian corporation. The complainant was not arguing that the assets of the US corporation were detrimentally affected by the actions of the Canadian corporation.

360 To hold in this case that NNL was responsible under section 141(2) of the CBCA for actions that did not affect the interests of NNL but of NNUK would mean that NNL had a duty to look after the interests of NNUK. That however, is not our law. A shareholder holds no duty to a corporation to act in the best interests of the corporation. Their interests may well conflict.

361 If a corporation has a subsidiary, the directors of the parent corporation in the exercise of their fiduciary duties to the corporation must consider how the subsidiary can benefit the interests of the parent corporation. What is done with the subsidiary may be in the best interests of both the parent and the subsidiary, or it may not be. But the duties of the directors and officers of the parent are to the parent, not to the subsidiary. Likewise, the duties of the directors of the subsidiary are to the subsidiary and not to the parent. See *Scottish Co-operative Wholesale Society Ltd. v. Meyer* (1958), [1959] A.C. 324 (U.K. H.L.). See also *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Gen. Div.), per Farley J.

362 This is not a case such as *Scottish Co-operative Wholesale Society Ltd. v. Meyer* in which the nominees of the majority shareholder on the board of the subsidiary, who were also directors of the majority shareholder, failed to consider the interests of the subsidiary and instead just did the bidding of the majority shareholder that had nominated them. I recognize an argument under our oppression provisions governing a CBCA corporation that if a majority shareholder of a subsidiary participated through its nominees in those nominees breaching their fiduciary duties to the subsidiary, there may be some responsibility on the majority shareholder as there was in *Scottish Co-operative Wholesale Society Ltd. v. Meyer*. However I need not determine that question.

363 In this case, NNUK had its own distinct board of directors advised by independent solicitors, auditors and financial advisors. The board of NNUK owed fiduciary duties to NNUK and the directors understood that as is clear from the affidavits of Peter Currie, the CFO of NNC and NNL who was a director of NNUK and of Gordon Davies, a very senior legal officer who held various positions in the Nortel organization in Europe and in Canada. The NNUK had senior people on its board and I accept that they were not "yes men" doing the bidding of NNL but rather were fulfilling their fiduciary obligations to NNUK.

364 There is another reason for not recognizing the Trustee as a complainant. Apart from the claim on the guarantees made by NNL in favour of the Trustee, which I shall discuss, the complaints of the UKPC relate to transactions to which

NNUK was a party. Some but not all of the complaints were the subject of claims made by the administrators of NNUK against NNL. These include what the UKPC describes in its brief as the fundamental oppression claims, being (a) the failure of NNL to pay amounts due and payable to NNUK under the MRDA, (b) the failure of NNL to pay interest to NNUK on amounts outstanding under the MRDA, and (c) the managing of world-wide cash by NNL in a manner to keep it out of NNUK. All of the claims of the administrators of NNUK have been settled and releases provided. The claims by the UKPC for these things are essentially derivative claims of NNUK and I would not recognize the UKPC as a complainant against NNL for these matters released by NNUK.

365 For all of these reasons, I would not exercise my discretion to recognize the UKPC as a complainant.

(b) Merits of oppression claims

366 On the assumption that the UKPC does have standing to claim oppression I will deal with the merits of the claims. There are some facts in general that are important in considering the claims.

367 Nortel operated as an integrated global business, which benefited all members of the Nortel Group. The integrated structure allowed all members to gain efficiencies by coordinating and centralizing capabilities, areas of expertise and common cost centres. Nortel was organized on a matrix basis, where each entity was integrated into regional and product line management structures to share information and perform R&D, sales and other common functions across geographic boundaries and across legal entities.

368 As Mr. Currie testified, the regions were responsible for selling and marketing product, the lines of businesses were responsible for developing product, having it manufactured, servicing it after the fact, and the support organizations were responsible to supporting all the organizations whether regions or lines of business, regardless of where they were located in the world.

369 As a result of Nortel's matrix structure, no single Nortel entity or region, including either NNUK or NNL, was able to provide the full line of Nortel products and services, including R&D capabilities, on a stand-alone basis. This was well understood by Mr. David Davies, the chairman of the Trustee who testified at the trial of his understanding that none of these entities was a stand-alone entity and they were integrated and depended upon one another. While he did not think about it at any great length, he understood that that the group would allocate capital to where it was needed for the benefit of the whole. He certainly understood that NNUK could not itself survive without the support of the global enterprise.

(i) Interest-free loans

370 The first and second matter raised by the UKPC relates to the large inter-company loan from NNUK to NNL that was interest free. This loan arose from the payments due over time to NNUK under the MRDA which allocated profits to the companies doing research and development on a residual profit split method. Under the MRDA, amounts to be paid were to be paid with interest if not paid within 90 days of notification that they owed. This did not happen in the case of NNUK and others in the group as well.

371 The UKPC state in their brief that it was reasonable for the UKPC to expect that NNL and NNUK would comply with their own contractual arrangements. The implication of this contention is that it was reasonable for the Trustee to expect that the MRDA payments would be made each year and that, if not, interest would be paid. I cannot accept that in so far as it contended that the Trustee had any expectation that the loans or interest on them would be paid at any time. The amounts under the MRDA were converted by agreement of NNUK into interest free loans, to the knowledge of the Trustee of the UK Plan. It was common in the Nortel Group for that to happen as a result of the need and desire of the group to manage its cash in an efficient manner and to allocate cash as needed to members of the group. The parties agreed in article 3(d) of the MRDA that any payment under the MRDA would be reflected in inter-company accounts payable and receivable and that the payments "may be netted pursuant to the standard NNL practice for managing intercompany accounts".

372 No evidence was led by the UKPC that the Trustee expected the loans would be paid at any point in time or that interest would be paid on them. The implication of the complaint of the UKPC is that if the loans or interest had been paid, more money would have been available to put toward the deficiencies in the UK Plan. That is the only interest that the Trustee could have in this matter. That contention ignores the negotiations between NNUK and the Trustee that took place over several years leading to the Funding Agreement in 2006 in which NNUK agreed to make periodic payments to reduce the deficiency by 2012. Mr. Davies, the chairman of the Trustee since 2007 testified that there was no expectation that NNL would make any payments to the UK Plan other than those provided in the Funding Guarantee and the Funding Agreement. He also testified that the Trustee had to be satisfied before signing off on the Funding Agreement that they had fulfilled their fiduciary duties to the UK Plan. Even if the Trustee's expectations regarding what NNUK would do were relevant, they do not support the claim being made.

373 The allegation by UKPC also ignores the way in which the Nortel Group operated so far as cash was concerned. One of the functions of Nortel Canada within the Nortel Group was to raise cash as needed by the group and to ensure that it was distributed to the various entities in order to meet their operational, statutory and regulatory requirements. All debt service costs were borne by NNL and did not form part of the accounting or profit split among the subsidiaries. Managing cash in an efficient manner was seen to be in the best interests of Nortel as a whole, and of all the entities within it, and the board of NNUK were of this view. Intercompany loans were a commonly used vehicle for moving cash throughout the Nortel Group. To the extent that any member of the Nortel Group did not generate sufficient funds to support itself through its own operations and was therefore facing a "cash deficit", other entities within the Nortel Group would provide the necessary loans, capital infusions and/or other forms of working cash. Importantly, NNUK was itself a regular recipient of intercompany financing, including interest-free loans, from other Nortel companies.

374 The intercompany loans on the books of NNUK owed by NNL were approved by the board of directors of NNUK from time to time after debate with the benefit of advice from NNUK employees in the EMEA treasury department and from NNUK's tax, finance and legal personnel as well, on occasion, from outside independent legal advice. Due consideration was given to relevant issues, as is clear from the evidence of Mr. Waida, a director of NNUK who signed loan extension agreements and who testified that the board of NNUK considered the loans to be in the best interest of NNUK. The evidence of Ms. Rolston, a director of NNUK from 2006, was that it was not unusual in any group structure for the companies to seek to utilize cash in the most effective way for the use of the group as a whole which benefited the group and also the individual companies in the group, and was something the directors of NNUK thought they were doing in approving the loans.

375 The board of NNUK received briefing notes from senior personnel within NNUK before each loan was approved advising on the various issues, including tax, cash management and legal. In a briefing note to the board dealing with the conversion of the payable owing from NNL to NNUK in October 2003 into a non-interest loan, the following was stated, which indicated that it was understood to be in NNUK's interest to see to the efficient deployment of cash within the Nortel Group:

Treasury (Maggi Fraser) has advised that it is in the best interests of NNUK to enter into the loan transaction. This is because NNUK benefits from intra-group arrangements pursuant to which its activities are and have been, where necessary, from time to time funded by other group companies. Unless each such group company engages with the wider group in a manner that is conducive to prudent cash management, the interests of each such group company (and in this case NNUK) would be irredeemably harmed.

376 On December 19, 2005, Lovells, the UK solicitors advising the board of NNUK, advised the board on the intercompany loans that it had and was considering increasing. Lovells advised as to the fiduciary obligations of the directors to NNUK and with respect to the intercompany loans stated:

Given the importance to NNUK of its parent company NNL and, as we understand it, the other members of the group, we would not have thought that it should be difficult for the directors of NNUK to conclude that the making of the loans is in the best interest of NNUK.

NNUK's directors will not be in breach of their duties if they authorize loans to group companies, even on interest free terms...provided that they reasonably consider at the time when the loans are made that they are overall in NNUK's own interests, even if the benefit will be indirect.

377 It is clear from the briefing notes to the board of NNUK that the board of NNUK considered on each occasion whether NNL was good for the money. On each occasion the board was advised that NNL could repay the loan by borrowing from NNI, the main US subsidiary. This would have occurred within the global cash management system utilized by Nortel. I do not accept the contention of the UKPC that there was scepticism as to the ability of NNL to repay the loans. The snippets of the few e-mails referred to by the UKPC do not represent the balance of the thinking at NNUK and they preceded the advice obtained from Lovell's. After the advice from Lovell's, Ms. Chan and Mr. Widdison supported the extension and increase in the loan that year. As well, Mr. Stephens of NNUK testified that despite the fact the loan was repayable on demand between 2003 and 2008, NNUK never demanded repayment on the loan and NNUK was never short of cash during this period. He also testified that the loan served a good business purpose for NNUK by supporting NNL from a cash flow perspective.

378 The board of NNUK was not a puppet of NNL. After the market crash in September 2008 the NNUK board refused a request by NNL to move surplus cash to Canada by way of an intercompany loan.

379 There is no cogent evidence from any witness of NNUK that supports the allegation of UKPC regarding these intercompany loans. It is all argument and ignores the business judgment exercised by the board of NNUK from time to time. That business judgment was reasonable and should be given deference in this case. See [BCE](#) at para. 40.

380 I find that there was no oppressive conduct by NNL in connection with the intercompany loans from NNUK to NNL on an interest free basis.

(ii) Project Swift

381 The next matter raised by the UKPC has to do with Project Swift. That project in December, 2007 involved the transfer of subsidiary corporations of NNL in Europe held by NNIF (a Netherlands company) to NNUK in return for a reduction of the intercompany loan from NNUK to NNL. One of the subsidiaries to be transferred was NNSA, a French subsidiary, held 8.83% by NNIF and 91.17% by NNL. For reasons that I will discuss, NNL's 91.17% interest in NNSA was not transferred and the amount of the intercompany loan from NNUK to NNL that was to be reduced was adjusted so that it did not reflect the transfer of NNL's interest in NNSA. The UKPC contend that the failure to transfer NNL's interest in NNSA was oppressive to the Trustee.

382 The genesis of Project Swift was that the EMEA tax department wanted to reduce NNUK's exposure to tax liability. Mr. Kerry Stephens, a chartered accountant and a member of the EMEA tax department, was considered the architect of the project. Under UK tax law, interest on the loan from NNUK to NNL was imputed to NNUK. No tax had been paid by NNUK because it had sufficient tax losses against which the imputed interest could be written off. However, the tax loss asset was in danger of running out and in order to deal with that risk, the EMEA tax people proposed writing off the loan in return for the European subsidiaries to be transferred to NNUK. Mr. Davies was aware that one of the purposes of the transaction was to reduce the taxes that would be imputed to NNUK. There were other benefits to the transaction from NNUK's point of view, including rationalizing the EMEA group legal and management structure so that NNUK would become the owner of those entities for which it already exercised significant management responsibilities and replacing the loan, a non-income-producing asset, with the transferred subsidiaries that could produce dividend income. Mr. Davies, the chairman of the Trustee, understood that the project had been

proposed by NNUK because they believed it would provide a net benefit to NNUK because of the tax saving and the improvement in the profits of NNUK.

383 NNUK retained the UK law firm Osborne Clarke to advise it on the transaction. NNUK also retained Ernst & Young UK (EY UK)¹⁷ to provide an independent valuation of the subsidiaries to be transferred to NNUK in order to be satisfied that the value of the subsidiaries to be transferred to NNUK were at least equal to the amount of the loan from NNUK to NNL that was to be reduced.

384 EY UK was asked to prepare an independent valuation of the Swift Entities on an open market basis. EY UK's open market valuation was done on the basis of a discounted cash flow using multiples to arrive at a terminal value for the European subsidiaries to be transferred to NNUK. EY UK ultimately assessed the value of the subsidiaries at US \$749.5 million. EY UK also prepared a separate valuation report, entitled "Project Eagle", that considered the estimated realizations and potential security value of the subsidiaries for NNUK after Project Swift, under both a going-concern approach and a theoretical insolvency scenario. The insolvency analysis was conducted for comparison purposes on a worst case scenario basis. Mr. Freemantle, a NNUK director, testified that at the time of the project, he did not believe that insolvency was a likely scenario.

385 Nortel understood that the Trustee would have to be involved in the Swift transaction and NNUK therefore approached the Trustee about it. The Trustee had to agree to it or it could have gone to the Regulator to discuss its concerns. I think it fair to conclude that NNUK would have preferred to avoid that result, but I do not cast aspersions against NNUK, as invited to do so, because of an attempt to avoid the Regulator. I accept the evidence of Mr. McCorkle, the acting treasurer of Nortel at the time who was part of the Project Swift team and to whom Mr. Freemantle reported, that he believed that Nortel should consider going to the Regulator if the Trustees were unable to resolve their concerns about Project Swift because he thought the Regulator would have agreed with Nortel that it was an overall transaction to everyone's benefit.

386 The Trustee retained its own independent financial advisor, PWC, to analyze and comment on the valuation of the transaction that had been conducted by EY UK. The Trustee also retained Pinsent Masons LLP as its independent legal advisor. The valuation prepared by EY UK was changed following input from PWC.

387 Both NNL's majority interest and NNIF's minority interest in NNSA were originally intended to be transferred to NNUK in December 2007. However, by mid-November 2007 it had been determined that the transfer of NNL's majority ownership in NNSA would be deferred to an unspecified time, while the transfer of NNIF's minority interest would proceed. The reason was a tax audit by the French tax authorities of NNSA. The intention of the parties was that the transfer of NNL's majority interest in NNSA would take place once the issues surrounding NNSA had been dealt with.

388 It was NNUK's decision to exclude NNL's interest in NNSA from the Project Swift transaction in December 2007. Mr. Stephens, the architect of Project Swift, testified that NNUK was concerned about whether the ongoing tax audit of NNSA would have an economic impact on the value of NNSA. In order to determine what the consideration should be for NNSA to be transferred, NNUK wanted the tax audit to be resolved and another valuation done to reflect the impact of that settlement on NNSA. Thus, NNUK wanted to have the certainty of the valuation before proceeding with the transfer of NNSA.

389 A subsequent valuation by EY UK reflected only NNIF's 8.83% in NNSA and this was reported by PWC to the Trustee. This final valuation was used and the amount of the intercompany loan that was reduced corresponded with this value of assets that NNUK received in Project Swift. On December 21, 2007, NNUK acquired the entire issued share capital of NNIF from NNL for £327.6 million (US\$628.9 million), pursuant to the EY UK independent valuation, and the intercompany loan from NNUK to NNL was reduced by that amount. While it was the intention to still pursue a future transfer of NNSA, none of the transaction documents included a contractual obligation to do so and the intercompany loan was not reduced by the amount that had previously been earmarked to be reduced for the 91.17% of NNSA that was not transferred to NNUK.

390 As late as April 2008, it was still the expectation of the parties that NNSA would be transferred to NNUK, possibly in the first quarter of 2009, once NNSA's tax audit issues had been resolved and it had been properly valued. Those issues were not resolved prior to the administration proceedings of NNUK on January 14, 2009, as a result of which the valuation of NNL's interest in NNSA was never undertaken and that part of Project Swift never went forward. Without the completed valuation, the amount of the remaining intercompany loan which would be reduced upon the transfer of NNSA could not be determined.

391 The UKPC contend that the Trustee would not have agreed to Project Swift without the representation that NNSA would be transferred to NNUK and that because of the failure of NNSA to be transferred the reasonable expectation of the Trustee that it would be transferred has been thwarted.

392 This claim is made in oppression because there was no binding agreement that NNSA would be transferred. The issue is whether NNL has acted oppressively in disregarding the interests of the Trustee. I do not think the evidence supports the allegation. First, it was NNUK and not NNL who decided not to accept the transfer of NNSA because of the tax issues regarding NNSA. The NNUK board considered all of the issues after taking advice and made a reasonable decision to proceed with the transaction in December 2007 without NNL's interest in NNSA being included. The Trustee was well aware of that decision when it became a party to the Swift Guarantee.

393 The UKPC contend in its reply brief that while reducing the risk of tax liability was plainly in NNUK's interest, that could have been done in ways which were more beneficial to NNUK than Project Swift, such as NNL repaying the loan, or at the very least paying interest payments to NNUK which would have been sheltered by historic tax losses. The latter suggestion ignores the evidence that the tax loss asset was diminished and was the reason for Project Swift. The UKPC then say in their reply brief that the real issue is what options were open to NNUK to address the fact that it was about to start incurring a cash cost on imputed interest, which contradicts the previous point they make.

394 It is not the test for an oppression action that there were better options for NNUK than Project Swift. If the board of NNUK gave due consideration to the issues before it, and its decision was reasonable, deference should be given to its business judgment. *BCE* at para. 40. In this case the board of NNUK was advised by leading outside legal and financial advisors and there is no evidence that the directors did not consider the issues carefully.

395 Mr. Davies, the chairman of the Trustee, testified that at the time when the Trustee became party to the Swift Guarantee, if the Trustee had been at all concerned about whether the terms of the transaction provided adequate safeguard for the UK Plan, it could have gone to the Regulator but did not do so. He acknowledged that when the Trustee agreed to the terms of Project Swift, it had to be satisfied that it protected the UK Plan and its members by the terms agreed to, which in this case was the provision of the Swift Guarantee of NNL. Mr. Gilchrist, also a director of the Trustee, testified that if at any time the Trustee felt the UK Plan's interests were imperilled by Project Swift, it could have gone to the Regulator but it never considered that to be necessary. He said that the decision not to go to the Regulator was made by the Trustee on its own, without any influence or direction from NNUK or NNL. It is obviously the case that the Trustee was satisfied with the terms of the Swift Guarantee.

396 I do not see how in the circumstances the Trustee can now assert that Project Swift unfairly disregarded the interests of the UK Plan or its members. The Trustee was intimately involved in the transaction for several months and was advised by leading solicitors and financial advisors. While it expected the remaining majority interest of NNSA to eventually be transferred to NNUK, it knew that there was no contractual requirement to do that.

397 In any event, all of the parties to Project Swift expected and intended to have NNL's 91.17% interest in NNSA transferred to NNUK once the tax audit problems at NNSA were worked out and a valuation of NNSA obtained. Through no fault of NNL or NNUK, that did not happen before NNUK filed for administration in January, 2009. The failure cannot be regarded as any failure by NNL to regard the interests of the Trustee that would give rise to relief under the oppression provisions of the CBCA. Moreover, there has never been a valuation done of NNSA which is in insolvency

proceedings in France, and no evidence as to the value lost to NNUK of not having 91.17% of the shares of NNSA as an asset of NNUK. There is no evidence that the value lost by not having NNSA transferred to NNUK was more than the amount of the intercompany loan that was left owing by NNL to NNUK and not retired in December 2007.

398 The UKPC make another claim regarding the Swift Guarantee. They contend that while it was agreed that the guarantee would be in the amount of US\$150 million, the Trustee wanted a guarantee of US\$600 million but agreed to the lesser amount of US\$150 million on the promise that NNSA would be transferred to NNUK. It is argued that the Trustee would not have agreed to a guarantee of less than US\$600 million had it known that NNSA would not be transferred to NNUK. Because that has not occurred, an oppression remedy ought to be granted allowing the claim of the Trustee at an additional US\$450 million on the Swift Guarantee. I cannot accept this contention.

399 The evidence of Mr. Davies, the chairman of the Trustee, is that the Trustee was advised that if NNUK failed, the damage to the UK Plan would be US\$150 million. The US\$600 million was recommended by PWC to the Trustee as a negotiating position. The notion was that if the guarantee was for US\$600 million, it would fetch \$150 million in the event of an insolvency of NNL. Mr. Davies testified:

We were concerned that in the event of an insolvency, whatever amount would be awarded would get diluted by so many cents on the dollar. And we wanted to arrive at a figure of 150, which the analysis that had been produced showed to be the detriment to the pension scheme.

400 For NNL to agree to US\$600 million in these circumstances could have amounted to a preference if NNL became insolvent, and Nortel advised the Trustee of that. Mr. Freemantle, a director of NNUK and someone who was negotiating with the Trustee, stated that to Mr. Davies in an e-mail:

As a result, in order to move the process forward and subject to obtaining all internal approvals, we are willing to consider offering an additional contingent support guarantee from NNL for the identified theoretical "gap" payable in the event of an insolvency of NNUK after a demand is made by the trustees. If exercised, this would be a senior unsecured obligation of NNL, *pari passu* with all other senior unsecured obligations of NNL. As such, we feel it would be totally inappropriate to increase the level of the guarantee beyond the level of the gap in order to create an adjustment factor based on some theoretical assumptions around NNL's ability to honour its commitments. It is paramount that we treat all senior unsecured creditors equally. From a corporate governance perspective, it is therefore difficult for NNL to justify offering mitigation in excess of an identified detriment which could be seen as a preference to one unsecured creditor over others.

401 Mr. Davies testified at trial that the Trustees had concluded they were not going to persuade NNL to provide a guarantee of anywhere near USD\$600 million and agreed to counter NNL's offer of USD\$100 million with an offer of USD\$150 million and accept that amount if NNL agreed.

402 The evidence does not support any notion that at the time there was a thought that the harm to the UK Plan in the event of an insolvency of NNUK would be US\$600 million. The US\$150 million detriment to the UK Plan was estimated by EY UK on the assumption that there would be no recoveries from the subsidiaries of NNUK on an insolvency of NNUK. The Trustee did not request a guarantee of US\$600 million on the basis that it was the estimate of harm that would be caused to the UK Plan by an insolvency of NNUK. Mr. Davies was quite open in his negotiations with Mr. Freemantle that the US\$600 million figure was put forward so that on an insolvency of NNL, the amount that would be realized by the Trustee under the Swift Guarantee would be US\$150 million.

403 Nor is there any evidence that the Trustee would have required a guarantee of US\$600 million if it had known that the 91.17% of NNSA would not be transferred to NNUK. The figure of US\$600 million had nothing to do with NNSA. Mr. Davies' letter to Mr. Freemantle of December 20, 2007, which he said in his affidavit he wrote to record why the Trustee had taken the points that it had, said nothing about giving up a guarantee of US\$600 million because of the anticipated NNSA transfer. He said the opposite. In his note he stated:

After careful reflection, the trustee became prepared to accept a limited guarantee from NNL (in the amount of \$150m) on the insolvency of NNUK in order for Project Swift to proceed. I would note that whilst it is not and has never been the trustee's intention to frustrate the progress of Project Swift, the company will appreciate that we are obliged to protect the interests of the plan's members. We appreciate that Project Swift will generate tax savings at the NNUK level, however on taking Independent financial and legal advice, it did appear to the Trustee that Project Swift will also have potential downsides which cannot be ignored, and we have shared our concerns with the company in this respect. In particular, whilst admittedly a remote scenario, it does seem clear that following Project Swift, the plan would be materially worse off in a group wide and NNUK insolvency scenario, hence our request for additional security to address this potential weakening in employer covenant.

404 That is, the extra security of a guarantee of US\$600 million was to cover the eventuality that NNL became insolvent in a group wide insolvency and would be able to pay only so many cents on the dollar, which is exactly what Mr. Davies' evidence was and which the contemporaneous documents disclosed.

405 Mr. Davies testified that if he had been told that the 91.17% of NNSA held by NNL would not be transferred to NNUK, he would not have agreed not to object to Project Swift. This is the form of the leading question put to him. Even assuming the evidence to be reliable, I do not think it assists the Trustee's case. No one at the time of the closing of Project Swift thought that the interest in NNSA would not be transferred. It was expected that the transfer would eventually take place after the issues in NNSA were sorted out. No one misled Mr. Davies on this. I do not accept that Mr. Freemantle gave him any definite date when the transfer would take place. It was unknown when the problems with NNSA would be concluded and a valuation done. If a fixed date for the transfer was of importance to the Trustee, one might have expected with the legal advice the Trustee was receiving that a covenant regarding timing would have been requested.

406 In any event, I have difficulty accepting the reliability of this testimony of Mr. Davies. It was not contained in his affidavit and there is no contemporaneous note that refers to the NNSA transfer as being a condition of Mr. Davies' agreeing to the Swift Guarantee. Nor is there any evidence that Mr. Davies thought that the amount of the intercompany loan that was not being retired was less than the value of NNSA. I regard the testimony as being *ex post* rationalization.

407 Even if there were some basis for concluding that NNL had unfairly disregarded the interests of NNUK in relation to Project Swift, which I do not think the case, I would see no basis to order that the difference of US\$450 million between the negotiating position of the Trustee and the amount settled on in the Swift Guarantee that should be paid by NNL to the Trustee. It would amount to NNUK receiving the 91.17% if NNSA without paying for it.

408 I find that there was no oppressive conduct by NNL in connection with Project Swift.

(iii) Funding and Swift Guarantees

409 The UKPC also contend that if the Funding Guarantee or Swift Guarantee that NNL signed in favour of the Trustee are held not to be enforceable, the Trustee had an expectation that they would be enforceable and therefore an oppression remedy should be granted for the amount of those guarantees. I have held that the Funding Guarantee is enforceable but that the Swift Guarantee is not.

410 I fail to see how this claim has any merit. Either the guarantees by their terms are enforceable or they are not. They are to be interpreted as disclosing the intention of the parties to them. In this case, the Trustee was well advised in connection with both guarantees. Surely the expectation of the parties is derived from the terms of the agreement. In *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.* (2008), 41 B.L.R. (4th) 51 (Ont. C.A.) Doherty J.A. stated:

62 The reasonable expectations of parties to commercial agreements negotiated at arm's length must be those reasonable expectations that find expression in the agreements negotiated by the parties.

411 I find that there was no oppressive conduct by NNL in connection with the Funding Guarantee or Swift Guarantee.

(iv) *Transfer pricing*

412 While in their initial closing brief the UKPC included claims of \$262 million and \$335 million under their heading Remedial Claims (which included their oppression claim) for alleged improper transfer pricing, they stated in their reply closing brief that no allegation regarding transfer pricing was being made in their oppression claim.

(v) *Conclusion*

413 The Monitor's disallowance of the claim of the UKPC for oppression is upheld.

Unjust Enrichment

414 The UKPC make a claim for unjust enrichment for the same matters that are the subject of the oppression claim. In their post-trial brief a claim for a constructive trust was made as well, but this was abandoned in their post-trial reply brief.

415 The test for unjust enrichment is well established in Canada. There must be (i) an enrichment of the defendant, (ii) a corresponding deprivation of the plaintiff and (iii) an absence of juristic reason for the enrichment. See *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 (S.C.C.) at para. 30.

416 The Monitor takes the position that there can be no claim by the UKPC as the Trustee asserts harm to NNUK and that there must be a direct nexus between the enrichment of the defendant and the deprivation of the plaintiff. As there has been no deprivation of the Trustee, it is said that there is no direct nexus between the enrichment of NNL, assuming there was such an enrichment, and a deprivation to the Trustee, assuming there was such a deprivation.

417 This principle of the need for a direct nexus between the enrichment of the defendant and the deprivation of the plaintiff is taken from a number of cases dealing with plaintiffs who acquired a product or services from a retailer and sued the supplier to the retailer in unjust enrichment. See *VGI General Partner Inc. v. Ensis Management Inc.*, 2010 ONSC 3766 (Ont. S.C.J.). In that case Justice Perell struck a claim in unjust enrichment in a class action. In the passage relied on by the Monitor, he stated:

20 With respect to the first two elements, there must be a direct nexus between the enrichment of the defendant and the deprivation of the plaintiff: *Brian Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113 (S.C.J.) at para. 111. In other words, the defendant's enrichment must cause the plaintiff to suffer a corresponding economic deprivation: *Barnabe v. Touhey* (1995), 26 O.R. (3d) 477 (C.A.), revg. (1994), 18 O.R. (3d) 370 (Gen. Div.); *Sharwood & Co. v. Municipal Financial Corp.* (2001), 53 O.R. (3d) 470 (C.A.).

418 The statement of the need for a direct nexus came from a decision of Strathy J. (as he then was) in *Singer v. Schering-Plough Canada Inc.* [2010 CarswellOnt 79 (Ont. S.C.J.)], a class action by purchasers of sunscreen against the manufacturer of the sunscreen and not against the retailers from whom the sunscreen was purchased. Strathy J. stated, in part:

111 ...It is equally well-settled that there must be a direct nexus between the enrichment of the defendant and the deprivation of the plaintiff.

112 This issue was discussed by the Court of Appeal in the context of an attack on a pleading in a proposed class action involving a prescription drug: *Boulanger v. Johnson & Johnson Corp.* (2003), 174 O.A.C. 44, [2003] O.J. No. 2218. The plaintiff claimed, among other things, that she was entitled to reimbursement from the manufacturer for the purchase price paid for the drug on the ground of unjust enrichment. In dismissing the appeal on this issue, the Court of Appeal held that the price paid by the consumer had been paid to retailers and not to the manufacturer. The indirect and incidental benefit received by the manufacturer could not ground a claim for unjust enrichment. The Court of Appeal stated, at paras. 20 and 21:

[T]he appellant seeks to support these paragraphs on the basis of unjust enrichment. In my view this argument also fails. The difficulty is that the purchase price for which the appellant seeks reimbursement was paid to the retailer not to the respondents. Any benefit to the respondents from this payment was indirect and only incidentally conferred on the respondents. Unjust enrichment does not extend to permit such a recovery. In *Peel (Regional Municipality) v. Canada*; *Peel (Regional Municipality) v. Ontario*, 1992 CanLII 21 (S.C.C.), [1992] 3 S.C.R. 762, McLachlin J. said this at para. 58:

To permit recovery for incidental collateral benefits would be to admit of the possibility that a plaintiff could recover twice - once from the person who is the immediate beneficiary of the payment or benefit (the parents of the juveniles placed in group homes in this case), and again from the person who reaped an incidental benefit. [Citations omitted.] It would also open the doors to claims against an undefined class of persons who, while not the recipients of the payment or work conferred by the plaintiff, indirectly benefit from it. This the courts have declined to do. The cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant, such as the services rendered for the defendant or money paid to the defendant.

115 In my view, the claim based on unjust enrichment does not disclose a cause of action. The purchase of sunscreen by the plaintiff did not result in a corresponding enrichment of the defendants because the plaintiff purchased the products from a retailer and not directly from the defendants.

419 The UKPC relies on a recent decision of *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2013] 3 S.C.R. 477 (S.C.C.). In that case, a class action claim in unjust enrichment against Microsoft was made by consumers who acquired Microsoft products from sellers who had purchased the product from Microsoft. The claim alleged that Microsoft had overcharged for its PC operating systems and applications software. The claim was allowed to proceed. Rothstein J. for the Court stated:

87 In support of its first argument, Microsoft cites *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762. In *Peel*, McLachlin J. (as she then was) held, at p. 797, that "[t]he cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant". A claim in unjust enrichment must be based on "more than an incidental blow-by. A secondary collateral benefit will not suffice. To permit recovery for incidental collateral benefits would be to admit of the possibility that a plaintiff could recover twice - once from the person who is the immediate beneficiary of the payment or benefit ..., and again from the person who reaped an incidental benefit" (*Peel*, at p. 797). The words of *Peel* themselves would appear to foreclose the possibility of an indirect relationship between plaintiff and defendant. However, this does not resolve the issue. First, it is not apparent that the benefit to Microsoft is an "incidental blow-by" or "collateral benefit". Second, Pro-Sys relies on *Alberta Elders*, which it says stands for the proposition that an unjust enrichment may be possible where the benefit was indirect and was passed on by a third party. At this stage, I cannot conclude that it is plain and obvious that a claim in unjust enrichment will be made out only where the relationship between the plaintiff and the defendant is direct.

420 I do not think that the statements in these cases that the relationship between the plaintiff and defendant must be direct, or that it is not plain and obvious that it must be direct, are applicable to this case. All of those cases dealt with plaintiffs who allegedly suffered the damages. There was no issue about that and the courts did not deal with whether someone else who had not suffered the damage could bring the action for unjust enrichment. That is the issue in this case, in which it is alleged that while NNUK suffered the damages, the Trustee may make an indirect claim of unjust enrichment.

421 It seems to me that one must start with the basic principle that a plaintiff must establish that he or she suffered damage. If any authority is needed for this proposition, see Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 19th ed.) at para. 2-001 in which it is stated that the object of an award of damages is to give the claimant compensation

for the damage, loss or injury he has suffered. The test in an action for unjust enrichment that the plaintiff must establish a corresponding deprivation does not say anything differently. Thus I do not see any basis in this case for a claim of unjust enrichment by the Trustee for deprivation caused to NNUK.

422 I will deal briefly with the claims.

(i) Unjust enrichment claims

423 The UKPC is a creditor of NNUK and holds 93% of the accepted claims. It claims:

(a) 93% of the interest free loan from NNUK to NNL as at December 20, 2007; and

(b) 93% of the interest payable on the interest free loan, estimated by its expert to be \$135.6 million.

424 The UKPC further claim US\$450 million representing the difference in the amount of the Swift Guarantee and the amount sought.

425 In the event that either of the Funding Guarantee or the Swift Guarantee are held to be unenforceable, the UKPC claim the amount of such guarantees.

(ii) Interest free loans

426 I see no basis for this claim. First, it has not been established that there has been an enrichment of NNL.

427 These loans were the result of amounts allocated to NNUK under the profit split method contained in the MRDA. Pursuant to the MRDA, transfer pricing adjustments for the Participants, which included NNL, NNI (the US operating subsidiary), NNUK, NNSA (the French operating subsidiary) and Nortel Networks Ireland, were administered by NNL for all of the Participants. Article 3(d) provides:

(d) NNL agrees to administer this Agreement and the determinations under the RPSM as contemplated in this Agreement with respect to its interest and the interests of the Participants, and in particular, to compute the amount of any R&D Allocation to, and payment due from, each Participant on a periodic basis. Each Participant will be supplied with a copy of the calculations required under the RPSM as set forth in Schedule A. Any payment to, and payment from, a Participant will be reflected in the intercompany accounts of the affected Participant as a payable or a receivable, whatever the case may be and may be netted pursuant to the standard NNL practice for managing inter-company accounts.

428 This provision reflected the way in which the Nortel Group operated. Because Nortel was an integrated global organization in which the various entities had a high degree of interdependence and integration, managing cash in an efficient manner was in the best interests of Nortel as a whole, and all of the entities within it. If surplus cash was left to sit in the account of one subsidiary and could not be moved, and if as a result, tax "leakage" or avoidable financing costs were incurred, every entity in the organization would ultimately suffer. All liquidity decisions were made in compliance with applicable regulatory and legal requirements, and movements of cash were implemented by way of intercompany loans, dividends and equity investments, in accordance with applicable local laws. This included obtaining board approval from the appropriate subsidiaries for the transactions in question.

429 The fact that the books of NNUK reflected a loan to NNL is no proof that NNL used the cash for its own purposes. Cash was moved throughout the Nortel Group as required. The loan reflected allocations to NNUK under the MRDA derived from the profit split method used by the MRDA to allocate total Nortel residual profits to the participants. The Trustee has not established an enrichment to NNL regarding these loans. The same pertains to the interest free aspect of the loans. There is no basis to say that under the agreement made by NNUK, NNL was obliged to pay interest.

430 So far as a corresponding deprivation of NNUK is concerned, there is no proof that had the loans not existed or had interest been paid on them, any of the money would have gone into the UK Plan. Before 2003 when a deficit first appeared in the UK Plan, there was a contribution holiday on NNUK under which payments to the plan were not required. The evidence was that this was the standard practice in the UK and was recommended by the actuaries. The UK Government introduced legislation to prevent the accumulation of surpluses that could be used to avoid taxes by employers. Once the deficit appeared in January 2003, NNUK made periodic payments that were higher than would have been paid under a typical UK Plan recovery plan at the time, and then made payments as agreed with the Trustee under the 2005 and 2006 agreements. The discussions regarding these payments were primarily with Mr. Ken Gardener, the then chairman of the Trustee. Mr. Gardener was not called as a witness.

431 It cannot be said that there was an absence of juristic reason for the interest free loans. The MRDA and the later agreements made between NNL and NNUK and authorized by the board of directors of NNUK was a juristic reason for the loans. The board of NNUK considered the loans to be in the best interests of NNUK, and there is no basis to ignore the business judgment exercised by the directors.

432 Thus none of the three elements of unjust enrichment have been established by the UKPC with respect to the interest free loans.

(iii) Project Swift

433 The UKPC seek recognition of a claim for US\$450 million representing the difference between the amount of the Swift Guarantee of \$150 million and the amount of US\$600 million requested by the Trustee in reliance on representations that all of NNSA would be transferred to NNUK.

434 I need not repeat all of the findings on this issue made in the oppression claim asserted by the UKPC. The US \$600 million was a negotiating position to arrive at an estimated loss of US\$150 million in the event of a world-wide insolvency of the Nortel Group.

435 The UKPC has not established any deprivation of NNUK. The value of NNL's 91.17% interest in NNSA was expressly excluded from the amount of the inter-company loan forgiven by NNUK. NNL received no benefit. It just retained its 91.17% of NNSA. There is no evidence that its interest in NNSA was worth more than the amount of the loan retained by NNUK at the time of Project Swift or at any later time. No further valuation was ever done of NNSA.

436 The size of the Swift Guarantee was agreed between NNL and the Trustee. There is no lack of juristic reason for the size of the guarantee. While all parties intended that NNL's interest in NNSA would eventually be transferred once the issues at NNSA were resolved, there was no binding agreement requiring the transfer and the Trustee was well aware of that at the time it agreed to the Swift Guarantee. The decision to defer the NNSA transfer was made by the board of directors of NNUK. Time ran out before the issues at NNSA were resolved. There is no lack of juristic reason for the inability of NNL's interest in NNSA being transferred before NNUK entered into administration in January, 2009.

(iv) Funding and Swift guarantees

437 In the event that either of the Funding Guarantee or the Swift Guarantee are held to be unenforceable, the UKPC claim the amount of such guarantees. I have held the Swift Guarantee not to be enforceable. However I see no basis for an unjust enrichment claim. The juristic reason for that guarantee not being enforceable is because of its terms which were negotiated between NNL and the Trustee. Moreover, if by its terms it is not enforceable there has been no enrichment of NNL in not paying on the guarantee or deprivation of the Trustee in not receiving payment.

(v) Conclusion

438 The disallowance of the unjust enrichment claim by the Monitor is upheld.

End Result

439 The claim of the UKPC on the Funding Guarantee is allowed in the amount of £339.75 million. The Monitor's disallowance of the other claims is upheld.

440 If any party wishes costs, they should advise the opposite party and attempt to work out a procedure for settling costs. A 9:30 am appointment may be taken out to discuss the process.

Order accordingly.

Footnotes

- 1 Unless otherwise indicated, statements of fact in these reasons are findings of fact.
- 2 EMEA is an acronym for all of the Nortel subsidiaries in Europe, the Middle East and Africa.
- 3 Nortel Networks Australia was also a RPE until December 31, 2007.
- 4 Pension plans in the UK are called schemes.
- 5 Under the 2004 Act, a decision of the Determinations Panel is a decision of the Regulator. The 2004 Act specifies what acts of the Regulator must be made by the Determinations Panel rather than the executive arm of the Regulator. The reference to the Regulator in section 47(3) is a reference to the Determinations Panel.
- 6 Only one concerned a FSD for an insufficiently resourced company, being the undefended Nortel case.
- 7 I accept this figure of Dr. Reichert correcting the calculation of Dr. Felgran.
- 8 I am aware that in the uncontested Nortel case, the Determinations Panel made a finding that the Nortel transfer pricing system did not adequately compensate NNUK for the benefits it provided to the Nortel group. However, this was based on an expert report that was not challenged and involved no real analysis by the Determinations Panel other than to accept the conclusions in the report.
- 9 On April 19, 2010 the UKPC, not the Regulator, filed a motion in the CCAA proceeding for an order that the FSD proceedings in the UK before the Determinations Panel could go forward against NNC and NNL. The motion was later withdrawn.
- 10 I accept this figure of Dr. Reichert correcting the calculation of Dr. Felgran.
- 11 In his report, Mr. Ham made a number of assertions that appeared to be on issues of valuation rather than on issues of the legal principles to be applied. I realize that there may be a fine line between the two, but I have read his statements regarding valuation with caution.
- 12 The UKPC say that net book value can be less than market or fair value as witnessed by the price obtained by Nortel in liquidating its assets as against the net book value derived from its financial statements. That however is not a legitimate comparison. The issue in this case is the value of the resources of NNUK as at June 30, 2008 when the Nortel Group was a going concern, not the price achieved from 2009 to 2011 after the Nortel world-wide insolvency had occurred. Also, I accept Mr. Berenblut's opinion that price actually obtained in the market place is a different concept than value in a notional transaction as price can be affected by unequal ability or knowledge or financing. What happened from 2009 to 2011 is also impermissible hindsight information.
- 13 Mr. Ham stated in his report that in a contested case, it is virtually certain that one will get to the third stage. That is speculation on what the Regulator will do in any case. That is not a legal issue and I do not accept Mr. Ham's unsupported view of what the Regulator may in fact do.

- 14 The fact that Mr. Legge could not readily recall on cross-examination what other liabilities might be does to mean there could not be other liabilities. It is plain that there could be.
- 15 I disregard the statements (really argument) of Mr. Ham as to what an English court would likely do in construing the Swift Guarantee, for the same reasons expressed in these reasons in the FSD claim.
- 16 An example is clause 2.6(f) that refers to a bankruptcy of NNUK. Under English law, bankruptcy only applies to an individual and not to a company. See *Key2Law* at para. 83.
- 17 Contrary to the statements in the UKPC brief, it was not NNL that retained E&Y UK.

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TAB 4

2017 BCSC 709
British Columbia Supreme Court

Walter Energy Canada Holdings, Inc., Re

2017 CarswellBC 1166, 2017 BCSC 709, [2017] B.C.W.L.D. 3273,
[2017] B.C.W.L.D. 3277, 279 A.C.W.S. (3d) 77, 48 C.B.R. (6th) 62

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

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57, as Amended

In the Matter of a Plan of Compromise or Arrangement of Walter Energy
Canada Holdings, Inc. and the Other Petitioners Listed on Schedule "A"

Fitzpatrick J.

Heard: January 9-13, 16, 18-20, 2017

Judgment: May 1, 2017^{*}

Docket: Vancouver S1510120

Counsel: M. Paterson, M.I.A. Buttery, P. Riesterer, M.A. Rowe, K. Sachar for Petitioners
C. Dennis, Q.C., J. Sandrelli, T. Jeffries, O. James for United Mine Workers of America 1974 Pension Plan and Trust
C.D. Bavis, J. Sanders for United Steelworkers, Local 1-424
P.J. Reardon for Monitor, KPMG Inc.

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

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX](#) Companies' Creditors Arrangement Act

[XIX.5](#) Miscellaneous

Business associations

[I](#) Nature of business associations

[I.3](#) Nature of corporation

[I.3.b](#) Distinct existence

[I.3.b.ii](#) From related corporations

Headnote

Business associations --- Nature of business associations — Nature of corporation — Distinct existence — From related corporations

In 2010, US coal business, W Inc. (US), bought another company's coal mining operations in Canada and organized them under laws of BC as W Group — W Inc. (US) was party to pension plan (Plan) covering 88,000 US retirees and beneficiaries — Coal market dropped — W Inc. (US) commenced bankruptcy proceedings in US — W Group sought protection under Companies' Creditors Arrangement Act (CCAA) — W Inc. (US)'s assets were sold under stalking horse agreement relieving purchaser of liability under Plan — Plan made claim against W Group under US Employee Retirement and Income Security Act (ERISA) in respect of unfunded pension liabilities — W Group

brought application for declaration that Plan's claim as against W Group was governed by Canadian substantive law and not ERISA — Application granted — Canadian choice of law principles governed analysis of applicable law — Appropriate choice of law characterization of Plan's claim was that of law of separate legal existence of corporations, and issues concerning person's legal personality were governed by law of person's domicile, which was Canada and BC — BC and Alberta law determined whether separate legal personalities of W Group entities could be ignored — Contrary to Plan's contention, there was no contractual connecting factor between Plan and Canadian entities — W Group did not employ members of Plan, was not notified of or allowed to participate in contractual process by which Plan determined withdrawal liability, and had no contractual obligation to contribute to Plan — ERISA's imposition of liability by lifting corporate veil and ignoring separate legal existence of W Group entities was insufficient basis upon which to say that ERISA made W Group party to pension documents — As ERISA was not part of BC or Alberta law, Plan's claim had to fail.

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

Summary procedure — Under both CCAA and Bankruptcy and Insolvency Act, claims were to be determined as quickly as possible to allow for timely distribution to creditors to avoid prejudice from delay in terms of recovery and undue cost — CCAA required, presumptively, determination of claims on summary basis, but there was precedent to order filing of pleadings and oral discovery after filing of affidavits, and court had discretion to order another procedure where appropriate, including full trial or hybrid hearing.

Table of Authorities

Cases considered by *Fitzpatrick J.*:

B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd. (1989), 4 R.P.R. (2d) 74, 37 B.C.L.R. (2d) 258, 43 B.L.R. 67, (sub nom. *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Developments Ltd.*) 60 D.L.R. (4th) 30, 1989 CarswellBC 104 (B.C. C.A.) — followed

Bd. of Trustees Trucking Employees v. Gotham Fuel (1993), 860 F.Supp. 1044 (U.S. Dist. Ct. D. N.J.) — considered

British Columbia (Attorney General) v. Malik (2011), 2011 SCC 18, 2011 CarswellBC 923, 2011 CarswellBC 924, 76 C.B.R. (5th) 56, [2011] 6 W.W.R. 383, 1 C.P.C. (7th) 374, 17 B.C.L.R. (5th) 1, 330 D.L.R. (4th) 577, 414 N.R. 332, 303 B.C.A.C. 1, 512 W.A.C. 1, [2011] 1 S.C.R. 657 (S.C.C.) — referred to

Central States, SE & SW Areas v. Messina Products (2013), 706 F.3d 874 (U.S. C.A. 7th Cir.) — considered

Coast Capital Savings Credit Union v. Symphony Development Corp. (2011), 2011 BCSC 333, 2011 CarswellBC 669, 75 C.B.R. (5th) 221 (B.C. S.C. [In Chambers]) — followed

Concept Oil Services Ltd. v. En-Gin Group L & Ors (2013), [2013] EWHC 1897 (Eng. Comm. Ct.) — referred to

Connolly v. PBGC (1986), 475 U.S. 211 (U.S. Sup. Ct.) — considered

Connors v. Peles (1989), 724 F. Supp. 1538 (U.S. W.D. Pa.) — followed

Edgington v. Mulek Estate (2008), 2008 BCCA 505, 2008 CarswellBC 2664, 86 B.C.L.R. (4th) 78, [2009] 3 W.W.R. 440, 54 B.L.R. (4th) 165, 449 W.A.C. 56, 266 B.C.A.C. 56 (B.C. C.A.) — followed

Emtwo Properties Inc. v. Cineplex (Western Canada) Inc. (2011), 2011 BCSC 1072, 2011 CarswellBC 2211, 8 R.P.R. (5th) 192, 90 B.L.R. (4th) 231 (B.C. S.C.) — considered

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

Imperial Life Assurance Co. of Canada v. Colmenares (1967), [1967] S.C.R. 443, 62 D.L.R. (2d) 138, [1967] I.L.R. 1-183, 1967 CarswellOnt 65 (S.C.C.) — considered

JTI-Macdonald Corp. v. British Columbia (Attorney General) (2000), 2000 BCSC 312, 2000 CarswellBC 375, 184 D.L.R. (4th) 335, 74 B.C.L.R. (3d) 149, [2000] 6 W.W.R. 227, 73 C.R.R. (2d) 110, [2000] B.C.T.C. 178 (B.C. S.C.) — considered

Jameson House Properties Ltd., Re (2011), 2011 BCSC 965, 2011 CarswellBC 1863, 80 C.B.R. (5th) 52, 3 C.L.R. (4th) 266 (B.C. S.C.) — considered

Macmillan Inc. v. Bishopsgate Investment Trust (No. 3) (1995), [1996] 1 All E.R. 585, [1996] 1 W.L.R. 387 (Eng. C.A.) — considered

Minera Aquiline Argentina SA v. IMA Exploration Inc. (2006), 2006 BCSC 1102, 2006 CarswellBC 1776, 58 B.C.L.R. (4th) 217, 32 C.P.C. (6th) 31, [2007] 1 W.W.R. 43, 32 B.L.R. (4th) 165 (B.C. S.C.) — followed

Minera Aquiline Argentina SA v. IMA Exploration Inc. (2007), 2007 BCCA 319, 2007 CarswellBC 1291, 68 B.C.L.R. (4th) 242, 43 C.P.C. (6th) 45, 32 B.L.R. (4th) 242, [2007] 10 W.W.R. 648, 246 B.C.A.C. 1, 406 W.A.C. 1 (B.C. C.A.) — referred to

National Trust Co. v. Ebro Irrigation & Power Co. (1954), [1954] O.R. 463, [1954] 3 D.L.R. 326, 1954 CarswellOnt 61, [1954] O.W.N. 516 (Ont. H.C.) — considered

PBGC v. Smith-Morris Corp. (September 13, 1995), Doc. 94-cv-60042-AA (U.S. Dist. Ct. E.D. Mich.) — considered

Pension Ben. Guaranty Corp. v. Ouimet Corp. (1979), 470 F. Supp. 945 (U.S. Dist. Ct. D. Mass.) — referred to

Pension Benefit Guaranty Corp. v. Ouimet Corp. Pension Benefit (1983), 711 F.2d 1085 (U.S. C.A. 1st Cir.) — considered

Petrelli v. Lindell Beach Holiday Resort Ltd. (2011), 2011 BCCA 367, 2011 CarswellBC 2331, 24 B.C.L.R. (5th) 4, [2012] 1 W.W.R. 720, 340 D.L.R. (4th) 733, 310 B.C.A.C. 196, 526 W.A.C. 196 (B.C. C.A.) — referred to

Pine Valley Mining Corp., Re (2008), 2008 BCSC 356, 2008 CarswellBC 579, 41 C.B.R. (5th) 43 (B.C. S.C.) — considered

Raiffeisen Zentralbank Österreich AG v. Five Star General Trading LLC (The Mount I) (2001), 145 S.J.L.B. 45, [2001] C.L.C. 843, [2001] 1 Lloyd's Rep. 597, [2001] 1 All E.R. (Comm) 961, [2001] 3 All E.R. 257, [2001] 2 W.L.R. 1344, [2001] Q.B. 825, [2001] EWCA Civ 68 (Eng. C.A.) — referred to

Salomon v. Salomon & Co. (1896), [1897] A.C. 22, 45 W.R. 193, [1895-99] All E.R. Rep. 33, 66 L.J. Ch. 35, 13 T.L.R. 46, [1896] UKHL 1 (U.K. H.L.) — considered

San Juan Resources Inc., Re (2009), 2009 ABQB 55, 2009 CarswellAlta 98, 1 Alta. L.R. (5th) 303, 52 C.B.R. (5th) 97, (sub nom. *San Juan Resources Inc. (Bankrupt), Re*) 467 A.R. 391 (Alta. Q.B.) — referred to

Singer Sewing Machine Co. of Canada Ltd., Re (2000), 2000 CarswellAlta 155, [2000] 5 W.W.R. 598, 79 Alta. L.R. (3d) 95, 18 C.B.R. (4th) 127, (sub nom. *Singer Sewing Machine Co. of Canada Ltd. (Bankrupt), Re*) 259 A.R. 364, 2000 ABQB 116 (Alta. Q.B.) — considered

Sun Capital Partners III, LP v. New England Teamsters and Trucking Industry Pension Fund (2013), 724 F.3d 129 (U.S. C.A. 1st Cir.) — considered

Tassone v. Cardinal (2014), 2014 BCCA 149, 2014 CarswellBC 995, 354 B.C.A.C. 111, 605 W.A.C. 111 (B.C. C.A.) — referred to

The London Steam-Ship Owners' Mutual Insurance Association Ltd. v. The Kingdom of Spain & Anor (2013), [2013] 2 C.L.C. 562, [2013] EWHC 3188, [2014] 1 Lloyd's Rep. 309 (Eng. Comm. Ct.) — followed

Through Transport Mutual Insurance Association (Eurasia) Ltd. v. New India Assurance Association Co. Ltd. (2004), [2004] 2 C.L.C. 1189, [2005] I.L.Pr. 30, [2004] EWCA Civ 1598, [2005] 1 All E.R. (Comm) 715, [2005] 1 Lloyd's Rep. 67 (Eng. & Wales C.A. (Civil)) — followed

United States v. Vogel Fertilizer Co. (1982), 455 U.S. 16 (U.S. Sup. Ct.) — considered

Voyage Co. Industries Inc. v. Craster (1998), 1998 CarswellBC 1742 (B.C. S.C. [In Chambers]) — considered

Walter Energy Canada Holdings, Inc., Re (2016), 2016 BCSC 107, 2016 CarswellBC 158, 23 C.C.P.B. (2nd) 201, 33 C.B.R. (6th) 60 (B.C. S.C.) — referred to

Walter Energy Canada Holdings, Inc., Re (2016), 2016 BCSC 1746, 2016 CarswellBC 2658, 39 C.B.R. (6th) 292 (B.C. S.C.) — referred to

Walter Energy Canada Holdings, Inc., Re (2016), 2016 BCSC 2470, 2016 CarswellBC 3737, 43 C.B.R. (6th) 143 (B.C. S.C.) — referred to

Youell v. Kara Mara Shipping Co. Ltd. (2000), [2000] C.L.C. 1058, [2001] I.L.Pr. 34, [2000] EWHC 220, [2000] 2 Lloyd's Rep. 102, [2001] Lloyd's Rep. I.R. 553 (Eng. Comm. Ct.) — followed

0487826 B.C. Ltd., *Re* (2012), 2012 BCSC 1501, 2012 CarswellBC 3079, 97 C.B.R. (5th) 105 (B.C. S.C.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Generally — referred to

Chapter 11 — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Business Corporations Act, S.B.C. 2002, c. 57

s. 30 — referred to

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

Generally — referred to

Pt. IV — referred to

s. 20 — considered

Employee Retirement Income Security Act, 1974, Pub.L 93-406; 88 Stat. 829; 29 U.S.C. 18

s. 1001 — considered

s. 1002(2) — referred to

s. 1002(3) — considered

s. 1002(35) — considered

s. 1002(37)(A) — considered

s. 1002(40)(B) — considered

s. 1301(a)(2) "substantial employer" (B) — referred to

s. 1301(a)(3) "multiemployer plan" — considered

s. 1301(a)(14)(A) "controlled group" — referred to

s. 1301(a)(14)(B) — referred to

s. 1301(b)(1) — referred to

s. 1381 — referred to

s. 1382 — referred to

s. 1386 — referred to

s. 1391 — referred to

s. 1399(c)(5) — referred to

Internal Revenue Code, 26 U.S.C.

s. 414 — referred to

s. 414(b) — referred to

s. 1563(a) "controlled group of corporations" (1) — referred to

Labor Management Relations Act, 1947, P.L. 80-101; 61 Stat. 136; 29 U.S.C. 141
s. 302(c)(5) — considered

Partnership Act, R.S.B.C. 1996, c. 348
Generally — referred to

Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 1997, c. 41
Generally — referred to

s. 1(1) "manufacturer" [rep. & sub. 1998, c. 45, s. 2(g)] — referred to

Rules considered:

Supreme Court Civil Rules, B.C. Reg. 168/2009

R. 1-3(1) — considered

R. 9-7 — considered

R. 9-7(11)(b)(i) — referred to

R. 9-7(11)(b)(ii) — referred to

R. 9-7(15)(a)(i) — referred to

R. 9-7(15)(a)(ii) — referred to

Regulations considered:

Internal Revenue Code, 26 U.S.C.

Internal Revenue Code Regulations, 26 C.F.R. 1

s. 1.1563-1(a)(1)(i) "controlled group of corporations" — referred to

APPLICATION by Canadian business group for declaration that US pension plan's claim was governed by Canadian substantive law.

Fitzpatrick J.:

I INTRODUCTION

1 These are proceedings brought by the petitioners pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). The petitioner companies are part of what I will describe as the "Walter Canada Group" which includes other entities, as I will discuss below.

2 This application is brought by the Walter Canada Group to determine the validity of a claim filed in these proceedings by the UMWA 1974 Pension Plan and Trust (the "1974 Plan").

3 The 1974 Plan's claim is asserted as a liability of the Walter Canada Group based on the provisions of U.S. legislation, namely the *Employee Retirement and Income Security Act of 1974*, 29 U.S.C. § 1001, as amended ("*ERISA*"). The amount of the claim arises from certain unfunded pension liabilities owed to former employees of a U.S. entity within the larger international Walter Energy Group. For context, the Walter Canada Group is the Canadian part of the international

"Walter Energy Group". *ERISA* is sometimes referred to as "long arm" legislation in that the 1974 Plan asserts that this U.S. legislation applies to the Walter Canada Group even though they were all Canadian corporations or entities conducting their mining businesses only in Canada and not in the U.S.

4 As far as I'm aware, and all counsel agree on this point, this is the first time that a Canadian court will have considered whether *ERISA* applies in Canada and in these circumstances. It also appears to be the case that no U.S. court has yet considered whether *ERISA* applies to entities outside of the U.S.

5 The 1974 Plan's claim is extremely large - approximately \$1.25 billion. If the 1974 Plan's claim is valid, it will swamp all other valid claims that have been filed in the estate against the Walter Canada Group. The result would be that the vast majority of the realizations from the estate assets - estimated by mid-2017 to be approximately \$63 million - would be paid to the 1974 Plan and not in respect of the claims of other creditors. These other creditors include the Walter Canada Group's former employees, which in turn include union members represented by the United Steelworkers, Local 1-424 (the "Union"), to whom substantial amounts are owed.

II PROCEDURAL BACKGROUND

6 The Claims Process Order that was granted on August 16, 2016 (see *Walter Energy Canada Holdings, Inc., Re, 2016 BCSC 1746* (B.C. S.C.) at paras. 86-87) put in place a specific claims process designed to address the 1974 Plan's claim. Pursuant to the Claims Process Order, and with the objective of clarifying the issues as between the parties, the 1974 Plan filed a notice of civil claim on August 26, 2016 in this action. Responsive pleadings were filed by the Walter Canada Group and the Union shortly thereafter.

7 Paragraph 30 of the Claims Process Order provided that, upon the filing of the pleadings, the 1974 Plan's claim was to be adjudicated by the Court "under a procedure to be determined more fully by subsequent Order of this Court".

8 There were various disagreements between the Walter Canada Group, the Union and the 1974 Plan as to whether pre-hearing discovery procedures were required or necessary prior to a determination of certain preliminary issues raised by the Walter Canada Group. Since at least the fall of 2016, the 1974 Plan has taken the position that it is inappropriate to determine these preliminary issues on a summary basis without allowing it to conduct discovery of the Walter Canada Group.

9 This disagreement led the Monitor to apply for directions on the procedure to adjudicate the 1974 Plan's claim, as was expressly directed under paragraph 31 of the Claims Process Order. I denied the oral and document discovery sought by the 1974 Plan arising from two hearings: firstly, on October 26, 2016 (*Walter Energy Canada Holdings, Inc., Re* (Unreported; October 26, 2016) and secondly, on November 28/December 2, 2016 (*Walter Energy Canada Holdings, Inc., Re, 2016 BCSC 2470* (B.C. S.C.)). Those decisions were made in light of the Walter Canada Group's position that the preliminary issues could be resolved on a summary basis, consistent with the legislative objective under the *CCAA* to determine claims in that manner.

10 After the October 26, 2016 hearing, the parties agreed to a Case Plan Order which set out various deadlines for the delivery of the applications and responses, evidence and written arguments, all in advance of the January 2017 hearing.

11 In November 2016, the Walter Canada Group filed their application for a summary hearing to decide these issues. Although described as a "summary hearing", the nature of the hearing can be described as a hybrid one. In addition to the pleadings, applications and responses, the evidence before the Court consisted of various affidavits, the Walter Canada Group's notice to admit and the 1974 Plan's response to the notice to admit. In addition, as the answer to one of the issues - namely, whether *ERISA* applies extr territorially to the Walter Canada Group - is a matter of U.S. law, the Walter Canada Group and the 1974 Plan both filed expert reports from U.S. attorneys. All three of these experts were cross examined on their reports at this hearing.

III ISSUES

12 The Walter Canada Group seeks the following declaratory relief:

- a) under Canadian conflict of laws rules, the 1974 Plan's claim as against the Walter Canada Group is governed by Canadian substantive law and not U.S. substantive law (including *ERISA*);
- b) in the alternative, if the 1974 Plan's claim against the Walter Canada Group is governed by U.S. substantive law (including *ERISA*), then as a matter of U.S. law, "controlled group" liability for withdrawal liability related to a multiemployer pension plan under *ERISA* does not extend extraterritorially; and
- c) in the further alternative, if the 1974 Plan's claim against the Walter Canada Group is governed by U.S. substantive law (including *ERISA*), and *ERISA* applies extraterritorially, that law is unenforceable in Canada because it conflicts with Canadian public policy.

13 It is common ground that if the Walter Canada Group succeeds on any one of the above arguments, the 1974 Plan's claim is not a valid claim against the estate. While I have referred to the arguments below as that of the Walter Canada Group, I have considered the similar arguments advanced by the Union even if they are not specifically referenced as such.

IV IS A SUMMARY HEARING APPROPRIATE?

14 The 1974 Plan argues that the hearing should not proceed summarily and has brought a cross application to dismiss the Walter Canada Group's application. Consistent with Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (the "*Rules*") regarding summary trials, the 1974 Plan argues:

- a) the matter is not suitable for a summary hearing: Rule 9-7(11)(b)(i);
- b) a summary hearing on the preliminary issues will not assist in the efficient resolution of the validity of its claim: Rule 9-7(11)(b)(ii);
- c) the Court will be unable to find the necessary facts to determine the issues: Rule 9-7(15)(a)(i);
- d) the Court should find it unjust to determine the preliminary issues in the circumstances: Rule 9-7(15)(a)(ii); and
- e) the Walter Canada Group is "litigating in slices" by attempting to obtain a decision on only some of the issues.

15 The *CCAA* mandates that any dispute about claims will be determined, if possible, in a summary manner. Specifically, the *CCAA* provides for a summary determination of the validity of a disputed unsecured claim, such as that asserted here by the 1974 Plan:

Determination of amount of claims

20 (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

- (a) the amount of an unsecured claim is the amount

...

- (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor;

[Emphasis added]

16 The requirement for a summary determination of claims in a *CCAA* proceeding is similar to that found in the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3: see *San Juan Resources Inc., Re*, 2009 ABQB 55 (Alta. Q.B.) at para. 30. Both recognize the need to determine claims as quickly as possible to allow for a timely distribution to creditors, as creditors will suffer more prejudice if there is delay in receipt of whatever recovery they can expect from an insolvent estate. In addition, proceeding by summary application respects the need to resolve claims without undue cost, which would exacerbate the already insolvent circumstances and lessen the recovery of the parties.

17 Other than directing a "summary" determination of the issue, the *CCAA* provides no further guidance as to how a claim is to be determined. In this legislative vacuum, courts across Canada have drawn upon their statutory jurisdiction under the *CCAA* to fashion a process to do just that. This typically takes the form of a claims process order, as was granted in this proceeding on August 16, 2016.

18 There was agreement that the process typically found in a claims process order, allowing for review by the monitor and a revision/disallowance process, was not appropriate in these circumstances. The 1974 Plan's claim raised unique issues and it was recognized early in these proceedings that a resolution of that claim would likely require a more complex procedure.

19 There are examples where the courts in *CCAA* proceedings have fashioned a process that was "summary" in the sense of not requiring full pre-trial and trial procedures, but still allowed for certain appropriate pre-hearing steps.

20 A similar issue was before the Court in the *CCAA* proceedings in *Pine Valley Mining Corp., Re*, 2008 BCSC 356 (B.C. S.C.). A substantial claim had been advanced and the Court addressed how the claim should be resolved and the format of the summary trial. Justice Garson (as she then was) said:

[16] The second issue I have been asked to determine is the question of the format of this trial. Section 12 of the *CCAA* [now s. 20] requires a summary trial. I recognize that in some cases, courts have held that that does not preclude a conventional trial. (See *Algoma Steel Corporation v. Royal Bank of Canada* (1992), 8 O.R. (3d) 449 (C.A.). I do not understand Mr. McLean to object in principle to an order that this matter be determined in a summary way but, rather, I think he reserves his right to object to the suitability of such a procedure depending on how the evidence unfolds. It is my view that s.12 [now s. 20] of the *CCAA* informs any decision the court must make as to the format of a trial and that trial must surely be as the section dictates, a summary trial, unless to do otherwise would be unjust, or there is some other compelling reason against a summary trial. I am not persuaded that this claim cannot be tried summarily on the date reserved in May of this year. The parties have one week to work out an agreement as to a time line for the necessary steps to prepare for that trial, including the exchange of pleadings, disclosure of documents as requested by Tercon, agreed facts, delivery of affidavits, expert reports (including notice of reliance on all or part of the Monitor's reports), delivery and responses to notices to admit, examination for discovery if consented to, and delivery of written arguments. I acknowledge that many of these steps are underway.

[17] ... Either party has leave to apply to cross-examine the deponent of an affidavit out of court or in court. Either party has leave to apply to convert this summary trial to a conventional trial but I expect the parties to make their best efforts to manage this generally as a summary trial.

[Emphasis added]

21 Similarly, in *Jameson House Properties Ltd., Re*, 2011 BCSC 965 (B.C. S.C.) at paras. 13-14, Justice Adair departed from the strict terms of a claims process order and ordered the filing of pleadings and oral discovery after the filing of affidavits. An agreed statement of facts was also later filed although some facts remained in dispute. At para. 15, the Court stated that it was approaching the summary hearing as in a conventional trial; in other words, if the party bearing the onus of proof failed to establish the necessary facts, that party's case would fail.

22 In *Coast Capital Savings Credit Union v. Symphony Development Corp.*, 2011 BCSC 333 (B.C. S.C. [In Chambers]) at paras. 23-27, the Court referred to a "principled" approach to the determination of claims, albeit in a receivership context, which respected the summary claims process while also ensuring that the claim was adjudicated in a just manner.

23 Accordingly, although the *CCAA* requires that, presumptively, claims be determined on a summary basis, the court has the discretion to order another procedure where it is appropriate. That other procedure may, but will not usually, involve a full trial procedure. One possible approach is to conduct a hybrid hearing, such as occurred here.

24 Needless to say, the exercise of the court's discretion will be guided by the statutory objectives of the *CCAA* toward a timely and inexpensive resolution of claims and distribution to creditors, while also ensuring that the determination of claims is made in a manner that is just and fair to all the stakeholders, including the debtor company, the claimant and other creditors: *0487826 B.C. Ltd., Re*, 2012 BCSC 1501 (B.C. S.C.) at para. 38. These objectives are consistent with Rule 1-3(1) which states that the object of the *Rules* is to secure the "just, speedy and inexpensive determination of every proceeding on its merits". These objectives are also consistent with the Supreme Court of Canada's recent exhortation to the legal profession and the courts to embrace more summary forms of adjudication where appropriate, as found in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.).

25 In exercising the court's discretion to move beyond a pure summary determination in accordance with s. 20 of the *CCAA*, factors to be considered by the court will vary from case to case depending on the circumstances, but may include: the nature and complexity of the claim or issues arising; the amount in issue; the nature of the evidence (including whether credibility is in issue); the importance of the claim to the creditor and the estate; the cost and delay of further procedures; and what prejudice, if any, may arise from a summary hearing.

26 There is no "one size fits all" solution as to how any claim can be determined; ideally, the answer will no doubt be driven by the willingness of the parties to streamline the process and the creativity of the parties, and their counsel, in fashioning an efficient and expeditious means of obtaining the necessary evidence to put before the court. If agreement can't be reached, then it will fall to the court to consider the issue.

27 Procedural issues that may be considered include:

- a) whether pre-trial oral or document discovery is truly necessary and if so, whether limits can be put on such discovery;
- b) whether affidavits should be filed as opposed to *viva voce* evidence at a full trial;
- c) whether cross-examinations on affidavits or expert reports are necessary and whether that can be done ahead of the hearing or at the hearing itself;
- d) whether timelines for delivery of materials, such as affidavits, or any pre-hearing procedures, can be fixed so to expedite the determination of the issues;
- e) whether other means of establishing the evidentiary record can be ordered, such as through notices to admit, agreed statement of facts and common documents so as to minimize or eliminate any conflict as to the facts; and
- f) whether written arguments can be exchanged in advance of the hearing.

28 The 1974 Plan continues to take the position that the issues raised in the Walter Canada Group's application cannot and should not be determined at this hearing without providing it the opportunity to undertake the discovery that it earlier sought. It specifically seeks to examine William G. Harvey, the former executive vice-president and chief financial officer of the Canadian holding company within the Walter Canada Group, who was also the person who gave evidence in support of the initial *CCAA* filing. That evidence was accepted by this Court and various orders were made based on that evidence.

29 In substance, the 1974 Plan advocated for a reversal of what I consider to be the proper approach (and onus) here, as discussed above. The 1974 Plan submits that a full trial is required, unless the Walter Canada Group can successfully argue in favour of abbreviated procedures. Consistent with its goal of embarking upon a full scale litigation process, the 1974 Plan prepared its list of documents dated December 23, 2016. The Walter Canada Group has not yet provided any discovery, either oral or documentary.

30 I intend to address the 1974 Plan's objection to the lack of discovery from the Walter Canada Group in the context of the individual issues discussed below. It will suffice at this point to note that I reject the approach advocated by the 1974 Plan, although I will consider its arguments in the context of the relevant and material evidence needed to decide the issues raised on this application.

V BACKGROUND FACTS

31 In support of its overall position that this summary hearing is inappropriate, the 1974 Plan has steadfastly refused to admit to most facts as proposed by the Walter Canada Group. It insists on what it calls "trial quality" evidence on all issues and says that there remain "disputed facts" which are relevant to the determination of these issues, principally relating to the degree of integration between the Walter Canada Group and the entities within the U.S. arm of the Walter Energy Group.

32 The stridency of this position is particularly puzzling given the 1974 Plan's refusal to acknowledge even its own "facts" and documents, as found in its evidence filed in the course of this proceeding.

33 The 1974 Plan has shown absolutely no willingness to consider and co-operate in the development of a streamlined process which would have allowed the Walter Canada Group to put what I consider uncontroversial facts before the court. The more extreme examples of this obdurate position are found in the 1974 Plan's refusal to admit that: the Canadian mine operations and assets in this jurisdiction were governed by Canadian and British Columbian environment and mining legislation; and, that the Walter Canada Group's relationship with its Canadian employees (both unionized and non-unionized) were governed by Canadian and British Columbian labour and employment laws. To suggest otherwise is a confounding proposition and needless to say, the 1974 Plan never did explain how it could not be so. The 1974 Plan would only admit that the mines were located in British Columbia and that the Walter Canada Group employed persons working in British Columbia, matters that were in evidence at the beginning of this proceeding and as I said, uncontroversial.

34 The 1974 Plan has raised virtually every possible objection toward blocking a summary or even hybrid hearing on these preliminary issues, presumably toward the end game of avoiding this hearing and engaging in an extensive and expensive full-scale litigation process with corresponding discovery. In my view, the objections of the 1974 Plan can more accurately be described as angling for a "fishing expedition" so as to search for facts that may conceivably provide some basis for their claim.

35 I would also note that the 1974 Plan appears to have made no effort to obtain what it describes as relevant evidence from various U.S. sources, including speaking to Mr. Harvey and also obtaining documentation in the hands of the U.S. debtors within the Walter Energy Group: see *Tassone v. Cardinal*, 2014 BCCA 149 (B.C. C.A.) at paras. 38-39. As such, the 1974 Plan has not provided any foundation upon which to argue that further relevant facts may exist in order to prove its claim.

36 I have concluded that the approach advocated by the 1974 Plan is neither warranted nor appropriate in the circumstances and I am exercising my discretion to proceed otherwise.

37 Accordingly, I have taken the facts from various sources: the facts asserted by the 1974 Plan which are admitted or which are not contested by the Walter Canada Group or the Union for the purpose of this application; evidence filed by the 1974 Plan in these proceedings generally or in direct response to this application; and, what I consider to be the

uncontroverted facts introduced by the Walter Canada Group in its evidence in this proceeding which have been the foundation for numerous orders granted by me. I also rely on the findings in my earlier reasons for judgment in these proceedings (including *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107, 2016 BCSC 1413, 2016 BCSC 1746 (B.C. S.C.)); and, evidence introduced in other proceedings before this court and filed in this action. See *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367 (B.C. C.A.) at paras. 36-37; *British Columbia (Attorney General) v. Malik*, 2011 SCC 18 (S.C.C.) at paras. 46-48.

38 In my view, there is little, if any, controversy about the following facts which are more accurately described as simply background facts.

39 Below are my findings of fact. It will become clear from the analysis below that most of the following background facts only provide context for the specific determination of the issues raised by the Walter Canada Group. I will also address any further facts relevant to the analysis in the separate discussion of the issues.

(1) The Walter Energy Group and U.S. Operations

40 The Walter Energy Group operated its international coal production and export business in two distinct segments: (a) the U.S. operations, and (b) the Canadian and United Kingdom (U.K.) operations.

41 The parent corporation of all of entities within the Walter Energy Group is Walter Energy, Inc. ("Walter Energy U.S."), which is a public company incorporated under the laws of Delaware and headquartered in Birmingham, Alabama. The U.S. coal mining operations of the Walter Energy Group were conducted in Alabama and West Virginia through a variety of U.S. corporations.

42 The Walter Energy Group's U.S. entities included a wholly owned subsidiary of Walter Energy U.S., Jim Walter Resources, Inc. ("Walter Resources"). Walter Resources was incorporated in Alabama and conducted its coal production business in Alabama.

(2) Acquisition leading to Creation of Walter Canada Group

43 Before 2011, Walter Energy U.S. did not have any operations or subsidiaries in Canada or the U.K.

44 In October 2010, Walter Energy U.S. and Western Coal Corp. ("Western") began negotiating the acquisition of Western's coal mining operations in British Columbia, the U.K. and the U.S. (the "Western Acquisition").

45 Walter Energy U.S. publicly announced the Western Acquisition in November 2010, when Walter Energy U.S. issued a press release and filed both the press release and a Form 8-K with the SEC on its publicly available EDGAR system. The press release referred to Walter Energy U.S.'s intention to complete a "business combination" with Western.

46 In December 2010, Walter Energy U.S. announced that (admitted for the purpose of these statements having only been made, and not for the truth of the contents):

- a) it had entered into an arrangement agreement with Western whereby Walter Energy U.S. would acquire all of the outstanding common shares of Western;
- b) the "transaction will be implemented by way of a court-approved plan of arrangement under British Columbia law"; and
- c) in connection with the arrangement, Walter Energy U.S. intended to borrow \$2.725 million of senior secured credit facilities, "the proceeds of which will be used (i) to fund the cash consideration for the transaction, (ii) to pay certain fees and expenses in connection with the transaction, (iii) to refinance all existing indebtedness of the Company and Western Coal and their respective subsidiaries and (iv) to provide for the ongoing working capital of [Walter Energy U.S.] and its subsidiaries".

47 On March 9, 2011, Walter Energy U.S. incorporated Walter Energy Canada Holdings, Inc. ("Canada Holdings") and became its sole shareholder. Canada Holdings was incorporated specifically to hold the shares of Western and therefore, indirectly, its subsidiaries.

48 On March 10, 2011, Justice McEwan of this Court approved the proposed plan of arrangement through which the Western Acquisition was accomplished.

49 On April 1, 2011, Canada Holdings acquired all outstanding common shares of Western for an estimated total consideration of approximately US\$3.7 billion.

50 After completing the Western Acquisition, the Walter Energy Group engaged in a series of internal restructurings to rationalize operations and organize the Walter Energy Group into geographical business segments: the Walter U.S. group, the Walter Canada Group and the Walter U.K. Group. As a result, the U.S. assets previously held by Western were transferred from Canada Holdings to Walter Energy U.S. and no longer formed part of the Canadian assets.

(3) *Walter Resources and the 1974 Plan*

51 The 1974 Plan is a pension plan and irrevocable trust established in 1974 in accordance with section 302(c)(5) of the *Labour Management Relations Act of 1947*, 29 U.S.C. § 186(c)(5). It is a multiemployer, defined benefit pension plan under section 3(2), (3), (35), (37)(A) of *ERISA*.

52 The 1974 Plan is resident in Washington, D.C. and administered there. The trustees are resident in the U.S. and all participating employers in the 1974 Plan are resident in the U.S.

53 The 1974 Plan was established pursuant to a collectively bargained National Bituminous Coal Wage Agreement of 1974 negotiated between the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc., a multiemployer bargaining association. This agreement has been amended from time to time since 1974.

54 *ERISA* requires that the 1974 Plan be administered in accordance with the most recently negotiated collective bargained agreement and other related documentation, such as the pension plan document and pension trust document. These documents set out, among other things, the contribution obligations of contributing employers to the 1974 Plan, which include:

a) monthly pension contributions for as long as there were operations covered by the 1974 Plan; and

b) a "withdrawal liability" accruing upon a partial or complete withdrawal from participation in the 1974 Plan.

55 The participants and beneficiaries in the 1974 Plan are retired or disabled former hourly coal production employees and their eligible surviving spouses. There are approximately 88,000 such participants and beneficiaries.

56 All signatories to the collective bargaining agreements are "participating employers". All such "participating employers" are resident in the U.S.

57 Only one of the U.S. entities, namely Walter Resources (or a predecessor entity), was a signatory to various National Bituminous Coal Wage Agreements from 1978 forward and was therefore, a "participating employer" in the 1974 Plan. The last of such agreements signed by Walter Resources was the one negotiated in 2011 (the "2011 CBA").

58 No member of the Walter Canada Group is or ever was a signatory to any National Bituminous Coal Wage Agreement, including the 2011 CBA. The 1974 Plan does not suggest that the Walter Canada Group ever contributed to the 1974 Plan; nor does the 1974 Plan suggest that the Walter Canada Group entities had any obligation to contribute to the 1974 Plan.

59 At the time of the Western Acquisition in 2011, the 1974 Plan had an unfunded liability of more than US\$4 billion. Its status at that time was said to be "Seriously Endangered Status", meaning that the 1974 Plan's funded percentage was less than 80%. If Walter Resources had withdrawn from the 1974 Plan around that time, the estimated withdrawal liability was approximately US\$426 million. There is no indication that the 1974 Plan took any position in this court in respect of the Western Acquisition.

60 Walter Resources and the 1974 Plan entered into the 2011 CBA after the Walter Acquisition was completed.

61 As with many pension plans, the fortunes of the 1974 Plan (and hence its beneficiaries) have not escaped the brunt of global market forces over the last decade or so. The global financial crisis in 2008/2009 resulted in declining assets held by such plans. In addition, the demographics of an aging population combined with declining coal mining operations (and hence fewer participating employers) have resulted in added financial pressures on less resources. As of September 2015, the 1974 Plan was certified as being in "Critical and Declining Status", meaning that it is expected to become insolvent by 2025/2026. The 1974 Plan now asserts that the insolvency is expected to occur in six to seven years.

62 Beyond benefits available to the beneficiaries of the 1974 Plan under these private contractual arrangements, there is some governmental support. A U.S. government sponsored entity, the Pension Benefits Guaranty Corporation, guarantees payment of a portion of the 1974 Plan's benefits, but at a reduced level.

(4) Walter Canada Group Corporate Structure

63 All of the Walter Canada Group entities are organized in Canada and for the most part, in British Columbia. The Canadian business operations principally consisted of the operation of three coal mines in British Columbia, being the Brule, Willow Creek and Wolverine mines. These mining properties have since been sold to a purchaser, as approved in these proceedings last year: *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 1746 (B.C. S.C.) at para. 80.

64 In particular, the petitioner companies, being Walter Canadian Coal ULC and Canada Holdings, with the latter's wholly owned subsidiary corporations, being Wolverine Coal ULC, Brule Coal ULC, Willow Creek Coal ULC, Cambrian Energybuild Holdings ULC (which in turn owns the Walter Energy Group's U.K. assets) and 0541237 BC Ltd., are all incorporated under the laws of British Columbia. The lone exception is Pine Valley Coal Ltd., a company incorporated under the laws of Alberta.

65 Similarly, the partnerships in the Walter Canada Group, which are wholly owned by Canada Holdings, being Walter Canadian Coal Partnership, Wolverine Coal Partnership, Brule Coal Partnership, and Willow Creek Coal Partnership, are all organized under the laws of British Columbia.

66 As I earlier noted in my reasons (*Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107 (B.C. S.C.) at para. 4), "[t]he timing of the Canadian acquisition could not have been worse". In 2011, the market for metallurgical coal fell dramatically, affecting operations of the entire Walter Energy Group in the U.S., Canada and the U.K. One can only assume that other coal producers in those jurisdictions, including signatories to the 1974 Plan in the U.S., similarly suffered the same fate and are struggling or have struggled with this economic downturn in the coal industry.

(5) The U.S. Chapter 11 Proceedings

67 On July 15, 2015, Walter Energy U.S. and some or all of its U.S. subsidiaries, including Walter Resources, commenced proceedings under Chapter 11 of Title 11 of the U.S. *Bankruptcy Code* in the U.S. Bankruptcy Court for the Northern District of Alabama (the "Chapter 11 Proceedings").

68 On October 8, 2015, the 1974 Plan filed proofs of claim in the Chapter 11 Proceedings against all of the U.S. debtors, including Walter Resources and Walter Energy U.S., claiming what was anticipated to be the withdrawal liability of Walter Resources if it withdrew from the 1974 Plan. It appears to be the case that everyone anticipated that Walter

Resources would seek to withdraw from the 1974 Plan through the Chapter 11 Proceedings. The unsecured claim was for not less than approximately US\$904 million.

69 The Proofs of Claim filed by the 1974 Plan do not refer to any entity within the Walter Canada Group as having any potential liability for this claim.

70 The U.S. insolvency filing in turn sparked the need for the corporations within the Walter Canada Group to seek creditor protection in Canada.

71 On December 7, 2015, this Court granted an Initial Order in this proceeding in favour of the petitioners. Protection was also granted in favour of the partnerships (see *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107 (B.C. S.C.) at para. 3). The Walter Canada Group did not seek recognition of the CCAA Proceedings in the U.S.; similarly, the Walter Energy Group's U.S. debtors did not seek recognition of the Chapter 11 Proceedings in Canada.

72 At the time of the Canadian CCAA filing, Mr. Harvey indicated that efforts were underway in the Chapter 11 Proceedings to implement a sales process to sell all of Walter Energy U.S.'s Alabama assets. A stalking horse agreement was part of that sales process, as is typical in those proceedings.

73 It quickly became apparent to the U.S. stakeholders that the stalking horse purchaser in the Chapter 11 Proceedings had no interest in assuming what the U.S. Bankruptcy Court would later describe as Walter Resources' "legacy and current labour costs", including that owing under the 2011 CBA. The asset purchase agreement later signed by the U.S. debtors and the purchaser expressly provided that the sale was subject to the U.S. Bankruptcy Court issuing an order allowing the U.S. debtors to reject the 2011 CBA, in accordance with the U.S. *Bankruptcy Code* provisions. It is common ground that upon such rejection, the withdrawal liability under the 1974 Plan would arise.

74 Arising from opposition to the stalking horse process from some factions, including the unsecured creditors committee (the "UCC"), a settlement was reached. On December 22, 2015, the U.S. Bankruptcy Court entered an order approving a Settlement Term Sheet between the Walter Energy group's U.S. debtors, a steering committee, the stalking horse purchaser and the UCC. The Settlement Term Sheet entitles unsecured creditors, which includes the 1974 Plan, to receive 1% of the common equity issued in the stalking horse purchaser on closing, as well as the right to participate in any exit financing. Later documentation filed in March 2016 by the Walter Energy Group's U.S. debtors and the UCC in the Chapter 11 Proceedings confirms that this settlement was intended to establish the extent of any recovery by unsecured creditors, such as the 1974 Plan, from the Chapter 11 estates.

75 The Walter Canada Group entities were not involved in the Chapter 11 Proceedings and were not parties to the Settlement Term Sheet.

76 On December 28, 2015, the U.S. Bankruptcy Court granted an order allowing Walter Resources to reject the 2011 CBA, over the objections of labour related stakeholders, including the 1974 Plan. The order (the "1113/1114 Order") authorized Walter Energy U.S. and its U.S. affiliates to reject the 2011 CBA and declared that any sale to the stalking horse purchaser was free and clear of any encumbrance or liabilities under the 2011 CBA. The U.S. Bankruptcy Court also declared that upon such sale, Walter Resources had no further contribution obligations under the 2011 CBA.

77 The Walter Canada Group did not participate in the hearing which gave rise to the 1113/1114 Order. The reasons of the U.S. Bankruptcy Court which led to the granting of the 1113/1114 Order do not refer at all to the Walter Canada Group entities or any assets or operations in Canada held by those entities.

78 The 1974 Plan appealed the 1113/1114 Order, although that appeal was later withdrawn in February 2016. At that time, the 1113/1114 Order became final.

79 By early January 2016, the 1974 Plan clearly anticipated that Walter Resources' withdrawal from the 2011 CBA was imminent. Around that time, the 1974 Plan began filing materials in these *CCAA* proceedings asserting that the Walter Canada Group entities were jointly and severally liable for the withdrawal liability under the 1974 Plan.

80 The sale of the U.S. assets, as approved by the U.S. Bankruptcy Court, closed on April 1, 2016. Accordingly, immediately before that date, all contributions by Walter Resources to the 1974 Plan ceased and the withdrawal liability arose. The 1974 Plan now estimates that the withdrawal liability is in excess of US\$933 million.

81 The 1974 Plan introduced the evidence of Dale Stover, the Director of Finance and General Services employed with the 1974 Plan. He indicates that by reason of Walter Resources' withdrawal, the status of the 1974 Plan has been further jeopardized even beyond that recognized in September 2015. He indicates that the other employers in the 1974 Plan will be further burdened by this loss.

82 Despite the extensive proceedings before the U.S. Bankruptcy Court, at no time has that Court expressed any opinion on the validity of the 1974 Plan's claim as asserted in the Chapter 11 Proceedings. In addition, at no time did the U.S. Bankruptcy Court address the ability of the 1974 Plan to assert joint and several liability for the withdrawal liability against the other U.S. debtors. Certainly, that court did not address the core (and second) issue before me on this application; namely, whether the entities within the Walter Canada Group are liable under *ERISA*'s provisions.

(6) Estimated Recoveries

83 In my view, the evidence and submissions on this point are substantially irrelevant, and completely irrelevant to the determination of some issues. I understand that the parties all agree as to this irrelevancy although they also all saw fit to ensure that I knew the consequences of a win/loss to each side. Accordingly, to round out the narrative, the consequences arising from this application are as follows.

84 If the 1974 Plan's claim is found to be invalid as against the Walter Canada Group entities, it is anticipated that all other unsecured claims filed against the Canadian estates will be paid in full, including in relation to substantial amounts (approximately \$12.8 million) owed to the Canadian unionized employees who worked in the British Columbia coal mines. In that event, it is also expected that the remaining funds will likely flow to Walter Energy U.S. arising from intercompany claims that have been filed.

85 I am advised by the 1974 Plan that, if this happens, no funds will be paid to it in respect of its unsecured claim. This appears to arise from the Settlement Term Sheet, discussed above, and which appears to limit recovery for the U.S. unsecured creditors (including the 1974 Plan) to equity in the stalking horse purchaser and participation in exit financing, which I gather provided little or no recovery in the U.S. Accordingly, the 1974 Plan asserts that without recovery from the Walter Canada Group's assets, it will fail to have achieved any recovery, either here in Canada or in the U.S.

VI ERISA's PROVISIONS

86 A review of the legislative provisions found in *ERISA* is helpful at this point. It is certainly required in order to consider and decide the second question, namely whether the Walter Canada Group is liable under *ERISA* as a matter of U.S. law. However, an understanding of those provisions is also necessary in order to answer the first question, namely being whether U.S. law (i.e. *ERISA*) even applies here.

87 The following, which I have largely adopted from the expert report of one of the Walter Canada Group's expert on U.S. law, Marc Abrams, summarizes the relevant legislative provisions under *ERISA* (or Title 29). Some of these provisions have already been generally described above:

- a) a "multiemployer plan" is a collectively bargained pension plan maintained and funded by more than one unrelated employer, typically within the same or related industries: 29 U.S.C. § 1301(a)(3). As stated above, the 1974 Plan is a multiemployer defined benefit pension plan: see 29 U.S.C. § 1002(2), (3), (35) and (37)(A);

b) if one of the contributing employers withdraws from a multiemployer plan, either partially or completely, *ERISA* requires the "employer" to pay to the plan its share of any unfunded vested benefits, generally determined as of the end of the plan year preceding the plan year in which the withdrawal occurs: 29 U.S.C. § 1386 and § 1391. The withdrawing employer's liability is referred to as the "withdrawal liability": 29 U.S.C. § 1381; and

c) the plan sponsor has a statutory duty to calculate and collect the withdrawal liability from the withdrawing employer: 29 U.S.C. § 1382. *ERISA* appears to contemplate that payments may be made over time in accordance with a schedule; however, if the withdrawing employer defaults in paying the withdrawal liability, the entire amount of the withdrawal liability becomes subject to collection: 29 U.S.C. § 1399(c)(5).

88 The key *ERISA* provisions which are said by the 1974 Plan to give rise to its claim against the Walter Canada Group entities are:

a) withdrawal liability is the joint and several obligation of not only the withdrawing "employer" (as a contributing employer) but also each member of the employer's "controlled group": 29 U.S.C. § 1301(a)(2)(B);

b) a contributing sponsor's "controlled group" consists of the contributing employer and others who are under "common control" (29 U.S.C. § 1301(a)(14)(A) and 29 U.S.C. § 1002(40)(B));

c) for a determination as to whether two persons are under "common control" where there is a single-employer plan, *ERISA* then refers to regulations "consistent and coextensive" with regulations under section 414 of Title 26 (also known as the *Internal Revenue Code*): 29 U.S.C. § 1301(a)(14)(B);

d) with respect to multiemployer plans, two or more trades or businesses are deemed to be a single employer if they are within the same "control group" and "control group" means a group of trades or businesses under "common control" with the employer: 29 U.S.C. § 1002(40)(B); and

e) for the purposes of *ERISA*, the three principal types of "controlled groups" are found in *Internal Revenue Code* regulations: (i) parent-subsidiary controlled groups; (ii) brother-sister controlled groups; and (iii) combined groups: 26 C.F.R. § 1.1563-1(a)(1)(i).

89 The 1974 Plan asserts that the corporations within the Walter Canada Group are part of Walter Resources' parent-subsidiary "controlled group". Under *ERISA*, a parent-subsidiary "controlled group" is a group consisting of entities connected through a controlling interest with a common parent where stock ownership of at least 80% of the voting power or value (other than the parent) is owned by one or more corporations and the common parent corporation owns stock with at least 80% of the voting power of at least one of the corporations: 29 U.S.C. § 1301(b)(1); 26 U.S.C. § 414(b); 26 U.S.C. § 1563(a)(1); 26 C.F.R. § 1.1414(c).

90 The 1974 Plan also relies on other provisions of the *Internal Revenue Code* and its regulations which refers to treating partnerships which are under common control as a single employer: 26 U.S.C. § 414(c); 29 U.S.C. § 1301(b)(1); 26 U.S.C. § 1563(a)(1); 26 C.F.R. § 1.1414(c)-2.

91 For purposes of this application, the Walter Canada Group and the Union agree that it can be assumed that under the above provisions, the Walter Canada Group entities were under common control and within the "controlled group" of the Walter Energy Group given the level of stock ownership held by Walter Energy U.S. in Canada Holdings and Walter Canadian Coal ULC. Further, as stated above, 100% ownership of all of the Canadian operating entities is held through Canada Holdings. All of the expert witnesses were similarly asked to make this assumption.

92 Accordingly, *prima facie*, *ERISA* purports to impose joint and several absolute liability on the entities within the Walter Canada Group based on the 1974 Plan having met the numerical (80%) test for stock ownership or voting control with respect to a "controlled group" under *ERISA*. In addition, no issue arises given that some of the entities are partnerships.

VII THE CHOICE OF LAW QUESTION

93 The first issue posed by the Walter Canada Group is:

Under Canadian conflict of laws rules, is the 1974 Plan's claim as against the Walter Canada Group governed by Canadian substantive law or U.S. substantive law (including *ERISA*)?

94 Accordingly, the question for this Court to consider is what choice of law - Canada or the U.S. (ie. *ERISA*) - governs the 1974 Plan's claim. Since the 1974 Plan has chosen to assert its claim in these Canadian proceedings, it is common ground that Canadian choice of law principles govern the analysis of what law applies to the 1974 Plan's claim: Janet Walker, *Castel & Walker Canadian Conflicts of Laws*, (Toronto, LexisNexis, 2005) (loose-leaf, 6th ed.) ch. 1 at 1-2.

95 The overall aim or purpose of the choice of law exercise is to identify the most appropriate law to govern a particular issue: A.V. Dicey, J.H.C. Morris & Lawrence Collins, *The Conflict of Laws*, vol. 1, 15th ed. (London, Sweet & Maxwell, 2012) at 51.

96 The authorities are clear that determining choice of law is a two-step process: firstly, the Court characterizes the claim to determine which choice of law rule applies; and secondly, the Court applies the proper choice of law rule to the claim. This process was described in *Castel & Walker* at 3-1 as follows:

In an action involving legally relevant foreign elements, a court may be asked to apply foreign law. To decide whether to do so, the court must ascertain the legal nature of the questions or issues that require adjudication and then apply its appropriate conflict of laws rules to them. For instance, do the facts raise a question of succession or of matrimonial property, or a question of capacity or of form? This analytical process is called the characterization or classification. Its purpose is to enable the court to find legal categories with which the forum is familiar. In other words, the court must allocate each question or issue to the appropriate legal category. The application of the forum's conflict of laws rule to each legal question or issue will indicate which legal system governs that question or issue. That legal system is called the *lex causae*.

Once the court has characterized the issue, it will consider the connecting factor — a fact or element connecting a legal question or issue with a particular legal system. Finally, the court will apply the law identified as the governing law. In doing so it must separate the rules of substance from the rules of procedure of the legal systems involved, because questions of procedure are governed by the *lex fori*.

97 The first step therefore requires that the court ascertain or characterize the "legal nature of the questions or issues". Typical legal categories used for characterization include: property law, the law of obligations, family law, the law of corporations and insolvency. Other categories, or sub-categories, include the law of contract (an "obligation"), tort and equitable remedies, such as unjust enrichment.

98 In Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws*, 2nd ed. (Toronto: Irwin Law Inc., 2016) at 223-226, the authors discuss the somewhat perplexing question as to just what is to be characterized. They conclude that facts are not to be characterized, but the courts have variously referred to both "issues" and "causes of action" as being characterized. At 224, the authors highlight, citing *Macmillan Inc. v. Bishopsgate Investment Trust (No. 3)* (1995), [1996] 1 W.L.R. 387 (Eng. C.A.), the possible differences that may arise in that respect and that claimants may attempt to characterize their claims to support their choice of law.

99 In this case, I see no material difference whether one characterizes the 1974 Plan's claim in terms of a "cause of action" or "issue". Fundamentally, the claim arises from the express legislative provisions of *ERISA*. As noted by the Walter Canada Group, there is no equivalent provision of *ERISA* here in Canada or British Columbia. In that event, the claim is to be characterized "as its closest functional equivalent under that [forum's] law", namely Canada and British Columbia: Pitel and Rafferty at 227.

100 The Walter Canada Group and the Union, on one hand, and the 1974 Plan, on the other, present starkly different approaches to the characterization of the 1974 Plan's claim. As I will describe below, the answer to this first step or question in turn leads to a distinct path or set of considerations as to the choice of law issue. The answers to each of the analytical steps also lead to different considerations in relation to most, if not all, of the evidentiary issues and objections raised by the 1974 Plan.

101 Accordingly, the statement found in Pitel and Rafferty at 222 that the characterization of the issue is "central to the choice of law process" is particularly apt here.

102 This two-step process is illustrated by this Court's decision in *Minera Aquiline Argentina SA v. IMA Exploration Inc.*, 2006 BCSC 1102 (B.C. S.C.), aff'd 2007 BCCA 319 (B.C. C.A.), upon which both parties rely. At paras. 160-181, this Court addressed the characterization issue, which arose from the competing positions of the parties. The defendant asserted that the claim related to a foreign immovable (in which case Argentina law applied) and the plaintiff asserted that the claim was an *in personam* claim for appropriation through a breach of confidence (in which case British Columbia law applied).

103 This Court in *Minera* determined that the claim was more appropriately characterized as an equitable claim for unjust enrichment arising from a breach of confidence, with the consequence that the relevant choice of law rule was the "proper law of the obligation" (see paras. 181-184).

(1) What is the Characterization of the 1974 Plan's Claim?

104 Turning to the first step, there is no disagreement that the 1974 Plan's claim does not arise as a result of the Walter Canada Group's conduct. The Walter Canada Group entities did not employ any beneficiaries of the 1974 Plan or have any direct relationship, contractual or otherwise, with the 1974 Plan. Nor did the Walter Canada Group contribute to or have any obligation to contribute to the 1974 Plan. No other conduct that may be relevant to the Walter Canada Group's liability in that regard has been raised. Simply put, the Walter Canada Group had nothing to do with either the 1974 Plan or Walter Resources' participation in it.

105 The Walter Canada Group contends that the 1974 Plan's claim is properly characterized as an issue under the law of corporations or as an issue of legal corporate or partnership status or personality. They say that the basis for the claim simply arises under *ERISA* and as a result of Walter Resources' withdrawal from the 1974 Plan. Further, they say that the *only* basis for the claim against the Walter Canada Group arises from *ERISA*'s "common control" provisions, discussed above, and are said to apply solely from the fact that the Walter Canada Group entities and Walter Resources are both owned directly or indirectly by Walter Energy U.S.

106 It is clear that Walter Resources was the only signatory to the 2011 CBA and that Walter Resources' corporate relationship, *albeit* indirectly, to the Walter Canada Group, is the sole basis upon which the 1974 Plan seeks to apply the "controlled group" concept under *ERISA*.

107 The 1974 Plan contends that its claim concerns the law of obligations and in particular, contract, such that U.S. law is the "proper law of the obligation". The 1974 Plan asserts that its claim is one based not only on *ERISA*, but also the documents by which the 1974 Plan administers itself: namely, the pension plan document, the pension trust document and the 2011 CBA.

108 I will first address the arguments of the 1974 Plan.

109 The arguments of the 1974 Plan rest on the central proposition that where a statute confers a right of action in favour of an entity which is not a party to a contract to which the claim relates, the "essential nature" of the claim is to enforce the terms of that contract, such that the claim is properly characterized as one in contract. The 1974 Plan

describes its claim as seeking to enforce the contractual obligations of Walter Resources against the Walter Canada Group. Three English insurance cases are cited in support.

110 The court in *Youell v. Kara Mara Shipping Co. Ltd.*, [2000] EWHC 220 (Eng. Comm. Ct.) was addressing the consequences of a collision at sea between two ships. The owners of the "innocent" vessel commenced proceedings in Louisiana. In that jurisdiction, such a party was allowed, by statute, to claim directly against the "at fault" vessel owner's insurers. The insurers ultimately applied in England to restrain these proceedings on the basis that the "direct action" statutory claim was pursuant to insurance policies which required any litigation to be brought in England. The English court agreed, stating:

58. The position in the present case is that World Tanker has asserted a claim on the H&M Policies by virtue of the *Direct Action Statute* in the Direct Action Claim. It is true that World Tanker have not become a party to the policies by a mechanism of statutory novation or of statutory assignment. But in my view, the nature of the rights that the *Direct Action Statute* confers to World Tanker is contractual; it confers a statutory right to make a claim on a contract to which World Tanker was not originally a party. ... the rights are confined to the "*terms and limits of the policy*".

...

61. Therefore, I conclude that the nature of the claim by World Tanker against YM Insurers in the Direct Action Claim is contractual and the terms of that contract would include the English proper law clause and the [exclusive jurisdiction clause].

111 In *Through Transport Mutual Insurance Association (Eurasia) Ltd. v. New India Assurance Association Co. Ltd.*, [2004] EWCA Civ 1598 (Eng. & Wales C.A. (Civil)), the court was considering Finnish legislation that gave a person a direct right to sue the defendants' insurer for losses caused by the defendant. At para. 56, the court agreed with the trial judge's approach to consider the "substance" of the claim being advanced. At para. 57, the court adopted the trial judge's comments on the characterization issue for choice of law purposes:

... If in substance the claim is independent of the contract of insurance and arises under the Finnish legislation simply as a result of its having a right of action against an insolvent insured, the issue would have to be characterized as one of statutory entitlement to which there may be no direct equivalent in English law. In that case the issue would in my view have to be determined in accordance with Finnish law. If, on the other hand, the claim is in substance one to enforce against the insurer the contract made by the insolvent insured, the issue is to be characterized as one of obligation. In that case the court will resolve it by applying English law because the proper law of the contract creating the obligation is English law.

112 The Court of Appeal in *Through Transport* agreed with the lower court's conclusions that the claim was, in substance, to enforce the insurance contract between the responsible party and its insurer:

58. ... In short, the title to section 67 [of the Finnish Act] is the "*insured person's entitlement to compensation under general liability insurance*" and the right is defined as a right "to claim compensation in accordance with the insurance contract direct from the insurer" in certain defined circumstances. The claim under the Act is not therefore in any sense independent of the contract of insurance but under or in accordance with it. In these circumstances it seems to us that the judge was correct to hold that the issue under the Act is one of obligation under the contract. The judge noted in passing ... that the Finnish court itself described the Act as giving the injured party the right to claim compensation "according to the insurance policy".

[Emphasis added]

The Court of Appeal also noted at para. 59 that, although the Finnish Act gave the claimant a right of action directly against the insurer without the need of a formal assignment, what he obtained was "essentially a right to enforce the

contract in accordance with its terms". Therefore, pursuant to the terms of the insurance contract, that stated English law applied, English law was the proper law of the claim.

113 The third and final case cited by the 1974 Plan is *The London Steam-Ship Owners' Mutual Insurance Association Ltd. v. The Kingdom of Spain & Anor*, [2013] EWHC 3188 (Eng. Comm. Ct.). There, the court followed the analysis in both *Youell* and *Through Transport*, stating that in deciding whether or not a direct action right under a statute is "in substance" a claim to enforce the contract or a claim to enforce an independent right of recovery, what matters most is the content of the right, rather than the derivation of its content (paras. 82-88). The Court held that the essential content of the right was provided by the insurance contract, despite the Spanish law which also created further liability for an event that would not normally be insurable. The direct action right conferred by Spanish law against the liability insurers was found to be, in substance, a right to enforce the contract rather than an independent right of recovery.

114 The 1974 Plan argues that, for choice of law purposes, its claim arises under the law of obligations - namely it is one of contract. It argues that the three English cases above all involve: (a) a plaintiff advancing a claim against another party for a liability arising under a contract where there was no privity of contract; (b) a plaintiff claiming that the defendant's liability arose under a statute from a law other than the *lex fori*; and (c) a court characterizing the claim as a right to enforce a contract which only existed by reference to that contract.

115 The 1974 Plan contends that its claim is the same because, although Walter Resources was the only signatory to the 2011 CBA, *ERISA* (namely the foreign law) provides that the Walter Canada Group is liable in relation to Walter Resources' rejection of 2011 CBA and the withdrawal liability that arose under that contract.

116 Despite the 1974 Plan's fervent submissions on this issue, I am not convinced that the three English cases are analogous to the situation here. In my view, they are distinguishable.

117 Firstly, the foreign statutes in the English cases simply authorized a direct action against a *party* to the contract in question, being the insurance policy. In essence, the plaintiffs were made parties to the insurance contract between the insurer and the insured. In contrast here, *ERISA* does not authorize the 1974 Plan to sue the Walter Canada Group as a party to the 2011 CBA, the pension plan and trust documents. The 1974 Plan relies solely on the provisions in *ERISA* which only references the contractual liability as the basis upon which to monetarily determine the amount of the liability.

118 Secondly, the reasoning of and results in the English courts was substantially influenced by the fact that even though the plaintiffs were essentially to step into the insurance contracts, the terms of the contract were, by the statutory provisions, still to govern. This meant that the plaintiffs took the insurance contracts as they found them and were subject to not only the benefits under the contracts, but also other provisions (or burdens) that might, for example, deny or limit coverage and therefore, recovery. As shown in the results found in those cases, that meant that the plaintiffs were subject to exclusive jurisdiction clauses and provisions requiring arbitration, which was the bargain struck in the insurance contracts.

119 In *Through Transport*, the court stated at para. 58 that the claim was not "independent of the contract of insurance but under or in accordance with it."

120 Here, *ERISA*'s provisions are entirely devoid of any mention of the underlying contractual obligations of Walter Resources. Those provisions simply provide that if there is a "withdrawal liability", the other members of the "controlled group" are liable for that amount. I see no basis upon which one could say that, in substance, the Walter Canada Group became a party to the 2011 CBA and the other pension documents by reason of *ERISA*'s provisions.

121 For example, there is no suggestion that the other "controlled group" members could contest the amount of the withdrawal liability or advance any other substantive issues that Walter Resources might have raised under the terms of the 2011 CBA and the related documents. The evidence shows that the Walter Canada Group was not even notified of, let alone allowed to participate, in the contractual process by which the 1974 Plan determined the "withdrawal liability"

under the 2011 CBA. The discussion of "absolute liability" of "controlled group" liability under *ERISA*, cited by the Union, found in *Connors v. Peles*, 724 F. Supp. 1538 (U.S. W.D. Pa. 1989) at 1577-8, is instructive on this point:

... Under certain circumstances, one member of a controlled group may be responsible for the withdrawal liability of another member of the controlled group. These principles apply only when there are two or more separate businesses that are banded or associated together in a "controlled group". Participation in the controlled group, by itself, imposes equal responsibility upon all members of the controlled group for the withdrawal liability of an "employer" member of the controlled group, i.e., even though the "employer" member of a group of trades or businesses is the only one with a pension plan. Once notice to the "employer" is given, as required by 29 U.S.C. § 1399, it is totally irrelevant as to whether actual or even constructive notice is given or imputed to the "non-employer" members of a controlled group. The liability of the "non-employer" members of a controlled group does not rest on any notice safeguards under ERISA. The "non-employer" members of the controlled group do not even have to be engaged in the same business enterprise, or even in a similar business. A striking example is provided in *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 630 F.2d 4, 11-13 (1st Cir.1980), where one member of a controlled group (the "non-employer") did not even have any employees!

Congress built the equivalent of withdrawal liability "guaranty's" into *ERISA*, at the time of the enactment of the multiemployer amendments. The "guaranty's", commonly known and referred to as the "controlled group" statutes, 29 U.S.C. § 1301(b)(1), and the regulations adopted thereunder, 29 C.F.R. Part 2612, and consider the entire group as but one "employer", 29 U.S.C. § 1002(5), and impose *absolute* liability upon all members of a control group for the withdrawal liability of any member of a statutory group of enterprises, even though the "employer" member of a group of trades or business is the only one with a pension plan, and regardless of whether their groups have employees. *Pension Benefit Guaranty Corp. v. Ouimet Corporation*, 630 F.2d 4 (1st Cir.1980). Under "controlled group" statutory liability, an inquiry as to the interrelationship of the members of the control group, with the employees of all members of the control group, as required under the "single employer" test, is totally unnecessary and irrelevant.

[Emphasis added in underlining]

122 During the hearing, the 1974 Plan's counsel referred to the 1974 Plan as having certain "contractual expectations". While this may have been true in relation to Walter Resources, in my view, the 1974 Plan could only have had "statutory expectations" in relation to other "controlled group" members in the Walter Energy Group arising from *ERISA*. Certainly, the Walter Canada Group had no "contractual expectations" in these circumstances; this is in contradistinction to the fact that the insurers in the English cases most certainly would have had "contractual expectations" arising from the insurance contracts they issued.

123 I turn to consider the argument advanced by the Walter Canada Group that the appropriate choice of law characterization of the 1974 Plan's claim is one of the law of corporations and more specifically, one of separate legal existence or personality.

124 The 1974 Plan argues that the choice of law rule advocated by the Walter Canada Group is intended only for matters related to corporate existence, such as whether an entity has the capacity to sue or be sued. The 1974 Plan concedes that it may also apply to issues of corporate governance, such as shareholder rights, the authority of directors, the power to make contracts or rights to issue or transfer shares.

125 I do not agree that such a narrow approach as advocated by the 1974 Plan is appropriate in characterizing the issue. The references in the cases to looking at the "substance" of the claim support a more far-ranging and holistic analysis. Indeed, although in support of its own argument, the 1974 Plan itself asserted that the characterization exercise is to be done in accordance with the rules and in a "flexible manner".

126 In *Macmillan*, the English court of appeal was called upon to settle a dispute about shares that were wrongly offered as security in England, when in fact they were owned by an American company. In the choice of law analysis, Auld L.J., at 407, discussed the need to look beyond the strict or narrow formulation of the claim:

...classification is governed by the *lex fori*. But characterisation or classification of what? It follows from what I have said that the proper approach is to look beyond the formulation of the claim and to identify according to the *lex fori* the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law. However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the *lex fori*, or that of the competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the *lex fori* which may not be applicable under the other system: see *Cheshire & North's Private International Law*, 12th ed., pp. 45-46, and *Dicey & Morris*, vol. 1, pp. 38-43, 45-48.

Here, the "true issues" that are raised by the claim go well beyond the narrow formulation advanced by the 1974 Plan.

127 Further, the text authority cited by the 1974 Plan on this issue in fact supports the position of the Walter Canada Group. In *Castel & Walker*, the authors also adopt a wider view of the "law of corporations" as including questions of status, separate legal personality and the limited liability that flows from that personality. At 30-1, the authors state:

Questions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation. This domicile is in the state, province or territory of incorporation or organization and it cannot be changed during the corporation's existence even if the corporation carries on business elsewhere.

...

While the state, province or territory in which the foreign corporation intends to carry on business has the right to prescribe the extent to which the corporation may exercise its corporate powers and capacity, this does not mean that proceedings may be taken in this jurisdiction to affect its status as a corporation. ...

There is some controversy over which law determines the liability of a corporation for the obligations of a foreign subsidiary. Since the personality and status of the subsidiary is called into question, it would seem that the law applicable to the status and capacity of the subsidiary should determine whether its corporate veil can be pierced.

[Emphasis added]

128 The 1974 Plan also argues that this Court should consider the rationale of the choice of law rule it is applying and also the purposes of the substantive law to be characterized and then determine if the conflict rule covers the substantive law at issue (ie. the effect of a certain characterization): Dicey at 51 citing *Raiffeisen Zentralbank Osterreich AG v. Five Star General Trading LLC (The Mount I)*, [2001] EWCA Civ 68 (Eng. C.A.) at para. 27. The 1974 Plan then says that the purpose of the substantive law (ie. *ERISA*) is to ensure that employees who are promised retirement benefits actually receive those benefits, citing *Connolly v. PBGC*, 475 U.S. 211 (U.S. Sup. Ct. 1986), 214. The 1974 Plan then asserts that this purpose is entirely different than that behind the corporate choice of law rule whose purpose is the determination of corporate matters or more specifically, corporate capacity or governance. After analyzing the underlying policy purposes of the conflicts rule, that corporations are governed by the substantive law of the country of incorporation, the 1974 Plan argues that this substantive law issue is not engaged here since its claim is about employees' pension entitlements, in which case U.S. law should apply.

129 This argument is entirely without merit in that it confuses the intent or purpose behind the "controlled group" provisions found in *ERISA* with the effect of those provisions. I agree that *ERISA* has been employed by the U.S.

Congress with the *intention* and *purpose* of seeking to ensure that U.S. retirees receive contracted for benefits; however, the *effect* of the "controlled group" provisions is to collapse the corporate structure to ensure that as many entities within a corporate group are liable for retirement plan withdrawal and that their assets are available to meet obligations to those retirees.

130 Seen in that vein, the purpose of the choice of law rule proposed by the Walter Canada Group intersects with the substantive law under *ERISA*, in that both address the corporate status or the separate legal existence or personality of other persons, including the Walter Canada Group entities. *ERISA* ascribes liability based solely on corporate and other legal relationships.

131 As the Walter Canada Group argues, it is trite law in British Columbia and Canada that corporations have separate legal personalities from that of its shareholders and that shareholders are not *prima facie* liable for the debts of the corporation: *Salomon v. Salomon & Co.* (1896), [1897] A.C. 22 (U.K. H.L.). A corporation has the capacity and the rights, powers and privileges of an individual of full capacity: *Business Corporations Act*, S.B.C. 2002, c. 57, s. 30.

132 The well-known decision in *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 37 B.C.L.R. (2d) 258 (B.C. C.A.) at 266-268 affirmed the sanctity of a corporation's existence per *Salomon* and discussed that the corporate veil may be pierced only in certain and exceptional circumstances. To similar effect, see *Edgington v. Mulek Estate*, 2008 BCCA 505 (B.C. C.A.) at paras. 20-25 where, following *B.G. Preeco*, the court stated at para. 21 that the "separate legal personality of the corporation will not be lightly disregarded". These and other cases were recently discussed in *Emtwo Properties Inc. v. Cineplex (Western Canada) Inc.*, 2011 BCSC 1072 (B.C. S.C.) beginning at para. 97 to similar effect.

133 The intention behind, purpose and effect of *ERISA*'s "common control" or "controlled group" provisions are aided by interpretations of those provisions by the U.S. courts. In that respect, Mr. Abrams' expert report is again of assistance. He states at pp. 6-7 of his report:

Courts have described the operation of *ERISA*'s "controlled group" liability provisions as a "veil-piercing" statute that disregards formal business structures in order to impose liability on related businesses.

...

As the U.S. Supreme Court has recognized, in place of the "subjective, case-by-case analysis that had previously prevailed," Congress purposefully adopted an "objective test" for determining whether a controlled group exists, based on a "mechanical formula" that establishes "a sharp dividing line that is crossed by incremental changes in ownership." [citing *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 34 (1982)] Thus, the applicable regulations for withdrawal liability of "controlled groups" establish a "brightline test based purely on stock ownership," and affiliates are not required to have actually exercised control over the employer (or vice versa) or engaged in any wrongdoing or misconduct in order to be liable as a member of the "controlled group."

134 The citations provided by Mr. Abrams for these comments amply support his summary of the U.S. courts' characterization of *ERISA*'s "controlled group" provisions. Other comments found in the U.S. cases cited by him are equally instructive:

a) the *ERISA* provisions were aimed at "curbing abuses of multiple incorporation": *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (U.S. Sup. Ct. 1982) at 36;

b) in *Bd. of Trustees Trucking Employees v. Gotham Fuel*, 860 F.Supp. 1044 (U.S. Dist. Ct. D. N.J. 1993) at 1050, the court stated that members of the controlled group are "deemed, by law" to constitute a single entity. At 1050-1051, the court adopted an earlier statement of the legislative intent underlying *ERISA*:

The legislative background of ERISA ... makes it abundantly clear that, for the purpose of [ERISA], Congress was unconcerned with the actual corporate form of a business. ... Congress instructed ... the courts to disregard the corporate form and treat several inter-related corporations as one entity, the ERISA "employer" ...

and also stated:

Controlled group members are statutorily determined to be 'single entities,' without the necessity of a finding of improper motive or wrongdoing.

c) in *PBGC v. Smith-Morris Corp.*, Doc. 94-cv-60042-AA (U.S. Dist. Ct. E.D. Mich. September 13, 1995), 1995 US Lexis 22510 at 8 (E.D. Mich. Sept. 13, 1995), the court stated that *ERISA*'s concern is not whether a stockholder who has a controlling share actually exercised control over corporate affairs but simply whether it had "the ability to control," as evidenced through stock ownership;

d) in *Sum Capital Partners III, LP v. New England Teamsters and Trucking Industry Pension Fund*, 724 F.3d 129 (U.S. C.A. 1st Cir. 2013) at 138, the court stated that:

... [ERISA's] broad definition of "employer" extends beyond the business entity withdrawing from the pension fund, thus imposing liability on related entities within the definition, which, in effect, pierces the corporate veil and disregards formal business structures. ...

e) finally, in *Central States, SE & SW Areas v. Messina Products*, 706 F.3d 874 (U.S. C.A. 7th Cir. 2013), at 877-878, the court stated:

When an employer participates in a multiemployer pension plan and then withdraws from the plan with unpaid liabilities, federal law can pierce corporate veils and impose liability on owners and related businesses. ...

...

The [joint and several withdrawal liability] provision's purpose is to "prevent businesses from shirking their ERISA obligations by fractionalizing operations into many separate entities..." (Citing: *Central States, Southeast and Southwest Areas Pension Fund v. White*, 258 F.3d 636, 644 (7th Cir.2001))

135 The 1974 Plan's expert witness as to U.S. law and specifically, *ERISA*, Judith Mazo, agrees. She describes at paragraph 37 of her report that the "arithmetic rules" or "bright lines" under *ERISA* apply to determine common control. She further states there is no other relevant consideration as to whether *ERISA* applies:

44. ... Because the law uses mechanical tests and looks at highly concentrated levels of ownership, it does not matter whether the decision-makers actually exercised their control since they had the power to do so if they chose.

136 Simply put, the 1974 Plan's claim arises solely by reason of Walter Energy U.S. owning more than an 80% stake in both Walter Resources and the Walter Canada Group entities. Arising from that "arithmetic" rule, *ERISA* dictates that the Walter Canada Group is liable for any withdrawal liability of a signatory (ie. Walter Resources) under the 1974 Plan.

137 Accordingly, I agree with the Walter Canada Group that *ERISA*'s "controlled group" provisions impose liability by ignoring separate corporate personalities and effectively amalgamating, consolidating or collapsing "common control" entities into a single "employer" liable for any withdrawal liability of any other entity within that group. There can be no dispute that, but for *ERISA*'s provisions, the Walter Canada Group would not be liable for any obligations owing by Walter Resources under the 2011 CBA. It is only by reason of the Walter Canada Group's relationship with Walter Resources, through the indirect corporate ownership of Walter Energy U.S., that such liability arises.

138 As the U.S. cases note, this is the essence of "lifting the corporate veil" so as to look beyond the corporate personality of Walter Resources and impose liability on other entities within the corporate group through common shareholdings.

139 My conclusions are consistent with the comments found in *Pension Benefit Guaranty Corp. v. Ouimet Corp. Pension Benefit*, 711 F.2d 1085 (U.S. C.A. 1st Cir. 1983), 6 where the Court of Appeals, First Circuit allocated a termination liability to certain solvent members of the Ouimet Group:

On the surface this result may appear to disregard unduly the legal separateness of the corporate entities. There is precedent, however, for piercing the corporate veil in bankruptcy situations. Under its general equitable powers a bankruptcy court may "substantially consolidate" the assets and liabilities of various entities. Substantial consolidation will usually, but not always, involve only debtors and be granted if absolutely necessary for achieving reorganization or protecting creditors' economic interests. ... Some of the facts a court will look for in deciding whether to grant a substantive consolidation include the parent owning a majority of the subsidiary's stock, the entities having common officers or directors, the subsidiary being grossly undercapitalized, the subsidiary transacting business solely with the parent, and both entities disregarding the legal requirements of the subsidiary as a separate corporation. ...

There is no need to show that any or all of these factors are present to justify holding the solvent members of the Ouimet Group responsible for the entire liability in this case. Avon's corporate veil was, in effect, pierced by Congress when it enacted the termination liability provisions of ERISA. The corporate form is a creation of state law and states may impose stringent limitations on attempts to disregard it; the factors courts consider in deciding whether to grant substantive consolidations reflect such limitations. These limitations, however, do not constrict a federal statute regulating interstate commerce for the purpose of effectuating certain social policies ... *Corn Products Refining Co. v. Benson*, 232 F.2d 554, 565 (2d Cir.1956) (existence of separate corporate entity may be disregarded when necessary to further the purpose of a federal regulatory statute). Thus, concerns for corporate separateness are secondary to what we view as the mandate of ERISA in this case.

[Emphasis added]

140 Since *ERISA* is a creature of the U.S. Congress, there is no similar legislation in Canada that might be considered in this characterization exercise. There is no case authority from Canada that addresses *ERISA*, nor any case authority involving the type of characterization exercise involved here. Nevertheless, the Walter Canada Group argues that characterizing the 1974 Plan's claim as one implicating legal personality is consistent with at least one British Columbia authority.

141 In *JTI-Macdonald Corp. v. British Columbia (Attorney General)*, 2000 BCSC 312 (B.C. S.C.), this court considered the constitutionality of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 1997, c. 41 (the "*Tobacco Act*"). The *Tobacco Act* created a cause of action permitting the government to directly recoup medical costs from the tobacco industry. The *Tobacco Act* defined "manufacturer" broadly and, coupled with the group liability provisions, extended liability to affiliated (perhaps also foreign) companies (see paras. 156-158). Similar to *ERISA*, the *Tobacco Act* "imposed liability upon a foreign defendant not on the basis of wrongful conduct but on the basis of being deemed a member of a group in which another member commits a wrongful act." (para. 233).

142 I agree with the 1974 Plan that the result in *JTI-Macdonald Corp.* is limited since it arose in the context of a constitutional challenge which is not involved here. Nevertheless, many of the comments of Justice Holmes in respect of the *Tobacco Act* strike a similar chord in terms of what *ERISA* seeks to accomplish as against the Walter Canada Group. I have included lengthy quotes of Holmes J. here, particularly given the degree of reliance placed on this case by the Walter Canada Group:

[172] The combined effect of [provisions of the *Act*] purport to affect the status, structure and corporate personality of foreign corporations and the rights of their shareholders.

[173] The *Act* has the effect of abolishing the separate corporate personalities of companies incorporated under federal or foreign law with domiciles outside British Columbia.

[174] A company's registered office establishes its domicile. [*Gasque v. Inland Revenue Commissioners*, [1940], 2 K.B. 80; Fraser & Stewart, op. cit. at p.144; *National Trust Co. Ltd. v. Ebro Irrigation & Power Co. Ltd.*, [1954], 3 D.L.R. 326 (Ont.H.C.); *Voyage Co. Industries v. Craster*, [1998] B.C.J. No. 1884 (Unreported) (B.C.S.C.)].

[175] A corporation's domicile determines the law respecting its creation and continuation (corporate personality), matters of internal management, share capital structure, and shareholder rights. [Castel, J.G., *Canadian Conflict of Laws* 4th ed., (Toronto: Butterworths, 1997) pp.574-575; *Voyage Co. Industries v. Craster*, *supra*; *National Trust Co. Ltd. v. Ebro Irrigation & Power Co. Ltd.*, *supra*; Fraser & Stewart, op. cit. p.144; Palmer's Company Law (looseleaf ed.) Vol. I, (London: Sweet & Maxwell, 1997) pp.2105-2106]:

Questions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation. This domicile is in the state or province of incorporation or organization and cannot be changed during the corporation's existence even if it carries on business elsewhere. Thus, the law of the state or province under which a corporation has been incorporated or organized determines whether it has come into existence, its corporate powers and capacity to enter into any legal transaction, the persons entitled to act on its behalf, including the extent of their liability for the corporation's debts, and the rights of the shareholders.

[Castel, *supra*, at p.574-575].

[176] It is a fundamental principle of company law that a corporation is a legal entity distinct from its shareholders. [*Salomon v. Salomon & Co. Ltd.*, [1897] A.C. 22 (H.C.); Palmer's Company Law 24th ed., Schmitthoff, C.M. Ed., (London: Stevens & Sons, 1987) pp.200-201; Fraser & Stewart Company Law of Canada 6th ed., (Carswell, 1993) at p.17; *Canada Business Corporations Act*, R.S.C. 1985, c.C-44, S.15(1)].

[177] This distinction is operative in a parent and subsidiary relationship and applies to related corporations owned by a common shareholder. [Fraser & Stewart, op. cit. at p.21, Davies, P.L., *Gower's Principles of Modern Company Law* 6th ed. (London: Sweet & Maxwell, 1997) at pp.80, 159-163; *BG Preeco I (Pacific Coast) Ltd. v. Bon Street Developments Ltd.* (1989), 60 D.L.R. (4th) 30 (B.C.C.A.)].

[178] There is a distinction in Canadian constitutional law between the power to incorporate and the power to regulate the activities of a company. The power to incorporate a company is the ability to bestow legal personality on an association of persons, regulate a corporate structure and define the rights of shareholders.

[179] A company once incorporated however will be responsible to the laws of jurisdictions in which it operates. A federally incorporated company is, for example, accountable under provincial security laws.

...

[189] The *Act* therefore attempts to alter and derogate from what are clearly domiciliary rights under the law of foreign jurisdictions, ...

...

[205] The *Act* overrides the substantive laws of extra-territorial Canadian or foreign jurisdictions in four major areas:

(a) in respect of the status and corporate personalities of corporate tobacco manufacturers with domiciles outside British Columbia;

.... and

(d) in respect of shareholder's rights and liabilities regarding shares of federal or foreign corporations.

...

[213] Sections [of the *Tobacco Act*], when they purport to govern the status, structure and corporate personality of a federally-incorporated company under the *Canada Business Corporations Act* are not only extra-territorial in effect they trench upon the exclusive jurisdiction of the Parliament of Canada.

[214] There is much force to the argument that a practical cumulative effect of these provisions of the *Act* is to "amalgamate" or "merge" defendant tobacco companies such that those "amalgamated" by the operation of the provisions of the *Act* incur liability for civil claims against others in the involuntary merger. That is a fundamental interference with a federal jurisdiction reserved under Part XV of the *Canada Business Corporations Act*.

[215] The combined effect of Sections...of the *Act* ignores the separate identities of federally-incorporated companies for the purpose of establishing a tobacco related wrong committed by a related company and for the purpose of calculating amounts assessed against them.

[216] The separate legal personality conferred under s.15(1) of the *Canada Business Corporations Act* is removed and the corporation loses its legal status as distinct from its shareholders.

...

[218] The provisions of the *Act* appear not so much designed to "pierce the corporate veil" as they are to strip away separate identities and treat them as if they had legally merged or amalgamated. The effect of provisions of the *Act* is not to look through the façade of a company shell; it is to deny the right to any separate corporate existence.

[Emphasis added]

143 Applying these same comments to *ERISA*, it is clear that the "controlled group" provisions simply disregard the separate corporate personalities of other companies within the Walter Energy Group (including those within the Walter Canada Group) by lifting their corporate veils. It does this by ignoring the separate legal existence and personality of the Walter Canada Group entities (and limited liability per *Salomon*), effectively amalgamating or consolidating those entities, in deeming them to be one "employer" along with Walter Resources.

144 I agree that *JTI-Macdonald* provides substantial support that a claim which purports to impose liability arising purely as a result of corporate relationships, such as *ERISA* does, are properly classified as claims concerning the status and legal personality of corporations. To use the words of Holmes J., the application of *ERISA* to the Walter Canada Group results in those entities' "separate legal personality" being removed or "stripped away" such that they lose their legal status as distinct from their shareholders.

145 I agree that the 1974 Plan's claim against the Walter Canada Group, being founded on *ERISA*'s "controlled group" liability provisions, should be characterized as concerning the status and legal personality of corporations and partnerships within the Walter Canada Group.

146 In conclusion, in my view, the legal nature of the 1974 Plan's claim is appropriately characterized as one of corporate or partnership law and specifically, a claim which results in a challenge to the status and separate legal personalities of the entities within the Walter Canada Group.

(2) What Choice of Law Rule Applies?

147 Having characterized the claim, I now turn to the second step in the choice of law analysis. This involves a consideration of relevant "connecting factors".

148 At page 221, Pitel and Rafferty state:

As we will see, the selection of the connecting factor is critical in formulating the choice of law rule. There are many possible connecting factors. Some are relatively certain and predictable. These include the person's domicile or habitual residence and the place where a specific act occurs, such as the commission of a tort or the making of the contract. These sorts of connecting factors have a relatively narrow focus. They are quite specific and can therefore be described as rigid connecting factors. Other connecting factors have a broader focus and are thought to be more flexible. These include the "proper law" of a contract, ascertained by weighing several factual connections to various legal systems. One of the core debates in choice of law is how rigid or how flexible the connecting factor should be for a particular rule.

149 It is worthwhile being reminded at this time of Castel & Walker's comment at 3-1, quoted above, that a "connecting factor" is a "fact or element connecting a legal question or issue with a particular legal system" which is then identified as the governing law.

150 What then are the "connecting factors" to be considered after having characterized the 1974 Plan's claim as I have?

151 Under Canadian choice of law rules, issues concerning a person's legal personality are governed by the law of the person's domicile: *Castel & Walker* at 30-1, quoted above. Similarly, Pitel and Rafferty state that the "status of non-natural persons is governed by the law of the person's 'home' jurisdiction" (at 245) and that there is a "well-established principle that a corporation's domicile is the country in which it was incorporated" (at 26-27).

152 To similar effect, Dicey states at 1532-1533:

Whether an entity exists as a matter of law must, in principle, depend upon the law of the country under which it was formed. That law will determine whether the entity has a separate legal existence. The law of that country will determine the legal nature of the entity so create, e.g. whether the entity is a corporation or partnership, and, if the latter, the legal incidents which attach to it.

153 Domicile was addressed in *National Trust Co. v. Ebro Irrigation & Power Co.*, [1954] O.R. 463 (Ont. H.C.), where the court stated at 476:

It is well established that the domicile of a corporation is in the country in which it was incorporated. In *Cheshire on Private International Law*, 4th ed. 1952, at pp. 193-4, it is stated that: "Questions concerning the status of a body of persons associated together for some enterprise, including the fundamental question whether it possesses the attribute of legal personality, must on principle be governed by the same law that governs the status of the individual, *i.e.* by the law of the domicile. ... In the case of the natural person it is the domicile of his father, in the case of the juristic person it is the country in which it is born, *i.e.* in which it is incorporated." ...

154 The Walter Canada Group also refers to *Singer Sewing Machine Co. of Canada Ltd., Re*, 2000 ABQB 116 (Alta. Q.B.), a decision of the colourful Registrar Funduk. There, the Alberta court was considering whether to recognize an order from the U.S. Bankruptcy Court. It appears that the U.S. court has assumed jurisdiction not only over the Singer Sewing Machine entities in the U.S., but also over the Canadian subsidiary who only conducted business in Canada and whose assets were held in Canada. The intention of the U.S. court seemed to be toward assuming overall jurisdiction over the entire corporate group in terms of administering assets and presumably, claims against those assets.

155 This case was decided before amendments to Part IV of the *CCAA* which provides for a robust degree of comity in terms of addressing cross-border insolvencies. Nevertheless, the comments of the Registrar in terms of rejecting what he considered was a collapsing of the Canadian entity and its assets within the broader international group have, in my view, some relevance here:

11. Canadian law says that a corporation is a person in law. Canadian law says that a corporation has an existence separate from its shareholders. Canadian law says that a shareholder is not liable for the corporation's debts. Canadian law says that a shareholder does not own the corporation's assets. Canadian law says that a corporation's business activities are not the shareholder's business activities.

156 Similarly, amalgamation of corporations, characterized as a change of status, is governed by the law of the place of incorporation: *Castel & Walker*, vol. 2, at 30-5. If the merged or amalgamated corporations were incorporated in different jurisdictions, the merger must be valid under the laws of both jurisdictions: *Dicey* 1534. See also *Concept Oil Services Ltd. v. En-Gin Group L & Ors*, [2013] EWHC 1897 (Eng. Comm. Ct.) at paras. 70-72.

157 I agree with the Walter Canada Group that the 1974 Plan's claim depends entirely on *ERISA*'s provisions which allow the 1974 Plan to disregard the separate legal personalities of the Walter Canada Group entities as being distinct from that of Walter Resources. The 1974 Plan has not advanced any other theory of liability for its claim under British Columbia law or any other law; rather, it relies exclusively on *ERISA*'s "controlled group" provisions as the basis for its claim against the Walter Canada Group. Further, as I have already stated, the 1974 Plan's claim against the Walter Canada Group does not stem from any conduct by or contract with the Walter Canada Group.

158 During its submissions, the 1974 Plan did not draw any particular distinction between its claims against the corporations within the Walter Canada Group (who are the only *CCAA* petitioners) and the partnerships, who are not petitioners, but who were granted certain protections under the Initial Order. The claim of the 1974 Plan advanced in its pleading is only as against the "petitioners". The Walter Canada Group suggests that since the 1974 Plan chose to assert its claim only against the "petitioners", any claim against the partnerships is barred pursuant to the claims bar date set under the Claims Procedure Order. I am not sure as to the effect of such a distinction in terms of the recovery under the claims.

159 This "claims bar date" argument may have some merit, but I do not propose to base my decision as regards the partnerships solely on this basis. The simple answer is that the same analysis set out above in relation to the corporations applies equally to the partnerships, as was noted in *Dicey* at 1532-33, quoted above, which refers to the law of the country in which an "entity" was formed.

160 The issue as to whether the Walter Canada Group's separate legal personalities can be ignored is subject to the Canadian choice of law rule that the status and legal personality of a corporation is governed by the law of the place in which it was incorporated, namely British Columbia and Alberta. Here, as with the corporations within the Walter Canada Group, both with limited liability and unlimited liability, it is admitted that all of the partnerships were organized under British Columbia law. Accordingly, the choice of law analysis leads to the same result in relation to the partnerships, namely British Columbia law, including under the *Partnership Act*, R.S.B.C. 1996, c. 348.

161 The place of incorporation or organization is a matter of public record and all persons who would do business with or otherwise deal with the Walter Canada Group entities would or should be well aware of that fact.

162 I agree that, under Canadian choice of law rules, the place of incorporation or organization of the Walter Canada Group entities is the appropriate "connecting factor" in relation to the issue arising from the 1974 Plan's claim. As a result, British Columbia and Alberta law determine whether the separate legal personalities of the Walter Canada Group entities can be ignored.

163 The 1974 Plan also made substantial submissions concerning the choice of law rule applicable to its claim. Relying on this Court's analysis in *Minera* at paras. 184-207, the 1974 Plan asserts that one must consider which law has the "closest and most real connection" to the issue. Its further submissions are that the court must examine a non-exhaustive list of factors in that context (*Minera* at para. 200). This, of course led to the 1974 Plan's objection to this summary hearing and its position that, since it has been denied any discovery from the Walter Energy Group, it has been hampered in its ability to put into evidence all relevant factors at this summary hearing.

164 However, the analysis in *Minera* was made in the context of the Court's conclusion that the choice of law rule that applied to the unjust enrichment claim was the "proper law of the obligation". In addition, contrary to the two-step approach illustrated in *Minera*, at the end of its submissions, the 1974 Plan's argument essentially conflated that process by suggesting that the Court should consider connecting factors (most of which it says have yet to be disclosed through discovery from the Walter Canada Group) in the characterization exercise in the first step.

165 Rejecting the 1974 Plan's contention that its claim should be characterized as one of contract inevitably leads to the further conclusion that the appropriate choice of law rule is not the "proper law of the obligation".

166 Accordingly, I do not intend to address the 1974 Plan's detailed submissions on the second step within the choice of law issue other than to briefly comment on certain aspects.

167 The 1974 Plan argued that even if I accepted the characterization of the claim advanced by the Walter Canada Group, the Court would still need to address facts other than the place of incorporation. These facts were said to include the degree to which the Walter Canada Group was managed out of the U.S. and an understanding of the Walter Energy Group's global business. I reject these submissions on the basis of the above authorities. There is no need to look beyond the clear facts that when these Canadian entities were incorporated or organized, they were expressly created within these Canadian jurisdictions with the intention that their legal status and personality would be governed by Canadian laws. The same comment could presumably be made concerning the U.S. and English entities.

168 The 1974 Plan argued that the "proper law of the obligation" approach would allow this court to consider the connecting factors that exist between the 1974 Plan's claim and the Walter Canada Group, including the degree to which the U.S. and Canadian operations were integrated, citing *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] S.C.R. 443 (S.C.C.) at 448 and *Minera*.

169 However, my conclusions above have the effect of rendering moot the 1974 Plan's objections arising from the lack of discovery. In addition, it is clear enough that even if there was no degree of integration or management between the U.S. and Canadian entities, the 1974 Plan's position is that all "contract" factors point to the U.S. - including the contractual documents, the location of and management of the 1974 Plan, the location of Walter Resources (the only counterparty to the 2011 CBA), that the benefits under the 2011 CBA are for Walter Resources' U.S. employees and that the withdrawal by Walter Resources from the 1974 Plan arose in the U.S. As I have emphasized, as regards the choice of law analysis, there is absolutely no contractual connecting factor between the 1974 Plan and the Canadian entities.

170 In that regard, it is difficult to conceive (although I need not decide the issue) that any Canadian court would conclude that these "contractual" connecting factors pointed to anything other than the U.S. Any degree of integration or joint management could only add to such arguments; conversely, it is difficult to see that any lack of integration or joint management would detract from them.

171 On this last point (ie. the degree of integration), what emerges as crystal clear from the 1974 Plan's position, supported by Ms. Mazo's opinion, is that *ERISA* expressly makes such a factual enquiry entirely irrelevant. The "bright line" or "arithmetic" test under *ERISA* entirely disregards anything other than the level of stock ownership: see *Pension Ben. Guaranty Corp. v. Ouimet Corp.*, 470 F. Supp. 945 (U.S. Dist. Ct. D. Mass. 1979).

172 Other so-called "connecting factors" suggested by the 1974 Plan are bizarre to say the least. The 1974 Plan suggests that Walter Energy U.S. will be "enriched" given the potential payment of estate funds to that corporate level after payment to the Canadian creditors. This is hardly a relevant consideration. Further, any recovery available to the 1974 Plan against the U.S. entities is entirely driven by U.S. law, including *ERISA*, the Chapter 11 Proceedings and its participation in the Settlement Term Sheet. If the 1974 Plan obtains no recovery from the U.S. entities within the Walter Energy Group, that is of no moment as regards its claim against the Canadian entities.

173 The other "connecting factor" said to arise by the 1974 Plan is that the application of Canadian law works an injustice on the 1974 Plan "because of the removal of assets out of reach of *ERISA*". This proposition begs the very question as to whether *ERISA* applies to the Walter Canada Group at all. If *ERISA* does not apply to the Walter Canada Group in these circumstances, the Canadian assets were never within reach of the 1974 Plan.

174 The 1974 Plan further argues that accepting the Walter Canada Group's argument on choice of law would result in a "blanket denial" of all *ERISA* claims against Canadian entities in Canadian courts. In my view, this is an exaggeration. Canadian law allows for the imposition of liability on persons in a variety of ways - including tort and fraud (see *B.G. Preeco*). This decision is only intended to address whether these Canadian entities are subject to *ERISA* which seeks to impose liability on them, not by reason of any conduct or contract, but simply by reason of a corporate relationship.

175 The 1974 Plan also suggests that a decision that *ERISA* does not apply to the Walter Canada Group would threaten principles of international comity in that a Canadian court could not recognize a judgment made by a U.S. court in respect of a Canadian entity for withdrawal liability under *ERISA*. This other "chicken little" argument is entirely speculative. Firstly, this case does not involve any judgment obtained against the Walter Canada Group. Further, in my view, my decision does not detract from the well-entrenched and long standing comity that has existed between Canada and the U.S. courts, particularly in the field of insolvency.

176 As described above, the only facts and connecting factors relevant here given my characterization of the 1974 Plan's claim are uncontroversial and have been admitted. In these circumstances, I see no difficulty in proceeding to determine this matter in a summary fashion, based on the considerations discussed earlier in these reasons.

177 In conclusion, I find that the 1974 Plan's claim is characterized as one of corporate or partnership law and specifically, one relating to the status, legal existence and personality of corporations and partnerships. The appropriate choice of law rule is one of domicile or place of incorporation or organization. In the case of the entities within the Walter Canada Group, that is British Columbia or Alberta.

178 *ERISA* is not part of British Columbia or Alberta law. Accordingly, the 1974 Plan's claim must fail for that reason.

VIII THE SECOND AND THIRD QUESTIONS

179 The second and third issues posed by the Walter Canada Group are:

If the 1974 Plan's claim against the Walter Canada Group is governed by United States substantive law (including *ERISA*), then as a matter of U.S. law, does "controlled group" liability for withdrawal liability related to a multiemployer pension plan under *ERISA* extend extraterritorially?

If the 1974 Plan's claim against the Walter Canada Group is governed by U.S. substantive law (including *ERISA*), and *ERISA* applies extraterritorially, is that law unenforceable in Canada because it conflicts with Canadian public policy?

180 As I noted above, the Walter Canada Group only needed to succeed on one of the questions raised in this application in order to defeat the 1974 Plan's claim.

181 Accordingly, having found in favour of the Walter Canada Group on the first issue, it is not necessary to decide the other two questions. While they pose interesting issues, I see no need to delay these proceedings further in order to consider and decide those issues. A timely resolution is in the interests of justice and furthers the purposes of the *CCAA*.

IX CONCLUSION

182 In conclusion, I grant a declaration that, under Canadian conflict of laws rules, the 1974 Plan's claim as against the Walter Canada Group is governed by Canadian substantive law and not U.S. substantive law (including *ERISA*).

183 Costs are awarded against the 1974 Plan in favour of both the Walter Canada Group and the Union on the usual scale. If any party should wish to seek a different order of costs, such an application must be filed within 30 days of the release of these reasons and the hearing to determine the matter should be set as soon as possible. Failing such application(s) being filed, my costs award shall stand.

Application granted.

Footnotes

- * A corrigendum issued by the court on May 6, 2017 has been incorporated herein.

TAB 5

2013 QCCS 5194
Cour supérieure du Québec

Montréal, Maine & Atlantic Canada Co. / Montréal, Maine & Atlantique Canada cie, Re

2013 CarswellQue 10709, 2013 QCCS 5194, 238 A.C.W.S. (3d) 640, J.E. 2013-1922, EYB 2013-228346

In the matter of the arrangement relating to: Montréal, Maine & Atlantic Canada Co./Montréal, Maine & Atlantique Canada Cie, Debtor-Respondent, v. Montreal Maine & Atlantic Railway Ltd, LMS Acquisition Corporation and Montréal Maine & Atlantic Corporation, Third parties, and Richter Advisory Group Inc., Monitor, and Travelers Property Casualty Company Of America, Petitioner

Dumas J.C.S.

Heard: 1 october 2013

Judgment: 9 october 2013

Docket: C.S. Qué. Saint-François 450-11-000167-134

Counsel: Noms des procureurs — non précisés

Subject: Insolvency; International

Dumas J.S.C.:

1 The Court is seized of a "motion to lift the stay of proceedings granted in favour of Montréal Maine & Atlantic Railway" (MMA).

2 Said motion was heard jointly with an identical motion filed before Honorable Justice Louis Kornreich, Judge for the Maine Bankruptcy Court, who is in charge of the case of MMA's parent company located in the United States.

3 By its motion, Travelers asks permission to file a motion for declaratory judgment before the "United States District Court of the District of Maine".

4 This motion is contested by the trustee representing MMA in Canada and by the trustee representing MMR, MMA's parent company in the United States.

5 The joint hearing was held under a cross-border insolvency protocol approved by the undersigned and Honorable Justice Kornreich on September 9, 2013.

6 All are in agreement that the Québec courts have jurisdiction to hear the motion for declaratory judgment that Petitioner Travelers intends to file. Indeed, article 3150 of the *Civil Code of Québec* states:

Les autorités québécoises ont également compétence pour décider de l'action fondée sur un contrat d'assurance lorsque le titulaire, l'assuré ou le bénéficiaire du contrat a son domicile ou sa résidence au Québec, lorsque le contrat porte sur un intérêt d'assurance qui y est situé, ou encore lorsque le sinistre y est survenu.

A Québec authority has jurisdiction to hear an action based on a contract of insurance where the holder, the insured or the beneficiary of the contract is domiciled or resident in Québec, the contract is related to an insurable interest situated in Québec or the loss took place in Québec.

7 However, even though this court has jurisdiction to hear the motion for declaratory judgment, Travelers wants the Court to lift the stay of proceedings order to allow it to present its motion before the District Court of Maine.

8 A dispute has arisen between Travelers and MMA regarding the coverage and the scope of the coverage granted to MMA under an insurance policy issued on April 19, 2013¹.

9 The main dispute between the parties concerns insurance for lost profits which Travelers seemingly issued by mistake.

10 Travelers pleads that, with the exception of MMA Canada, all of the insured parties under the American insurance policy have their places of business and their operations in the United States.

11 However, notwithstanding the fact that the other companies covered by the insurance policy have their places of business in the United States, none of them have brought any claims against Travelers.

12 Is any reminder needed that the facts leading to a motion being filed under the *Companies' Creditors Arrangement Act* (CCAA) concern a railway accident which occurred on July 6, 2013 in the Town of Megantic.

13 According to MMA's own pleadings in its motion under the CCAA, this railway accident destroyed the downtown area of the Town of Megantic and caused the death of 47 people. MMA admits its responsibility for this tragic accident.

14 Even though Travelers admits that Québec Superior Court has jurisdiction to hear its motion for declaratory judgment, it is pleading that the US District Court of Maine would be better placed to hear its motion. To this end, it is pleading that the balance of convenience sways in favour of a hearing before the District Court. In fact, without saying so, the petitioner is pleading the doctrine of *forum non conveniens*.

15 It pleads, first of all, that the potential witnesses, including its own employees, reside in the United States. It also pleads that this court could not subpoena American witnesses, including its own employees, to force them to testify in Canada.

16 This is a fairly minor problem. Indeed, the cross-border protocol stipulates that the US Bankruptcy Court could issue such subpoenas if needed. Moreover, during the hearing, Honorable Justice Kornreich confirmed that subpoenas could be issued rapidly and that they could also be executed promptly.

17 The debtor's claim against Travelers is an asset of the debtor. Travelers pleads that it is the American parent company which would have had a loss of income, not the Canadian company. In so doing, Travelers is overlooking the fact that there is a significant difference between a loss of income and receivables which could be insured.

18 Regardless of what MMA planned to do with its money, that contributes nothing to resolve the dispute. It was an insured party designated in the policy and it is the one which has suffered a loss.

19 Moreover, the Court does not need to delve into the merits to decide on the present motion. MMA has a claim against Travelers. The Court does not need to ask whether the claim is well founded to decide whether it has jurisdiction.

20 Travelers' main argument is that the legislation governing its insurance policy would be Maine law. But, as recently reiterated by the Court of Appeal²:

[100] Et surtout, parce que le critère de la loi applicable ne constitue pas en soi un facteur important. Dans tout litige international, les conflits de lois sont l'ordinaire et non l'exception.

21 This is why the Court of Appeal in the *Stormbreaker* decision instructs us:

[101] C'est l'opinion de Guillemard, Prujiner et Sabourin²²

Il est surprenant que l'application d'une loi étrangère par le tribunal, qui est l'essence même du droit international privé, puisse justifier un déclinatoire de compétence au profit de l'autorité dont il s'agit d'appliquer la loi. D'autant plus que le Code civil du Québec a introduit des dispositions de nature à faciliter la preuve du droit étranger (voir l'article 2809 C.c.Q.) et que les droits dont il était question dans les décisions rapportées n'étaient guère exotiques.

²² *Supra*, note 12, p. 945.

22 To this, it must also be added that even if the foreign court is able to rule on the dispute, that is not the first criterion for declining jurisdiction. For this reason, the Court of Appeal in *Stormbreaker* recalled:

[79] Cela ressort du texte même de l'article 3135 C.c.Q. et de l'enseignement de la Cour suprême dans *Spar Aerospace Ltée c. American Mobile Satellite Corp.* de 2002 :

69 . . . deux éléments essentiels ressortent du texte de l'art. 3135 : sa nature exceptionnelle et l'exigence qu'un autre État soit mieux à même de trancher le litige (voir E. Groffier, *La réforme du droit international privé québécois : supplément au Précis de droit international privé québécois* (1993), p. 130).

70 Ces deux caractéristiques de la doctrine du *forum non conveniens*, énoncées à l'art. 3135, sont conformes à l'exigence de common law énoncée par la Chambre des lords dans l'arrêt de principe *Spiliada Maritime Corp. c. Cansulex Ltd.*, [1987] 1 A.C. 460, p. 476, et par notre Cour dans les arrêts *Amchem*, précité, p. 919-921, et *Holt Cargo*, précité, par. 89. [. . .]

[80] Les auteurs sont du même avis.

[81] Prujiner, Guillemard et Sabourin font la réflexion suivante quant à l'interprétation que devrait recevoir l'article 3135 du *Code civil du Québec* :

L'article 3135 du Code [. . .] fait de l'exigence « que les autorités d'un autre État [soient] mieux à même de trancher le litige » une condition nécessaire mais non suffisante pour un déclinatoire de compétence. Le seul fait que les tribunaux d'un autre État soient mieux placés à l'égard d'un litige donné n'a rien d'exceptionnel et se présente chaque fois que le Québec n'est pas le for naturel de litige. Décliner sa compétence sur cette seule base ignore donc l'exigence du Code « exceptionnellement ». [. . .]

(. . .)

[86] En bref, le Code civil ne permet au tribunal de décliner compétence qu'« exceptionnellement ». Comme toute décision, celle-ci doit être motivée, ce qui n'est pas le cas dans le jugement attaqué. Il y a donc lieu d'analyser les circonstances de l'affaire pour déterminer si cette seconde condition est satisfaite.

(footnotes omitted)

23 This should put a definite end to the debate, but there is more.

24 The observation of the Supreme Court in *Sam Lévy & Associés inc. c. Azco Mining Inc.*³ must also apply under the CCAA :

76 En l'espèce, nous faisons face à une loi fédérale qui établit à première vue un centre de commandement ou un « contrôle unique » (Steward précité, p. 349) pour la totalité des procédures liées à la faillite (par. 183(1)). Le contrôle unique n'est pas nécessairement incompatible avec le renvoi de litiges particuliers à d'autres ressorts, mais le créancier

(ou le débiteur) qui désire fragmenter les procédures et qui ne peut pas prétendre être un « étranger à la faillite » a le fardeau de démontrer l'existence d'un « motif suffisant », justifiant que le syndic doive accourir dans plusieurs ressorts.

76 In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or « single control » (Stewart, *supra*, at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a « stranger to the bankruptcy », has the burden of demonstrating « sufficient cause » to send the trustee scurrying to multiple jurisdictions.

25 The Supreme Court reiterated this principle very recently in the *AbitibiBowater*⁴ ruling, stating:

[21] Une des caractéristiques principales du régime créé par la *LACC* est de traiter la presque totalité des réclamations contre un débiteur suivant une procédure unique devant un même tribunal. En vertu de ce modèle, le tribunal peut ordonner la suspension de la plupart des mesures d'exécution engagées contre les actifs du débiteur de façon à maintenir le statu quo durant la négociation avec les créanciers. Lorsque la négociation réussit, les créanciers consentent habituellement à recevoir moins que le plein montant de leurs réclamations, lesquelles ne sont pas nécessairement exigibles ou liquidées dès le début des procédures d'insolvabilité. Ces réclamations doivent parfois être évaluées afin d'établir la valeur pécuniaire qui fera l'objet du compromis.

21 One of the central features of the *CCAA* scheme is the single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. Under this model, the court can stay the enforcement of most claims against the debtor's assets in order to maintain the *status quo* during negotiations with the creditors. When such negotiations are successful, the creditors typically accept less than the full amounts of their claims. Claims have not necessarily accrued or been liquidated at the outset of the insolvency proceeding, and they sometimes have to be assessed in order to determine the monetary value that will be subject to compromise.

26 Consequently, the Court believes that Travelers has not satisfied its burden of demonstrating that the stay of procedures should no longer apply to it.

27 Let us add that the Bankruptcy Court is a court of equity and that the notion of equity is interpreted as conferring on the Bankruptcy Court all powers to dispose of disputes or a difficulty even when the law contains no specific provision that is likely to apply⁵.

28 The case law cited by Travelers, which it wished to use by analogy, can be of no help to it.

29 Indeed, these decisions dealt with lifting a stay to allow a third party to sue the bankrupt's insurer. In fact, they constitute a typical example of a motion to lift a stay of proceedings where a person wants to sue a bankrupt's insurer. In that situation, it is pointless for the case to proceed before the bankruptcy court because often that has no impact on the administration of the bankruptcy. In the present case, we deal with the contrary. It concerns a bankrupt's claim (via the trustee) against its insurance company. Without the shadow of a doubt, this is an asset of the debtor over which the Bankruptcy Court has jurisdiction.

30 As for Travelers' argument that the order pronounced by Justice Castonguay has no extraterritorial effect, this court does not accept it.

31 We must first note that the Court does not have to decide whether the present judgment and that of Justice Castonguay are enforceable in the United States. That is not the question before the Court.

32 However, we know that Québec courts have jurisdiction and that Travelers does business in Québec. It should also be noted that this question is somewhat theoretical, given that a cross-border protocol has been adopted by this Court and the US Bankruptcy Court.

33 In the event of doubt regarding a stay of proceedings, this protocol would allow the US Bankruptcy Court to order a stay of proceedings, just as this Court would for the parent company if proceedings were brought against it in Canada.

34 This would simply be an application of the legal courtesy (comity) recognized in both our countries⁶.

35 Even if the order pronounced by Justice Castonguay were not enforceable outside Québec, the fact remains that the decisions of Québec courts will be enforceable against Travelers. Indeed, according to the information given by its counsel, it also does business in Québec. The extraterritorial effect of Justice Castonguay's order is therefore immaterial to this case.

36 Add to this the fact that the cross-border protocol stipulates:

Where an issue is to be addressed only to one Court, in rendering a determination in any cross-border matter, such Court may: (a) to the extent practical or advisable, consult with the other Court; and (b) in its sole discretion and bearing in mind the principles of comity, either (i) render a binding decision after such consultation; (ii) defer to the determination of the other Court by transferring the matter, in whole or in part to the other Court; or (iii) seek a joint hearing of both Courts.

37 The US Bankruptcy Court is prepared to allow Travelers specific limited relief from stay so that the U.S. debtor may be a party to a declaratory judgment proceeding in this Court.

38 It seems to us that the present decision achieves the objective of section 44 of the CCAA, which states:

La présente partie a pour objet d'offrir des moyens pour traiter des cas d'insolvabilité en contexte international et de promouvoir les objectifs suivants :

- a) assurer la coopération entre les tribunaux et les autres autorités compétentes du Canada et ceux des ressorts étrangers intervenant dans de tels cas;
- b) garantir une plus grande certitude juridique dans le commerce et les investissements;
- c) administrer équitablement et efficacement les affaires d'insolvabilité en contexte international, de manière à protéger les intérêts des créanciers et des autres parties intéressées, y compris les compagnies débitrices;
- d) protéger les biens des compagnies débitrices et en optimiser la valeur;
- e) faciliter le redressement des entreprises en difficulté, de manière à protéger les investissements et préserver les emplois.

The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
- (d) the protection and the maximization of the value of debtor company's property; and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.

FOR THESE REASONS, THE COURT:

39 *DISMISSES* the motion filed by Travelers, entitled "*motion to lift the stay of proceedings*";

40 *THE WHOLE WITH COSTS*.

APPENDIX

« Les autorités québécoises ont également compétence pour décider de l'action fondée sur un contrat d'assurance lorsque le titulaire, l'assuré ou le bénéficiaire du contrat a son domicile ou sa résidence au Québec, lorsque le contrat porte sur un intérêt d'assurance qui y est situé, ou encore lorsque le sinistre y est survenu.

A Québec authority has jurisdiction to hear an action based on a contract of insurance where the holder, the insured or the beneficiary of the contract is domiciled or resident in Québec, the contract is related to an insurable interest situated in Québec or the loss took place in Québec.

Or, malgré que le présent tribunal ait juridiction pour entendre la requête pour jugement déclaratoire, Travelers voudrait que le tribunal lève l'ordonnance de sursis des procédures afin de lui permettre de présenter sa requête devant le District Court du Maine.

Un litige est apparu entre Travelers et MMA concernant la couverture et la limite d'assurance dont bénéficierait MMA suite à l'émission d'une police d'assurance émise le 19 avril 2013⁷.

Le principal litige entre les parties concerne l'assurance pour perte de profit que Travelers aurait émis par erreur.

Travelers plaide que, à l'exception de MMA Canada, tous les assurés sous la police d'assurance américaine, ont leur place d'affaires et leurs opérations aux États-Unis.

Par contre, malgré que les autres compagnies couvertes par la police d'assurance ont leur place d'affaires aux États-Unis, celles-ci n'ont fait valoir aucune réclamation contre Travelers.

Est-il nécessaire de rappeler que les faits ayant donné lieu au dépôt d'une requête en vertu de la *Loi sur les arrangements des créanciers des compagnies* (LACC) est un accident ferroviaire survenu le 6 juillet 2013 dans la Ville de Mégantic.

Selon ce que MMA plaide elle-même dans sa requête en vertu de la LACC, cet accident ferroviaire a détruit le centre-ville de la Ville de Mégantic et a causé la mort de 47 personnes. MMA admet sa responsabilité pour ce tragique accident.

Même si Travelers admet que la Cour supérieure du Québec a juridiction pour entendre sa requête pour jugement déclaratoire, elle plaide que le US District Court du Maine serait mieux placé pour entendre sa requête. Pour ce faire, elle plaide que la balance des inconvénients penche clairement en faveur d'une audition devant le District Court. En fait, sans le dire, la requérante plaide la théorie du forum *non conveniens*.

Elle plaide tout d'abord que les témoins potentiels, incluant ses propres employés, résident aux États-Unis. Elle plaide également que le présent tribunal ne pourrait émettre de subpoenas à des témoins américains, incluant ses propres employés, pour les forcer à témoigner au Canada.

Ce problème est plutôt mineur. En effet, le *cross-border protocol* prévoit que le *US Bankruptcy Court* pourra émettre de tels subpoenas si nécessaire. D'ailleurs lors de l'audition, l'honorable juge Kornreich a confirmé que des subpoenas pouvaient être émis rapidement et que ceux-ci pouvaient également être exécutés promptement.

La réclamation de la débitrice face à Travelers est un bien de la débitrice. Travelers soulève que c'est la compagnie mère américaine qui aurait eu une perte de revenu et non pas la compagnie canadienne. Pour ce faire, Travelers fait abstraction du fait qu'il y a une différence notable entre une perte de revenu et des comptes recevables qui pourraient être assurés.

Peu importe ce que MMA comptait faire de son argent, cela n'apporte rien à la solution du litige. Elle était une assurée désignée à la police et elle est celle qui a subi une perte.

D'ailleurs, le tribunal n'a pas à entrer dans le fond du litige pour décider de la présente requête. MMA a une réclamation contre Travelers. Le tribunal n'a pas à se demander si elle est bien fondée pour décider s'il a juridiction.

Le principal argument de Travelers est que la loi gouvernant sa police d'assurance serait la *Loi du Maine*. Or, comme nous le rappelait très récemment la Cour d'appel⁸ :

[100] Et surtout, parce que le critère de la loi applicable ne constitue pas en soi un facteur important. Dans tout litige international, les conflits de lois sont l'ordinaire et non l'exception.

C'est pourquoi, la Cour d'appel dans l'arrêt *Stormbreaker* nous enseigne :

[101] C'est l'opinion de Guillemard, Prujiner et Sabourin²²

Il est surprenant que l'application d'une loi étrangère par le tribunal, qui est l'essence même du droit international privé, puisse justifier un déclinatoire de compétence au profit de l'autorité dont il s'agit d'appliquer la loi. D'autant plus que le Code civil du Québec a introduit des dispositions de nature à faciliter la preuve du droit étranger (voir l'article 2809 C.c.Q.) et que les droits dont il était question dans les décisions rapportées n'étaient guère exotiques.

²² *Supra*, note 12, p. 945.

À cela, il faut également ajouter que même si le tribunal étranger est à même de trancher le litige, cela n'est que le premier critère pour décliner compétence. C'est pourquoi la Cour d'appel dans *Stormbreaker* nous rappelait :

[79] Cela ressort du texte même de l'article 3135 C.c.Q. et de l'enseignement de la Cour suprême dans *Spar Aerospace Ltée c. American Mobile Satellite Corp.* de 2002 :

69 . . . deux éléments essentiels ressortent du texte de l'art. 3135 : sa nature exceptionnelle et l'exigence qu'un autre État soit mieux à même de trancher le litige (voir E. Groffier, *La réforme du droit international privé québécois : supplément au Précis de droit international privé québécois* (1993), p. 130).

70 Ces deux caractéristiques de la doctrine du *forum non conveniens*, énoncées à l'art. 3135, sont conformes à l'exigence de common law énoncée par la Chambre des lords dans l'arrêt de principe *Spiliada Maritime Corp. c. Cansulex Ltd.*, [1987] 1 A.C. 460, p. 476, et par notre Cour dans les arrêts *Amchem*, précité, p. 919-921, et *Holt Cargo*, précité, par. 89. [. . .]

[80] Les auteurs sont du même avis.

[81] Prujiner, Guillemard et Sabourin font la réflexion suivante quant à l'interprétation que devrait recevoir l'article 3135 du *Code civil du Québec* :

L'article 3135 du Code [. . .] fait de l'exigence « que les autorités d'un autre État [soient] mieux à même de trancher le litige » une condition nécessaire mais non suffisante pour un déclinatoire de compétence. Le seul fait que les tribunaux d'un autre État soient mieux placés à l'égard d'un litige donné n'a rien d'exceptionnel et se présente chaque fois que le Québec n'est pas le for naturel de litige. Décliner sa compétence sur cette seule base ignore donc l'exigence du Code « exceptionnellement ». [. . .]

(...)

[86] En bref, le Code civil ne permet au tribunal de décliner compétence qu'« exceptionnellement ». Comme toute décision, celle-ci doit être motivée, ce qui n'est pas le cas dans le jugement attaqué. Il y a donc lieu d'analyser les circonstances de l'affaire pour déterminer si cette seconde condition est satisfaite.

(notes de bas de page omises)

Cela devrait clore le débat de façon définitive, mais il y a plus.

Ce que nous mentionnait la Cour suprême dans *Sam Lévy & Associés inc. c. Azco Mining Inc.*⁹ doit également recevoir application en vertu de la LACC :

En l'espèce, nous faisons face à une loi fédérale qui établit à première vue un centre de commandement ou un « contrôle unique » (Steward précité, p. 349) pour la totalité des procédures liées à la faillite (par. 183(1)). Le contrôle unique n'est pas nécessairement incompatible avec le renvoi de litiges particuliers à d'autres ressorts, mais le créancier (ou le débiteur) qui désire fragmenter les procédures et qui ne peut pas prétendre être un « étranger à la faillite » a le fardeau de démontrer l'existence d'un « motif suffisant », justifiant que le syndic doive accourir dans plusieurs ressorts.

La Cour suprême a réitéré ce principe très récemment dans l'arrêt *AbitibiBowater*¹⁰ en mentionnant :

[21] Une des caractéristiques principales du régime créé par la LACC est de traiter la presque totalité des réclamations contre un débiteur suivant une procédure unique devant un même tribunal. En vertu de ce modèle, le tribunal peut ordonner la suspension de la plupart des mesures d'exécution engagées contre les actifs du débiteur de façon à maintenir le statu quo durant la négociation avec les créanciers. Lorsque la négociation réussit, les créanciers consentent habituellement à recevoir moins que le plein montant de leurs réclamations, lesquelles ne sont pas nécessairement exigibles ou liquidées dès le début des procédures d'insolvabilité. Ces réclamations doivent parfois être évaluées afin d'établir la valeur pécuniaire qui fera l'objet du compromis.

En conséquence, le tribunal croit que Travelers n'a pas surmonté son fardeau de démontrer que le sursis des procédures ne devrait plus s'appliquer à elle.

Ajoutons que la Cour de faillite est une Cour d'équité et que la notion d'équité est interprétée comme conférant à la Cour de faillite tous les pouvoirs pour disposer des litiges ou d'une difficulté même lorsque la loi ne contient aucune disposition particulière susceptible de recevoir application¹¹.

La jurisprudence citée par Travelers qu'elle voulait utiliser par analogie ne peut lui être d'aucune aide.

En effet, dans ces décisions, il s'agissait d'une levée du sursis pour permettre à un tiers de poursuivre l'assureur du failli. Il s'agit en fait d'un exemple type de requête pour levée de sursis des procédures lorsqu'une personne veut poursuivre l'assureur d'un failli. Il est alors inutile que sa procédure se fasse devant le tribunal de faillite puisque cela n'a souvent aucun impact sur l'administration de la faillite. En l'espèce, c'est le contraire qui se produit. Il s'agit d'une réclamation du failli (par l'entremise du syndic) contre sa compagnie d'assurance. Il s'agit sans l'ombre d'un doute d'un bien du failli sur lequel la Cour de faillite a juridiction.

Quant à l'argument de Travelers que l'ordonnance rendue par le juge Castonguay n'a aucun effet extraterritorial. Le tribunal ne peut l'accepter.

Nous devons d'abord noter que le tribunal n'a pas à décider si le présent jugement et celui du juge Castonguay est exécutoire aux États Unis. Ce n'est pas la question dont le tribunal est saisi.

Par contre, on sait que les tribunaux québécois ont juridiction et que Travelers fait affaires au Québec. Il faut aussi noter que cette question est plutôt théorique puisqu'un protocole inter-frontalier a été adopté par le présent tribunal et la US Bankruptcy Court.

Ce protocole permettrait en cas de doute sur la suspension des procédures que la US Bankruptcy Court ordonne le sursis des procédures tout comme le présent tribunal le ferait pour la compagnie mère si des procédures étaient intentées contre elle au Canada.

Il ne s'agirait que d'une simple application de la courtoisie judiciaire (Comity) reconnue dans nos deux pays ¹².

Même si l'ordonnance rendue par le juge Castonguay n'avait pas d'effet à l'extérieur du Québec, il reste que les décisions des tribunaux québécois seront exécutoires contre Travelers. En effet, selon l'information donnée par ses procureurs, celle-ci fait également affaire au Québec. L'extraterritorialité de l'ordonnance du juge Castonguay n'a donc pas de conséquence en l'espèce.

Ajoutons à cela que le *cross-border protocol* prévoit :

Where an issue is to be addressed only to one Court, in rendering a determination in any cross-border matter, such Court may: (a) to the extent practical or advisable, consult with the other Court; and (b) in its sole discretion and bearing in mind the principles of comity, either (i) render a binding decision after such consultation; (ii) defer to the determination of the other Court by transferring the matter, in whole or in part to the other Court; or (iii) seek a joint hearing of both Courts.

La U.S. Bankruptcy Court est prête à accorder une levée limitée et particulière de la suspension des procédures afin de permettre que la compagnie mère américaine M.M.R. puisse être partie à une procédure pour jugement déclaratoire devant le présent tribunal.

Il nous semble que la présente décision atteint l'objectif visé par l'article 44 LACC qui prévoit :

La présente partie a pour objet d'offrir des moyens pour traiter des cas d'insolvabilité en contexte international et de promouvoir les objectifs suivants :

- a) assurer la coopération entre les tribunaux et les autres autorités compétentes du Canada et ceux des ressorts étrangers intervenant dans de tels cas;
- b) garantir une plus grande certitude juridique dans le commerce et les investissements;
- c) administrer équitablement et efficacement les affaires d'insolvabilité en contexte international, de manière à protéger les intérêts des créanciers et des autres parties intéressées, y compris les compagnies débitrices;
- d) protéger les biens des compagnies débitrices et en optimiser la valeur;
- e) faciliter le redressement des entreprises en difficulté, de manière à protéger les investissements et préserver les emplois.

The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(d) the protection and the maximization of the value of debtor company's property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

POUR CES MOTIFS, LE TRIBUNAL ;

REJETTE la requête de Travelers intitulée « *motion to lift the stay of proceeding* »;

LE TOUT AVEC DÉPENS.

GAÉTAN DUMAS, J.C.S.

Mail list lawyers

Date d'audience :

1^{er} octobre 2013

Footnotes

1 See exhibit C-1;

2 [Stormbreaker Marketing c. Weinstock](#), 2013 QCCA 269, cited in another recent decision of the Court of Appeal in [Droit de la famille - 132433](#), 2013 QCCA 1529 (decision of 12 September 2013).

3 2001 3 R.C.S. 978.

4 [Newfoundland and Labrador v. AbitibiBowater Inc.](#), [2012] 3 S.C.R. 443.

5 See re: [La Société Pétrochimique Kemtec inc.](#), 1994 R.J.Q. 1345.

6 [Reflections on Comity and Sovereignty - Ten years later](#), in *Janis P. SARRA, Annual Review of insolvency Law 2012*, Toronto, Carswell, a division of Thompson Reuters Canada Ltd, page 1.

7 Voir pièce C-1.

8 [Stormbreaker Marketing c. Weinstock](#), 2013 QCCA 269, citée dans un autre arrêt récent de la Cour d'appel dans [Droit de la famille - 132433](#), 2013 QCCA 1529 (décision du 12 septembre 2013).

9 2001 3 R.C.S. 978.

10 [Terre-Neuve-et-Labrador c. AbitibiBowater Inc.](#), [2012] 3 R.C.S. 443.

11 Voir re : [La Société Pétrochimique Kemtec inc.](#), 1994 R.J.Q. 1345.

12 [Reflections on Comity and Sovereignty - Ten years later](#), dans *Janis P. SARRA, Annual Review of insolvency Law 2012*, Toronto, Carswell, a division of Thompson Reuters Canada Ltd, page 1.

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TAB 6

2006 CarswellOnt 4929
Ontario Superior Court of Justice [Commercial List]

Muscletech Research & Development Inc., Re

2006 CarswellOnt 4929, [2006] O.J. No. 3300, 150 A.C.W.S. (3d) 534, 25 C.B.R. (5th) 218, 33 C.P.C. (6th) 131

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

In the Matter of Muscletech Research and Development Inc. and Those Entities Listed on Schedule "A" Hereto

Mesbur J.

Heard: July 31, 2006

Judgment: August 16, 2006 *

Docket: 06-CL-6241

Counsel: Fred Myers, David Bish for Applicants

Kevin P McElcheran for Representative Plaintiffs

James H. Grout, Kyla Mahar for Krys Osborne, on behalf of herself and all other similarly situated California consumers

Derrick Tay for Iovate Health & Sciences, DIP Lender

Jeff Carhart for Ad hoc Tort Claimants Committee

Natasha MacParland for Monitor, RSM Richter Inc.

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX](#) Companies' Creditors Arrangement Act

[XIX.5](#) Miscellaneous

Headnote

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

Company was granted protection under Act to resolve large number of lawsuits — Call for claims order provided for broad notice to potential claimants — Creditors not filing proof of claim before specified date were barred from making claim — Four claimants purported to file proofs on behalf of all other similarly situated persons — Claimants had uncertified class actions pending in United States — Other creditors brought motion to prohibit representative claims — Motion granted — Act did not expressly prohibit representative claims but none had yet been allowed — This was not appropriate case to exercise discretion to allow claims because process under Act adequately protected interests of potential claimants — Claimants had as much notice and opportunity to file proofs as those who did — Absence of additional claims suggested they may not exist — Increasing potential claims after others were settled would prejudice success of process — Representative claims could continue as individual claims.

Table of Authorities

Cases considered by *Mesbur J.*:

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1999), 1999 CarswellOnt 3234, 12 C.B.R. (4th) 194, 39 C.P.C. (4th) 362 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 15 — considered

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 2 "claim provable in bankruptcy" — considered

s. 121(1) — considered

s. 124 — considered

s. 124(1) — considered

s. 124(3) — considered

s. 135(1.1) [en. 1997, c. 12, s. 89(1)] — considered

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

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

Generally — referred to

s. 12(1) "claim" — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 10 — considered

MOTION by creditors under *Companies' Creditors Arrangement Act* to prohibit representative claims.

Mesbur J.:

Nature of the motions:

1 These motions raise the question of whether plaintiffs in uncertified class actions may file claims in the claims process in this CCAA proceeding on behalf of themselves and all other similarly situated plaintiffs. The applicant, the Monitor, the DIP lender and the Ad Hoc Tort Claimants Committee all take the position that claims filed in this manner are a nullity, and should be forever barred.

2 Mr. McElcheran, on behalf of four plaintiffs in four yet-uncertified US class actions, and Mr. Grout and Ms. Mahar for a plaintiff in a yet-uncertified class action in California all are of the view that there is jurisdiction under the CCAA to permit such representative claims, and either the claims should be permitted, or alternatively, the stay of proceedings imposed by the CCAA should be lifted to allow them to proceed to certification motions in the United States for their

respective actions. I will refer to Mr. McElcheran's clients as the "Representative Plaintiffs", and Mr. Grout's clients as the "California Consumers".

Some history:

3 The applicants, whom I will refer to collectively as "Muscletech", are comprised of the applicant, Muscletech, and its various subsidiaries and related companies listed in Schedule "A". Muscletech is a Canadian company. Historically, it was in the business of the manufacture and sale of dietary supplements. Some of these supplements contained the chemical ephedra, while others contained what have been referred to as prohormones. Muscletech was not alone in selling supplements containing these compounds. A number of American companies did so as well. Because of problems surrounding the compounds, Muscletech's products have ceased to contain them since 2002. Nevertheless, there was significant litigation, particularly in various states in the United States, brought by the consumers of these products, against both Muscletech and other companies.

4 The litigation is essentially of two kinds. The ephedra litigation primarily concerns those consumers of products containing ephedra who allege they have suffered physical damages as a result of using these products. The parties here refer to that litigation as the Products Liability litigation. The prohormone litigation has been brought by consumers of products containing prohormone who allege either that the product failed to produce the promised increased muscle mass, or alternatively, produced the promised increased muscle mass, but in doing so, must have contained a controlled substance, namely anabolic steroids. In the first instance, the prohormone consumers complain of being the victims of false and misleading advertising. In the second, they complain of being illegally sold a controlled substance.

5 For the purposes of this motion, there are several of these lawsuits that are important. First, there is the group of four yet to be certified class actions relating to prohormone claims. These have been described as the Hannon Claim, the Hochberg Claim, the Rodriguez Claim and the Guzman Claim, or collectively, the Representative Plaintiffs' Claims.

6 The Hannon Claim was commenced in the State of Florida. The Hochberg and Rodriguez claims were commenced in New York State, and the Guzman claim was commenced in California. Using the multi-district litigation (MDL) provisions available in the United States, all four proceedings have been moved to the United States District Court for the Southern District of New York (the "U.S. District Court") in New York City, to be managed, along with all the other related ephedra litigation by Justice Rakoff of that court. As I have said, I will refer to these four claims as the "Representative Plaintiffs' Claims", and to the plaintiffs in them as the "Representative Plaintiffs".

7 In addition to the Representative Plaintiffs' Claims, there is a further yet-to-be-certified class action in the United States that is germane to this motion. It has been described as the California Consumers' Claim. Unlike the Representative Plaintiffs' Claims, the California Consumers' Claim is an ephedra claim, seeking damages for personal injuries. I refer to this action as the "California Consumers' Claim", and its plaintiffs as the "California Consumers". The California Consumers participated on the motion simply to support the Representative Plaintiffs' position; they seek no relief themselves.

8 In January 2006, Muscletech sought and was granted CCAA protection in this court. The initial stay has been extended throughout the proceedings to August 11, 2006.¹ As the applicants' factum puts it, seeking CCAA protection was done "principally as a means of achieving a global resolution of the large number of product liability and other lawsuits" against the applicants and others. These lawsuits relate to the products that Muscletech and others sold.

9 Once the initial order was granted, the Monitor commenced ancillary proceedings in the USA under Chapter 15 of the U.S. Bankruptcy Code. These proceedings are before the U.S. District Court as well. As a result of these ancillary proceedings, there is a similar stay in the U.S.

10 At the same time, the Monitor also applied for a Temporary Restraining Order and Preliminary Injunction (TRO/PI Application) in the U.S. District Court, to prohibit anyone commencing or continuing any products liability actions.

The TRO/PI application was granted. That application is referred to as the "Adversary Proceeding" under Chapter 15 of the U.S. Bankruptcy Code.

11 On February 8, 2006, an Ad Hoc committee of products liability claimants sought and was granted representative status in this CCAA proceeding. On March 3, 2006, this court made a Call for Claims order. American counsel for both the Representative Plaintiffs and the California Consumers were served with the motion and draft order in relation to the Call for Claims order, just as they have been served throughout these CCAA proceedings. Although many interested parties made submissions concerning the terms of the order both before the hearing and at the hearing itself, counsel for the Representative Plaintiffs and California Consumers did not. They took no steps, as did the Ad Hoc Committee, to obtain representative status, or direction as to how they might put forward their claims.

12 As I have mentioned, Muscletech sought and obtained an order in the USA bankruptcy court, recognizing and enforcing the Ontario CCAA order, including its automatic stay. The Call for Claims order was similarly recognized and approved by Judge Rakoff in the U.S. District Court on March 22, 2006. Judge Rakoff is managing all the ephedra litigation, as well as the motions to recognize and enforce orders made here under these CCAA proceedings, and the Adversary Proceeding as well.

13 The Call for Claims order established a process for calling for what were defined as both "claims" and "product liability claims". The object of the order was to identify everyone with any kind of claim against Muscletech, its affiliates, and some defined Third Parties. The process envisions "a person" completing a proof of claim, with particulars of the claim, and sending it to the Monitor.² In this way, the Monitor could identify what Mr. Tay for the DIP lender has called the "total universe of potential claims". The Call for Claims order does not set the process for deciding on the validity of any of the claims. Its purpose is simply to identify them.

14 The Call for Claims order set out comprehensive definitions of what constitutes both types of claims, as well as an elaborate method of giving broad notice to anyone who might have a claim. In this case, the order required the Monitor to send a package containing a proof of claim and other necessary information to all known creditors of Muscletech. It also required that the Monitor file these documents and the Call for Claims order electronically on the U.S. District Court's website in all three pieces of litigation there. These are described in the Call for Claims order as the "U.S. Chapter 15 Proceedings", the "U.S. Chapter 15 Adversary Proceedings" and the "U.S. MDL Proceedings". The order required the Monitor to publish notices to creditors in the national edition of the *Globe and Mail* newspaper, the *Wall Street Journal*, and *USA Today*. The Monitor was also required to post copies of the documents and Call for Claims order on the Monitor's website. The Monitor did all these things.

15 All proofs of claim were to be filed by May 8, 2006. This date was defined in the order as the Claims Bar date. Any creditor who has not filed a proof of claim by that date is forever barred from making or enforcing any claim, and is not entitled to participate as a creditor in the CCAA proceedings, or to vote at any meeting of creditors. Prior to the Claims Bar date, the members of the Ad Hoc Tort Claimants Committee filed individual proofs of claim. The California Consumers also filed individual proofs of claim.

16 On May 8, the Representative Plaintiffs, (that is, Hannon, Hochberg, Rodriguez and Guzman), filed proofs of claim, claiming to do so on their own behalves, and "on behalf of all other similarly situated persons". Unlike the Representative Plaintiffs, the California Consumers filed individual proofs of claim. Even though they have done so, they support the Representative Plaintiffs' position on this motion.

17 The monitor received some 33 ephedra claims, both from the California Consumers individually, and from others, including the members of the Ad Hoc Tort Committee. The only prohormone claims the monitor has received are from the Representative Plaintiffs. No other individual claims relating to prohormones have been filed.

18 After the claims bar date, this court made a Claims Resolution order. That order, dated June 8, 2006 provided, among other things, for a method for the monitor to review proofs of claim, accept or reject them, and for a claims

resolution process for resolving disputed claims. The Claims Resolution order is subject to an earlier Mediation Order, which provided for mediation of ephedra claims. Of the 33 ephedra claims filed, 30 have already been settled through the mediation process. The mediation process is part of a larger mediation process in New York, in the context of the much broader ephedra litigation that Judge Rakoff is managing. This litigation is referred to as the MDL, or multi-district litigation, in the U.S.

19 No one has appealed the Call for Claims order. No one moved to vary its terms, prior to the claims bar date. No one has appealed the Claims Resolution order. None of the Representative Plaintiffs have taken any steps in the United States (where their class actions are pending), to lift the stay of proceedings there to permit their actions to proceed to certification.

The parties and their positions:

20 On these motions the applicants take the position that the proofs of claims by the Representative Plaintiffs are a nullity, since there is no provision in either the CCAA or any of the court orders that permit these claims to be made either as representative claims, or class action claims. They say that to allow these claims would unreasonably delay the CCAA process, and would undermine the process that has already been established, which all stakeholders rely on.

21 The DIP lender supports the applicants' position. The DIP lender takes the position that if the proposed claims were allowed, there is a potential for significant prejudice to the DIP lender who is funding the process, and will ultimately fund any plan of compromise. The DIP lender has already settled with a significant number of other tort claimants (albeit ephedra, as opposed to prohormone claimants). The DIP lender says it reached its settlement on the basis of a particular "known universe" of claims. It suggests that allowing these indeterminate claims, and claimants, at this late date, would prejudice its position.

22 The Ad Hoc Committee of Tort Claimants supports the applicants as well. The Committee takes the position that even before the Call for Claims order was made, it was able to obtain an order allowing it to participate as a Committee in the CCAA process and obtain what is called representative status in the proceedings. It says that if the Ad Hoc Committee was able to do so within the CCAA process, these other proposed claimants could, and should have done the same. Since the other proposed claimants did not, and took no steps to appeal the Call for Claims order, and indeed, declined to participate in the motion in which its terms were set, they should be barred from doing so at this late date.

23 The Monitor also supports the applicants' position, saying the CCAA process gave the Representative Plaintiffs adequate opportunity to file individual claims. The forms were readily accessible in plain English. The Products Liability claimants, that is, the members of the Ad Hoc Committee, were able to put individual claims forward in the CCAA process and the Representative Plaintiffs had the same opportunity to participate in exactly the same way. Lastly, the Monitor says that the CCAA process is far more economic than the lengthy process of certification of class actions, particularly in the USA, where certification would have to take place. To allow this new process to be overlaid on the existing CCAA process would be cumbersome, excessively expensive and time consuming.

24 All those opposing the Representative Plaintiffs' Claims and California Consumers suggests that the real motivation for putting these claims forward is to obtain and secure payment of significant legal fees for the lawyers involved, rather than to reap any meaningful benefits for any class participants. I need not comment on what is essentially a bald allegation. I mention it only to make the record of the parties' positions complete.

25 Both the Representative Plaintiffs and the California Consumers take a contrary view. They say their clients' claims should not be defeated on what they describe as essentially procedural grounds. They suggest that fairness requires that they be permitted to file in this way. They say the current CCAA process is not so far advanced that there would be undue prejudice to any of the other stakeholders, if their proofs of claims were allowed to be filed as representative claims.

The law and analysis:

26 The first question to consider is whether the CCAA permits representative claims, or class action claims. The next issue is whether this particular CCAA process adequately protected the interests of this potential group of claimants. Lastly, given the inherent jurisdiction of the court, I must also address whether this case might be an appropriate case to exercise my discretion and permit the Representative Plaintiffs' Claims to proceed in some fashion at this time.

Does the CCAA permit representative claims?

27 The CCAA neither expressly permits nor forbids representative claims. The CCAA defines "claim" in s. 12(1). It says that for the purposes of the CCAA, "claim" means "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*." Thus, to determine what a CCAA "claim" is, one must turn to the *Bankruptcy and Insolvency Act*, and the definition of debts "provable in bankruptcy".

28 Section 121(1) of the BIA deals with "claims provable", and says:

All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason on any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

29 The BIA has a mechanism to determine whether a contingent or unliquidated claim is a provable claim. The mechanism is found in section 135(1.1), which provides:

The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

30 A determination under s. 135(1.1) is "final and conclusive", unless within a thirty day period after the trustee serves a notice of disallowance, the person to whom the notice of disallowance was sent appeals the trustee's decision.

31 Section 124 of the BIA deals with the proof of claims. First, it provides in subsection (1) that creditors shall prove claims. It says: "Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made." The section goes on, in subsection (3) to deal with who may make proof of claims. The subsection says: "The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person authorized, it shall state his authority and means of knowledge."

32 The term "creditor" is not specifically defined in the CCAA. The applicants therefore point to the definition of "creditor" in the Call for Claims order itself. There, creditor is defined as "any *Person* having a Claim or a Product Liability Claim" [emphasis added]

33 From the interplay of the sections of the CCAA and the BIA, together with the definition in the Call for Claims order, the applicants infer that only individual creditors may make claims, unless they have authorized someone else to do so on their behalf. Since there is no question the Representative Plaintiffs' Claims have not been authorized by the group of people whom they purport to represent, they have no authority to do so, and the applicants say these claims must therefore be declared a nullity, at least to the extent that they purport to advance claims for other than Hannon, Hochberg, Rodriquez and Guzman personally.

34 While this interpretation may be technically correct, it is also clear that representative orders of some kind have been used in other CCAA proceedings³, and even in this case.⁴ In addition, there have been cases in which a stay has been lifted in order to permit a potential class proceeding to file certification materials,⁵ while in other cases, a motion

to lift the stay for that purpose and to file a class claim have been denied.⁶ As yet, however, there are no examples in Canada where a class proof of claim has been specifically permitted.⁷

35 It is noteworthy here, that even though Farley J made an order granting a "representation and ancillary order regarding funding" to the Ad Hoc Committee in this proceeding, there was no order permitting "representative" claims to be filed; each member of the committee filed an individual proof claim with the monitor.

36 From this I conclude that while it is possible at least to have a limited representation order in CCAA proceedings, it is by no means clear that representation orders have been extended to permit a "representative" proof of claim to be filed. Canadian courts have not yet permitted a filing of a proof of claim by a plaintiff in an uncertified class proceeding on behalf of itself and other members of the class. At best, our courts have at least once lifted a stay to permit the filing of certification materials. Any steps beyond that would be the subject of a further motion.⁸ In the case of *Re Air Canada*, however, there was no suggestion that certification motions were going to be made in a foreign jurisdiction, as would be the case here.

37 While a representative claim may therefore be possible, the next question is whether this is a proper case to either permit this kind of "representative" claim, without the necessity of the individual members of the class filing claims, or whether the stay should be lifted to permit certification motions to proceed in the United States. This involves a discussion first of whether the orders here gave adequate protection to this potential group or groups of creditors, and second, whether this might be an appropriate case for the court to exercise its discretion and grant the relief the Representative Plaintiffs seek.

Did the CCAA process adequately protect the interests of these potential claimants?

38 When I consider the CCAA process here, I am drawn inescapably to the conclusion that it adequately protected the interests of these potential claimants, had they availed themselves of the process as other claimants did.

39 The Ad Hoc committee obtained a representation order, and participates on that basis, although its members filed individual proofs of claim. Even the California Consumers filed individual claims. If the members of the Representative Plaintiff's proposed class had wished to file proofs of claim, they had as much notice and opportunity to do so as anyone else. This is particularly so since the required notices were published not only in two American nation-wide newspapers, but also in three locations on the U.S. District Court's website. Not a single "similarly situated" person, other than Hannon, Hochberg, Rodriguez and Guzman filed a proof of claim. They easily could have. They did not. I cannot conclude that the absence of additional claims implies the process was somehow unfair or flawed. To the contrary, the absence of even a single additional claim suggests there may be no other claimants at all. The process adequately protected the interests of these potential claimants. They simply chose not to utilize that process.

Should the court exercise its discretion?

40 While the court clearly has a broad discretion in CCAA matters⁹, I am not persuaded that this is a proper case to exercise that discretion either to allow the representative claims as they are, or to lift the stay to permit certification motions to proceed.

41 First, representative claims *per se*, have not been recognized in Canadian jurisprudence in the context of CCAA proceedings. It is clear that rule 10 of the *Rules of Civil Procedure* permits the court to "appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served."

42 Rule 10, however, is generally used in estates and trusts cases, or as what has been described as the "simplified procedure" version of proceedings under the *Class Proceedings Act*, particularly in pension fund disputes.¹⁰ I was referred to no case in which the rule was specifically used in CCAA proceedings to permit the filing of a representative or

class claim. I do not see rule 10 as useful in these CCAA proceedings, which has created its own process and procedures. Here, a structure was established by court order, on notice to the very parties who now wish to alter the process fundamentally, after all stakeholders have relied on the structure that was established.

43 Changing and increasing the landscape of claimants after the settlement of 30 of the ephedra claims after the claims bar date could cause prejudice to the eventual success of the CCAA process. Simply put, all the arguments made by the Representative Plaintiffs and California Consumers should have been made before Farley J when the Call for Claims order was made, or earlier motions should have been made to deal with these issues before the Call for Claims order was even made.

44 The process gave adequate opportunity for anyone with a claim to file a proof of claim. The forms were accessible, in plain English. The products liability claimants all managed to make individual claims, even though they might have been involved in class actions. No other prohormone claimants have filed a proof of claim. To allow representative or class claims at this date would be prejudicial to the entire claims process, and would impair the integrity of the CCAA process here. I decline to exercise my discretion in these circumstances.

Disposition:

45 The applicants' motion is therefore granted, and the representative plaintiffs' motion is dismissed. To be clear, the "representative" claims are to be considered as individual claims for each of Hannon, Hochberg, Rodriguez and Guzman. As the parties have agreed, there will be no order as to costs.

SCHEDULE "A"

HC Formulations Ltd.

CELL Formulations Ltd.

NITRO Formulations Ltd.

MESO Formulations Ltd.

ACE Formulations Ltd.

MISC Formulations Ltd.

GENERAL Formulations Ltd.

ACE US Formulations Ltd.

MT Canadian Supplement Trademark Ltd.

Mt Foreign Supplement Trademark Ltd.

MC Trademark Holdings Ltd.

HC US Trademark Ltd.

1619005 Ontario Ltd. (f/k/a NEW HC US Trademark Ltd.)

HC Canadian Trademark Ltd.

HC Foreign Trademark Ltd.

Motion granted.

Footnotes

- * Additional reasons at *Muscletech Research & Development Inc., Re* (2006), 2006 CarswellOnt 5484, 25 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]).
- 1 Since hearing this motion, I have granted an order extending the stay to November 10 of this year. Judge Rakoff has made a similar order in the corresponding US litigation.
- 2 See "Notice to Creditors Re: Notice of Call for Claims and Product Liability Claims", Schedule "E" to the call for claims order.
- 3 See, for example, *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1999), 12 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]). See also the order of Blair J. in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge* dated July 29, 1998, in which he appointed representative counsel for various groups of claimants. It is noteworthy, however, that he did not provide for the filing of representative proofs of claim in the order.
- 4 See the reasons of Farley J. dated February 6, 2006 at paragraph 8, in which he says: "I understand that later this week the Ad Hoc Committee will be requesting a representation and ancillary order incorporating a joint funding agreement. [Note: as this is being typed up February 8th, I would note that I have just granted such an order.]" Again, nothing in the order permitted a representative *claim* to be filed.
- 5 *Re Air Canada*, Court File # 03-CL-4932. Endorsement of Farley J dated September 24, 2003.
- 6 *Re Canadian Red Cross*, *supra*
- 7 *Re Canadian Red Cross*, note 2, above, at page 197
- 8 *Re Air Canada*, note 5, above at paragraph 18.
- 9 The *CCAA* has been described as having a "broad remedial purpose", and cases have stated the Act should be given a large and liberal interpretation. See Holden & Morawetz *The 2006 Annotated Bankruptcy and Insolvency Act*, [Carswell, 2006] pp 1163-64, and these cases referred to there.
- 10 See *Overview* to rule 10, Killeen, Morton and James, *Ontario Superior Court Practice*

TAB 7

1999 CarswellOnt 3234

Ontario Superior Court of Justice [Commercial List]

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re

1999 CarswellOnt 3234, 12 C.B.R. (4th) 194, 39 C.P.C. (4th) 362

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

In the Matter of a Plan of Compromise or Arrangement of the
Canadian Red Cross Society/La Société Canadienne de la Croix-Rouge

The Canadian Red Cross Society/La Société Canadienne de la Croix-Rouge, Applicant

Blair J.

Judgment: July 28, 1999

Docket: 98-CL-002970

Counsel: *Benjamin Zarnett* and *Jessica Kimmel*, for applicant, Red Cross.

Charles M. Wright, for respondent, Barbara Baker et al.

John Spencer, for respondent, Attorney General of Canada.

Michael Kainer, for respondent, SEIU.

Carlton Mathias, for respondent, Bayer Corp.

Mary Margaret Fox, for respondent, Dominion of Canada General Insurance Company.

D. Ward, for respondents, Provinces & Territories (except Que.).

P. Huff, for respondent, 1986-1990 Hemophiliac, HCV claimants.

Jeff Carhart, for respondents, Québec Government & Hema-Québec.

Ken Arenson, for respondents, Certain Individual Claimants.

D. Harvey, for respondents, pre-86/post 90 HCV claimants.

J.H. Grout, for respondent, Monitor, Ernst & Young Inc.

Gary Smith, for respondents, pre86/post 90 BC HCV claimants.

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

Related Abridgment Classifications

Bankruptcy and insolvency

IX Proving claim

IX.4 Practice and procedure

IX.4.g Miscellaneous

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.c Conduct of class proceeding

V.2.c.ii Stay of other proceedings

Headnote

Bankruptcy --- Proving claim — Practice and procedure — Miscellaneous issues

Motion by individual for order lifting Companies' Creditors Arrangement Act stay in order to permit her leave to file class proof of claim in this proceeding, on her own behalf and on behalf of class of persons said to be exposed to infection as result of receiving transfusions of blood tainted or contaminated by Creutzfeld-Jakob Disease — Motion dismissed — This was not case to consider whether class proofs of claim were permissible in Canadian insolvency proceedings — It was matter for discretion of insolvency judge whether to permit filing of class proof of claim — Would not exercise discretion in circumstances to permit such filing.

Practice — Parties — Representative or class actions — General

Motion by individual for order lifting Companies' Creditors Arrangement Act stay in order to permit her leave to commence class action proceeding on her own behalf and on behalf of class of persons said to be exposed to infection as result of receiving transfusions of blood tainted or contaminated by Creutzfeld-Jakob Disease — Motion dismissed — Potential CJD claimants have received adequate notice of claims filing procedure designed to enable claimants to vote on proposed plan — Red Cross proceedings have been ongoing for more than year with very high profile — CCAA schedule was modified so timing of it and Red Cross proceedings would mesh — Didn't want to impose another feature into CCAA procedure which might upset timing — Claims procedure for voting purposes which had already been put in place with concurrence of various groups of transfusion claimants was one which was founded upon individual voting by claimants with respect to plan.

Table of Authorities

Cases considered by *Blair J.*:

Matter of American Reserve Corp. (1988), 840 F.2d 487, 56 U.S.L.W. 2497, 10 Fed. R. Serv. 3d 868, 17 Bankr. Ct. Dec. 504 (U.S. 7th Cir. Ill.) — referred to

Reid v. White Motor Corp. (1989), 886 F.2d 1462 (U.S. C.A. 6th Cir.) — referred to

Statutes considered:

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

MOTION by individual for order lifting *Companies' Creditors Arrangement Act* stay in order to permit her leave to commence class action proceeding and to file class proof of claim.

Blair J.:

1 This Motion is brought on behalf of Ms. Barbara Baker for an Order lifting the CCAA stay in order to permit her leave to commence a class action proceeding, and to file a class proof of claim in this proceeding, on her own behalf and on behalf of a class of persons said to be exposed to infection as a result of receiving transfusions of blood tainted or contaminated by Creutzfeld-Jakob Disease ("CJD"). CJD is a terrible malady — an infectious, rapidly progressive, fatal brain-deteriorating disease for which there is apparently no known treatment or cure.

2 The issue to be considered here is not the tenability of such a class action proceeding or the question of whether or not the proposed class would be certified. These are matters for the class action proceeding itself, if it is to proceed. The issue here is whether it would be helpful and effective from the perspective of blood claimants exposed to CJD and with respect to the overall processing of the Red Cross CCAA proceeding itself — including, of course, the timely and fair compensation of Transfusion Claimants as a whole from the proceeds made available through the proposed Plan, if accepted and approved — to lift the stay for the reason proposed.

3 In the particular circumstances of this restructuring proceeding I am not satisfied that it is necessary, or that it would be appropriate, to grant the relief sought. The motion is therefore dismissed.

4 There are a number of reasons for arriving at this conclusion.

5 First, the real issue is whether or not the potential CJD claimants have received adequate notice of the claims filing procedure designed, initially, to enable claimants to vote on the proposed Plan. A carefully constructed and elaborate notification procedure has been established and put into effect. It was arrived at after extensive negotiations amongst the myriad of claimants' representatives and finalized after full argument in Court. It included nation-wide notification in the national newspaper media on three occasions. It is readily apparent from the introductory words of the Notice itself that those who should claim included *anyone* with a direct or indirect blood claim against the Red Cross. A number of CJD claimants have already filed claims and numerous others have contacted the Red Cross or the Monitor. Ms Baker herself is Plaintiff in an Alberta action commenced against the Red Cross in 1996 and she received direct notification through her solicitors, as did other similar claimants. There is really no evidence that there have been any difficulties from inadequate notice to CJD claimants.

6 Secondly, I am not satisfied that any notification procedure evolving out of a commenced but then stayed class action proceeding would yield any different results. Neither the Red Cross nor the Monitor knows who the potential claimants are. Ms Baker's proposed class action solicitors appear not to know either.

7 Thirdly, the Red Cross proceedings have been ongoing now for more than a year. They have had a very high profile, accompanied by wide spread publicity. This factor in itself carries with it a certain momentum for the discovery and assertion of claims.

8 Fourthly — and against the background of the foregoing — the Red Cross proceedings themselves have developed a certain taut dynamic between the assertion of claims within the CCAA umbrella and the pending settlement of claims between at least a large group of the Transfusion Claimants and the various Governments. The proposed Plan is closely related to the successful completion of the Government settlement, and the timing of these proceedings is being synchronized with the timing of the approval and implementation of the latter. In an earlier motion today the CCAA schedule was modified so that the timing of the two would mesh.

9 There are two implications arising from this fourth point. In the first place, I am reluctant to impose another feature into the CCAA procedure which might upset the current timing, particularly where — as I have indicated — I think the helpfulness of the proposed class action proceeding would be marginal at best in respect of the individual CJD claimants and in respect of the CCAA proceedings. Moreover, the claims procedure for voting purposes which has already been put in place — with the concurrence of the various groups of Transfusion Claimants — is one which is founded upon individual voting by claimants with respect to the Plan.

10 I am not sure how individual voting would work in the context of the "class proof of claim" which Mr. Wright proposes should be filed, and I am not prepared to run the risk of upsetting the present procedure which is clearly underway and which has already absorbed a great deal of the time, energy and resources of the various Transfusion Claimants, at this late stage. There is an imperative at work here which demands that this proceeding be advanced and that voting and completion of the Plan (if accepted and approved) take place in as timely a fashion as possible, in order that Claimants receive what compensation they are entitled to as early as possible.

11 This is not the case, in my view — because it is not necessary to do so — to consider carefully and determine whether class proofs of claim are permissible in Canadian insolvency proceedings. There are apparently no examples in Canada yet where such a procedure has been permitted. In the United States, which has — as Mr. Wright's factum put it — "a lengthier history of class proceedings," class proofs of claim have sometimes been allowed in principle in the bankruptcy context: see, for example, In the *Matter of American Reserve Corp.*, 840 F.2d 487 (U.S. 7th Cir. III. 1988) (Feb. 18, 1988) (No. 87-1768), and *Reid v. White Motor Corp.*, 886 F.2d 1462 (U.S. C.A. 6th Cir. 1989), (Sept. 28, 1989).

As I understand these cases, it is a matter for the discretion of the insolvency judge as to whether to permit the filing of a class proof of claim. For the reasons I have articulated, I would not exercise my discretion in the circumstances of this case to permit such a filing, even if I were to apply the principles to be drawn from the American authorities.

12 The Motion is therefore dismissed. I do not rule out, by this disposition, the possible appointment of Representative Counsel for the CJD claimants in this proceeding (similar to those already appointed for the various groups of Transfusion Claimants) should it be felt and determined to be necessary or appropriate in the future.

Motion dismissed.

TAB 8

2006 CarswellOnt 7877
Ontario Superior Court of Justice

Muscletech Research & Development Inc., Re

2006 CarswellOnt 7877

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

AND IN THE MATTER OF MUSCLETECH RESEARCH AND DEVELOPMENT
INC. AND THOSE ENTITIES LISTED ON SCHEDULE "A" HERETO

Ground J.

Heard: November 3, 2006
Judgment: December 11, 2006
Docket: 06-CL-6241

Counsel: Jay A. Carfagnini, Frederick Myers, David Bish for Applicants, Muscletech Research & Development Inc. et al
D.J. Miller, Kyla E.M. Mahar for Krys Osborne & similarly situated California consumers

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

[IX Proving claim](#)

[IX.4 Practice and procedure](#)

[IX.4.g Miscellaneous](#)

Headnote

Bankruptcy and insolvency --- Proving claim — Practice and procedure — Miscellaneous issues

Several product liability actions were filed against applicants in United States pertaining to sale of product that contained ephedra — Applicants sought and obtained relief under Companies' Creditors Arrangement Act as means of achieving global resolution of claims against it — Court issued "Call for Claims" order that provided deadline by which claims must be filed failing which claims were barred — Monitor also commenced ancillary proceedings in United States — Monitor sent proofs of claim to all known creditors of applicants, filed proof of claim package electronically on U.S court dockets, advertised in newspapers and took other steps to inform potential creditors — Only proof of claim filed was that of creditor who sought to represent other creditors as member of class — Applicants brought motion for order that proof of claim was nullity to extent it purported to advance representative claim on behalf of other persons — Motion granted — Creditor brought cross-motion for order permitting claim to be filed on behalf of other persons and for related relief — Cross-motion dismissed — Although court had inherent jurisdiction to permit class proof of claim to be filed in proceedings determination as to whether to do so was to be made based on factual circumstances and equities between parties — "Call for Claims" order specifically permitted representative claims to be brought by legal personal representatives but creditor was not legal personal representative within meaning of order — Creditor did not have documentary evidence that she had authority to file claim on behalf of class or court order permitting her to do so — Although this did not preclude court from determining that creditor could file claim on behalf of class on facts, other creditors were given notice of proceedings and failed to file claims, applicants had resolved almost all other product liability claims — To permit

filing of class proof of claim at this stage would seriously disrupt and extend proceedings as well as increasing costs and decreasing benefits to all stakeholders — There were also substantial doubts as to whether allegedly false and misleading advertising that was basis of class action would be found to be established and as to whether class was certifiable — There was no evidence that claims order or process was unfair or unduly prejudicial to creditors.

Table of Authorities

Cases considered by *Ground J.*:

Alton, Re (2003), 45 C.B.R. (4th) 25, 2003 CarswellOnt 3044 (Ont. S.C.J.) — considered

Air Canada, Re (September 24, 2003), Farley J. (Ont. S.C.) — considered

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 24, 2000 CarswellAlta 728 (Alta. Q.B.) — considered

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1999), 12 C.B.R. (4th) 194, 1999 CarswellOnt 3234, 39 C.P.C. (4th) 362 (Ont. S.C.J. [Commercial List]) — considered

Ephedra Products Liability Litigation, Re (2005), 329 B.R. 1 (U.S. Dist. Ct. S.D. N.Y.) — considered

Muscletech Research & Development Inc., Re (2006), 25 C.B.R. (5th) 218, 2006 CarswellOnt 4929 (Ont. S.C.J. [Commercial List]) — considered

Perez v. Metabolife International Inc. (2003), 218 F.R.D. 262 (U.S. Dist. Ct. S.D. Fla.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 124(3) — considered

Bankruptcy Code, 11 U.S.C. 1982
Chapter 15 — referred to

Business and Professions Code, California
s. 17200 — referred to

MOTION for order that proof of claim was nullity to extent it purported to advance representative claim on behalf of other persons; CROSS-MOTION for order permitting claim to be filed on behalf of other persons and for related relief.

Ground J.:

1 This motion is brought by the Applicants in the within proceeding (collectively "Muscletech") for an Order that the proof of claim filed by Krys Osborne ("Osborne") in this proceeding is invalid and a nullity to the extent that it purports to advance a representative claim on behalf of other persons.

Background

2 In response to call for claims in this proceeding, Osborne filed a proof of claim in respect of claims against the Applicants Iovate Health Sciences Group Inc., Iovate Health Sciences U.S.A. Inc., General Nutrition Corporation and

other entities in a purported class representative capacity (the "Osborne Proof of Claim"). The Osborne Proof of Claim is based on alleged false and/or misleading advertising pertaining to the sale of Hydroxycut containing the ingredient ephedra and asserts a claim in the estimated amount of U.S. \$100 million.

3 Muscletech sought and obtained relief under the CCAA pursuant to an order of this court of Justice dated January 18, 2006 (the "Initial CCAA Order"). The Initial CCAA Order granted a stay of proceedings to and including February 18, 2006 in respect of the Applicants and certain non-applicant parties and appointed RSM Richter Inc. as Monitor of the Applicants (the "Monitor"). By subsequent Orders of this court, the Stay of Proceedings has been extended to and including February 1, 2007.

4 On January 18, 2006, the Monitor commenced ancillary proceedings in the United States of America in respect of the Applicants under Chapter 15 of the *U.S. Bankruptcy Code* and those proceedings are now before the United States District Court for the Southern District of New York (the "District Court").

5 The Applicants sought relief under the CCAA principally as a means of achieving a global resolution of the large number of product liability and other lawsuits commenced by numerous claimants (collectively, the "Product Liability Claimants") against Muscletech and others in the United States that related to products formerly sold by Muscletech (collectively, the "Product Liability Actions").

6 In addition to Muscletech, a number of affiliated and non-affiliated parties were also named as defendants or otherwise involved in certain of the Product Liability Actions (collectively, the "Non-Applicant Defendants"). The liability of the Non-Applicant Defendants is derivative of, and inextricably linked to, the liability of the Applicants.

7 On March 3, 2006, this court granted an order (the "Call for Claims Order") that established a process for the calling of: (a) all Claims (as defined in the Call For Claims Order) in respect of the Applicants and its officers and directors; and (b) all Product Liability Claims (as defined in the Call For Claims Order) in respect of the Applicants and the Non-Applicant Defendants. The Call For Claims Order required persons who wished to advance claims to file Proofs of Claim (as defined in the Call For Claims Order) with the Monitor by no later than 5:00 p.m. (EST) on May 8, 2006 (the "Claims Bar Date"), failing which the proposed claims would be barred. The Call For Claims Order was approved by Order of the District Court dated March 22, 2006.

8 In accordance with the Call For Claims Order, the Monitor: (a) sent a package containing the requisite proof of claim forms (the "Proof of Claim Package") to all known creditors of the Applicants; (b) filed electronically on the court dockets of the District Court the Proof of Claim Package and a notice to creditors advising of the call for claims process; (c) caused to be published a notice to creditors in *The Globe and Mail* (National Edition), *The Wall Street Journal*, and *USA Today*; and (d) posted a copy of the notice to creditors and the Proof of Claim Package on the Monitor's website. No Proof of Claim was filed by anyone, other than Osborne, who would be a member of the putative class sought to be represented by Osborne pursuant to the Osborne Proof of Claim.

9 The Call For Claims Order did not contain a process to resolve the Claims and Product Liability Claims. Accordingly, with the input of various key stakeholders, the Applicants established a claims resolution process (the "Claims Resolution Process") approved by this court and incorporated in a Claims Resolution Order dated June 8, 2006 (the "Claims Resolution Order") and approved by order of the District Court dated June 22, 2006.

10 The Claims Resolution Order provides: (a) a process for the review of all Proofs of Claim filed with the Monitor; (b) a process for the acceptance or dispute, in whole or in part, by the Applicants, with the assistance of the Monitor, of Claims and/or Product Liability Claims for the purpose of voting and/or distribution under a plan of compromise or arrangement in respect of the Applicants (a "Plan"); (c) the appointment of a claims officer to resolve disputed Claims or Product Liability Claims; and (d) an appeal process from the determination of the claims officer to this court.

11 Muscletech has, with the assistance of the Monitor, reviewed the proofs of claim filed with the Monitor with a view to accepting or objecting to them for voting and/or distribution purposes under a Plan and has reviewed the Osborne

Proof of Claim and denies that the claim advanced therein can succeed on the merits with respect to the allegations of false or misleading advertising.

12 On August 10, 2006, in accordance with the Claims Resolution Process, the Monitor issued a Notice of Objection to the Osborne Proof of Claim. In response to the Notice of Objection, Osborne filed a Dispute Notice dated August 23, 2006.

13 Paragraph 18 of the Claim Resolution Order authorizes Muscletech to move before this court to resolve or seek directions in respect of the validity, effect and/or quantum of proofs of claim submitted on a representative basis in respect of existing consumer class actions involving the Applicants, where such class actions were uncertified as of the date of the Initial CCAA Order.

14 The Osborne Proof of Claims pertains to an action that was brought against Muscletech and certain Non-Applicant Defendants in the Superior Court of the State of California on February 16, 2005, prior to the commencement of these CCAA proceedings alleging violations of Section 17200 of the *California Business & Professions Code*, which prohibits "unlawful, unfair or fraudulent" business practices. The case was subsequently transferred to the United States District Court of California (Los Angeles) and a motion to transfer the case to the District Court was heard and granted on June 19, 2006.

15 As stated above, the Applicants' motion now before this court seeks an order that the Osborne Proof of Claim is invalid as a nullity to the extent that it purports to advance a representative claim on behalf of other persons.

16 The class of claimants purported to be represented by Osborne was uncertified as of the date of the filing of the application in this CCAA proceeding and, as a result of the stay of proceedings, remains uncertified as of this date.

17 The cross motion filed by Osborne and now before this court seeks an order for, among other things:

(a) a declaration that the Call for Claims Order permits the filing of a proof of claim by Osborne, on behalf of herself and all other similarly situated California consumers, as the class representative of the putative class;

(b) in the alternative, to vary the Call for Claims Order *nunc pro tunc* to allow for the filing of the Osborne Proof of Claim to be determined for voting and/or distribution purposes in accordance with the Claims Resolution Order;

(c) in the further alternative, to lift the stay of proceedings to allow Osborne, as the class representative of the putative class, to take the necessary steps to certify the class action (the "California Class Action") and, contingent upon obtaining certification of the class, allow for the filing of the Osborne Proof of Claim in this proceeding to be determined for voting and/or distribution purposes in accordance with the Claims Resolution Order; and

(d) in the further alternative, to lift the stay of proceedings as against (i) Iovate Health Sciences Group, Inc. ("Iovate Group"), (ii) Iovate Health Sciences USA, Inc. ("Iovate USA") and (iii) General Nutrition Corporation ("GNC") (collectively the "Relevant Non-Applicant Defendants") to allow Osborne as the class representative of the California Consumers to continue the California Class Action as against the Relevant Non-Applicant Defendants.

Issues

18 The motions before this court raise the following issues:

(1) Is there any authority for the filing of uncertified class action claims in proceedings under the CCAA?

(2) Is Osborne the legal personal representative of the members of the putative class as referred to in the definition of "person" in the Call for Claims Order and what is the proper law for the determination of whether Osborne is a legal personal representative?

(3) Whether or not there is any such authority, should this court, in considering the equities of the case, exercise its inherent jurisdiction and accept the Osborne Proof of Claim for filing on behalf of the putative class.

Analysis

Class Proofs of Claim in CCAA Cases

19 The CCAA is silent as to whether class proofs of claim may be filed in a CCAA proceeding and it would appear that no Canadian court has definitively held that class proofs of claim may not be filed in a CCAA proceeding.

20 In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1999), 12 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]), the applicant sought an order to lift the CCAA stay to commence a class proceeding on behalf of those who received blood tainted with Creutzfeld-Jakob Disease ("CJD"), and an order to file a class proof of claim. Blair, J. concluded that the real issue raised by the applicant was the adequacy of the notice of the established CCAA claims filing procedure. He dismissed the application on the basis that there was no evidence of inadequate notice to CJD claimants and the CCAA proceedings having gone on for one year and having had a very high profile, Blair, J. doubted that permitting a class action to proceed would yield different results, and concluded that allowing the class action to proceed would disrupt the CCAA proceedings with only marginal benefit to CJD claimants. Regarding the last point, Blair, J. stated at paras. 9-11:

In the first place, I am reluctant to impose another feature into the CCAA procedure which might upset the current timing, particularly where ___ as I have indicated ___ I think the helpfulness of the proposed class action proceeding would be marginal at best in respect of the individual CJD claimants and in respect of the CCAA proceedings. Moreover, the claims procedure for voting purposes which has already been put in place ___ with the concurrence of the various groups of Transfusion Claimants ___ is one which is founded upon individual voting by claimants with respect to the Plan.

I am not sure how individual voting would work in the context of the "class proof of claim" which Mr. Wright proposes should be filed, and I am not prepared to run the risk of upsetting the present procedure which is clearly underway and which has already absorbed a great deal of the time, energy and resources of the various Transfusion Claimants, at this late stage. There is an imperative at work here which demands that this proceeding be advanced and that voting and completion of the Plan (if accepted and approved) take place in as timely a fashion as possible, in order the Claimants receive what compensation they are entitled to as early as possible.

This is not the case, in my view ___ because it is not necessary to do so ___ to consider carefully and determine whether class proofs of claim are permissible in Canadian insolvency proceedings. There are apparently no examples in Canada yet where such a procedure has been permitted. In the United States, which has ___ as Mr. Wright's factum put it ___ a "lengthier history of class proceedings", class proofs of claim have sometimes been allowed in principle in the bankruptcy context: see, for example, In the *Matter of American Reserve Corp.*, 840 F.2d 487 (U.S. 7th Cir. III. 1988) (Feb. 18, 1988) (No. 87-1768), and *Reid v. White Motor Corp.*, 886 F.2d 1462 (U.S. C.A. 6th Cir. 1989), (Sept. 28, 1989). As I understand these cases, it is a matter for the discretion of the insolvency judge as to whether to permit the filing of a class proof of claim. For the reasons I have articulated, I would not exercise my discretion in the circumstances of this case to permit such a filing, even if I were to apply the principles to be drawn from the American authorities.

21 In *Air Canada, Re* (September 24, 2003), Farley J. (Ont. S.C.) (unreported), the applicants sought an order to lift the CCAA stay to commence a class proceeding in Federal Court on behalf of various travel agencies and requested an order permitting them to thereafter file a class proof of claim. Farley J. dismissed the applicants' request that they be permitted to apply as a class of creditors if their class action was certified, and dismissed their request to submit a favourable judgment in the class action as a class proof of claim. Since the applicants' claims under the CCAA would

have to be dealt with in the near future, and it was not likely that the Federal Court would be able to dispose of the class action in time, Farley J. concluded that "nothing is gained by their request". Farley, J. therefore did not definitively rule on the appropriateness of class proofs of claim.

22 In *Muscletech Research & Development Inc., Re*, 2006 CarswellOnt 4929 (Ont. S.C.J. [Commercial List]), four plaintiffs in yet-uncertified American class actions relating to physical damages alleged to be caused by prohormones in certain products sold by Muscletech and others, applied to submit class proofs of claim and to have the CCAA stay lifted. In her Endorsement, Mesbur, J. noted that the CCAA neither expressly permits nor forbids class proofs of claim and, referring to the BIA and the cases noted above, she concluded that class proofs of claim under the CCAA were possible and the question was whether this was a proper case to permit the representative claims. For the reasons stated in her Endorsement, Mesbur, J. did not allow the class proofs of claim to be filed. It has been agreed between the parties that the Order of Mesbur, J. does not constitute *res judicata* or issue estoppel with respect to the motions now before this court relating to the Osborne claim.

23 In *Alton, Re* (2003), 45 C.B.R. (4th) 25 (Ont. S.C.J.), the bankrupt Alton applied for a discharge. One Claude Millard opposed Alton's application. The issue was whether Millard was a proven creditor. Millard was the representative plaintiff in a certified class action against Alton for losses arising from an allegedly fraudulent investment scheme operated by Alton. A previous Order of Farley J. dated January 31, 2001, stated that Millard,

may file a proof of claim in the bankruptcy of [Alton] on behalf of himself and all Class Members in the amount of \$5,000,000...and such proof of claim shall be accepted by the Trustee for voting purposes only in the place and stead of proofs of claim filed on behalf of each of the Class Members individually.

Lax, J. accordingly found that this Order made Millard a proven creditor for all purposes other than distribution.

24 It would appear from the above authorities that this court has inherent jurisdiction to permit a class proof of claim to be filed in a CCAA proceeding but that the determination of whether it should be permitted in any particular case will depend upon the factual circumstances of the case and the equities between the parties.

Osborne as Legal Personal Representative

25 The Call for Claims Order defines "claim" as a claim of any "person" and "person" is defined as meaning:

... any individual, partnership, limited partnership, joint venture, trust, corporation, unincorporated organization, government, agency, regulatory body or instrumentality thereof, legal personal representative or litigation guardian, or any other judicial entity howsoever designated or constituted.

26 The Call for Claims Order accordingly contemplates claims being brought in a representative capacity. In addition, paragraph 18 of the Claims Resolution order contemplates a motion before this court with respect to proofs of claim submitted on a representative basis. Paragraph 18 provides as follows:

18. THIS COURT ORDERS that, notwithstanding anything herein to the contrary, the Monitor or the Applicants may move before the Court to resolve or seek directions in respect of the validity, effect and/or quantum of Proofs of Claim submitted on a representative basis in respect of existing consumer class actions involving the Applicants, where such class actions were uncertified as of the Filing Date.

27 In my view, the terms of these Orders clearly contemplate that this court may order the acceptance of a claim filed on a representative basis by a legal personal representative, including a class action claim. The issue then becomes whether Osborne qualifies as a "legal personal representative" for the purposes of this proceeding.

28 Although under the law of California Osborne may owe certain duties to members of the putative class having purported to institute a proceeding on their behalf, I am of the view that the law of Ontario must be applied to determine

whether Osborne is a legal personal representative for purposes of orders of this court such that she has authority to file a proof of claim on behalf of such persons in the CCAA proceeding before this court.

29 It is not alleged that Osborne has any specific authority from any member of the putative class to file a proof of claim on his or her behalf. It is to be noted that the reference to "legal personal representative" in the definition of "claim" in the Call for Claims Order is in the context of "legal personal representative or litigation guardian, or any other judicial entity howsoever designated or constituted". It would seem to me that the definition implies that a legal personal representative must have been designated or constituted or in some way obtained authority from the persons alleged to be represented by way of power of authority, proxy, court order or some other document. In *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 24 (Alta. Q.B.) at paragraph 50, Paperny, J. stated:

A proxy signed by a participant and beneficial owner will be sufficient to authenticate a claim. However, a proxy signed by a participant and a third party claiming to have authority on behalf of a beneficial holder absent something from the beneficial holder itself is insufficient to extend to voting on behalf of the beneficial holders.

30 The definition of "claim" in the Call for Claims Order also makes reference to claims that "would have been claims provable in bankruptcy under the *Bankruptcy and Insolvency Act*". Subsection 124(3) of the *Bankruptcy and Insolvency Act* provides as follows:

124. (3) Who may make proof of claims ____ The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge.

31 This again indicates that for a proof of claim to be made by a legal personal representative such representative must have some authority from the person on whose behalf the claim is being filed.

32 Accordingly, I am of the view that absent some documentary evidence that Osborne has authority from the members of the putative class to file a proof of claim on their behalf or a court order granting such authority, she is not a "legal personal representative" for purposes of Call for Claims Order.

Equities and Inherent Jurisdiction

33 As stated above, in order for the court to determine whether a class proof of claim should be accepted in a particular proceeding, the court must consider the factual circumstances of the case and the equities between the parties. In addition, in my view, the inherent jurisdiction of this court under the CCAA would enable this court to permit the acceptance of the Osborne Proof of Claim even though Osborne does not strictly qualify as a legal personal representative.

34 In making such determination there are, in my view, a number of factual matters which the court should take into account in addition in considering the equities as between the parties. Among the factual matters to be considered are the following. This CCAA proceeding was commenced for the purpose of achieving a global resolution of all product liability and other lawsuits commenced in the United States against Muscletech and others, including the Non-Applicant Defendants, relating to products formerly sold by Muscletech. As a result of strenuous negotiation and successful court-supervised mediation through the District Court, the Applicants have succeeded in resolving virtually all of the outstanding claims with the exception of the Osborne claim and, to permit the filing of a class proof of claim at this time, would seriously disrupt and extend the CCAA proceedings and the approval of a Plan and would increase the costs and decrease the benefits to all stakeholders. There appears to have been adequate notice to potential claimants and no member of the putative class other than Osborne herself has filed a proof of claim. It would be reasonable to infer that none of the other members of the putative class is interested in filing a claim in view of the minimal amounts of their claims and of the difficulty of coming up with documentation to support their claim. In this context the comments of Rakoff, J. in *Ephedra Products Liability Litigation, Re* [329 B.R. 1 (U.S. Dist. Ct. S.D. N.Y. 2005)] U.S. Dist. LEXIS 16060 at page 6 are particularly apt.

Further still, allowing the consumer class actions would unreasonably waste an estate that was already grossly insufficient to pay the allowed claims of creditors who had filed timely individual proofs of claim. The Debtors and Creditors Committee estimate that the average claim of class [*10] members would be \$ 30, entitling each claimant to a distribution of about \$ 4.50 (figures which Barr and Lackowski do not dispute; although Cirak argues that some consumers made repeated purchases of Twinlabs steroid hormones totaling a few hundred dollars each). Presumably, each claimant would have to show some proof of purchase, such as the product bottle. Because the Debtor ceased marketing these products in 2003, many purchasers would no longer have such proof. Those who did might well find the prospect of someday recovering \$ 4.50 not worth the trouble of searching for the old bottle or store receipt and filing a proof of claim. Claims of class members would likely be few and small. The only real beneficiaries of applying Rule 23 would be the lawyers representing the class. *Cf Woodward*, 205 B.R. at 376-77. The Court has discretion under Rule 9014 to find that the likely total benefit to class members would not justify the cost to the estate of defending a class action under Rule 23.

35 In addition, in the case at bar, there would appear to be substantial doubt as to whether the basis for the class action, that is the alleged false and misleading advertising, would be found to be established and substantial doubt as to whether the class is certifiable in view of being overly broad, amorphous or vague and administratively difficult to determine. (See *Perez v. Metabolife International Inc.* [218 F.R.D. 262 (U.S. Dist. Ct. S.D. Fla. 2003)] U.S. Dist. LEXIS 21206 at pages 3-5). The timing of the bringing of this motion in this proceeding is also problematic. The claims bar date has passed. The mediation process is virtually completed and the Osborne claim is one of the few claims not settled in mediation although counsel for the putative class were permitted to participate in the mediation process. The filing of the class action in California occurred prior to the initial CCAA Order and at no prior time has this court been asked to approve the filing of a class action proof of claim in these proceedings. The claims of the putative class members as reflected in the comments of Rakoff, J. quoted above would be limited to a refund of the purchase price for the products in question and, in the context of insolvency and restructuring proceedings, *de minimus* claims should be discouraged in that the costs and time in adjudicating such claims outweigh the potential recoveries for the claimants. The claimants have had ample opportunity to file individual claims if they were so inclined and none, other than Osborne, has done so. There is no evidence that the call for claims order or the claims process as implemented has been prejudicial or unfair to the putative class members.

36 In summary, taking into account the factual circumstances of this case and the equities as between the parties, I am of the view that this court should not exercise its inherent jurisdiction to permit the filing of the Osborne Proof of Claim. An order will issue that the Osborne Proof of Claim is invalid and a nullity to the intent that it purports to advance a representative claim on behalf of other persons. The Cross-Motion is dismissed.

37 Counsel may make brief written submissions to me as to the costs of this proceeding, on or before December 29, 2006.

Schedule A

HC Formulations Ltd.

CELL Formulations Ltd.

NITRO Formulations Ltd.

MESO Formulations Ltd.

ACE Formulations Ltd.

MISC Formulations Ltd.

GENERAL Formulations Ltd.

ACE US Trademark Ltd.

MT Canadian Supplement Trademark Ltd.

MT Foreign Supplement Trademark Ltd.

HC Trademark Holdings Ltd.

HC US Trademark Ltd.

1619005 Ontario Ltd. (f/k/a New HC US Trademark Ltd.)

HC Canadian Trademark Ltd.

HC Foreign Trademark Ltd.

Motion granted; Cross-motion dismissed.

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

Court File No.: CV-16-11582-00CL

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: Disallowance of Putative Class Claim)**

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