

**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
CANTRUST HOLDINGS INC., CANTRUST INC.,
CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.**

Applicants

**BOOK OF AUTHORITIES OF THE RESPONDING PARTY
PETER ACETO
(Motion Returnable March 19, 2021)**

March 18, 2021

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AND TO: **SERVICE LIST**

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ELAN CORPORATION et al. v. COMISKEY (TRUSTEE OF) et al.

Finlayson, Krever and Doherty JJ.A.

Heard: October 30 and 31, 1990

Judgment: November 2, 1990

Docket: Doc. Nos. CA 684/90 and CA 685/90

Counsel: *F.J.C. Newbould*, Q.C., and *G.B. Morawetz*, for appellant The Bank of Nova Scotia.

John Little, for respondents Elan Corporation and Nova Metal Products Inc.

Michael B. Rotsztein, for RoyNat Inc.

Kim Twohig and *Mel Olanow*, for Ontario Development Corp.

K.P. McElcheran, for monitor Ernst & Young.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX](#) Companies' Creditors Arrangement Act

[XIX.5](#) Miscellaneous

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act

Corporations — Arrangements and compromises — Court having discretion when ordering creditors' meeting under s. 5 of Companies' Creditors Arrangement Act to consider equities between debtor company and secured creditors and to consider possible success of plan of arrangement — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.

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The applicants were two related companies. The bank was the lender to the companies and was owed over \$2,300,000. R Inc. was also a secured creditor of the companies, and was owed approximately \$12 million. By agreement, the bank had a first registered charge on the companies' accounts receivable and inventory and a second registered charge on land, buildings and equipment, while R Inc. had a second registered charge on the accounts receivable and inventory and a first registered charge on the land, buildings and equipment. The security agreements with the bank prohibited the companies from encumbering their assets without the bank's consent. The bank also had s. 178 *Bank Act* security. The Ontario Development Corporation ("ODC") guaranteed part of the companies' debt to R. Inc. and held as security a debenture from one of the companies ranking third to the bank and R Inc. Two municipalities had first priority liens on the companies' lands for unpaid municipal taxes.

The bank demanded payment of its outstanding loans and on August 27, 1990, appointed a receiver-manager pursuant to the security agreements. When the companies refused to allow the receiver-manager access to the premises, the Court made an interim order authorizing the receiver-manager access to monitor the companies' business, and permitting the companies to remain in possession and carry on business in the ordinary course. The bank was restrained from selling the assets and from notifying account debtors to collect receivables, but could apply accounts receivable that were collected by the companies to the bank loans. On August 29, 1990, the companies each issued debentures to a friend and to the wife of the companies' principal, pursuant to trust deeds. The debentures conveyed personal property to a trustee as security. No consent was obtained from either the bank or the receiver-manager. It was conceded that the debentures were issued for the sole purpose of qualifying each company as a "debtor company" within the meaning of s. 3 of the *Companies' Creditors Arrangement Act*, ("CCAA").

The companies applied under s. 5 of the CCAA for an order directing the meeting of secured creditors to vote on a plan of arrangement. The plan of arrangement filed provided that the companies would carry on business for 3 months, the secured creditors would be paid and could take no action on their security for 3 months, and the accounts receivable assigned to the bank could be utilized by the companies for their day-to-day operations. No compromise was proposed. At the hearing of the application, orders were granted which set dates for presenting the plan to the secured creditors and for holding the meeting of the secured creditors. The companies were permitted, for 3 months, to spend the accounts receivable collected in accordance with cash flow projections. Proceedings by the bank, acting on its security or paying down the loan from the accounts receivable were stayed. An order was granted that created two classes of creditors for purposes of voting at the meeting of secured creditors. The classes were: (a) the bank, R Inc., ODC and the municipalities; and (b) the principal's wife and friend, who had acquired the debentures to enable the companies to apply under the CCAA. The bank appealed.

Held:

The appeal was allowed, Doherty J.A. dissenting in part; the application was dismissed.

Per Finlayson J.A. (Krever J.A. concurring): — Since the CCAA was intended to provide a structured environment for the negotiation of compromises between the debtor company and its creditors for the benefit of both, which could have significant benefits for the company, its shareholders and employees, debtor corporations were entitled to a broad and liberal interpretation of the jurisdiction of the Court under the CCAA. However, it did not follow that in exercising its discretion to order a meeting of creditors under s. 5 of the CCAA, a Court should not consider the equities as they related to the debtor company and to its secured creditors. Any discretion exercised by the Judge in this instance was not reflected in his reasons. Therefore, the appellate Court could examine the uncontested chronology of these proceedings and exercise its own discretion.

The significant date was August 27, 1990. The effect of the appointment of the receiver-manager was to disentitle the companies to issue the debentures and bring the application under the CCAA. Neither company had the power to create further indebtedness, and thus to interfere with the ability of the receiver-manager to manage the two companies. The interim order granting the receiver-manager access to the premises restricted its powers, but did not divest the receiver-manager of all its managerial powers. The issue of the debentures to the friend and wife was outside the companies' jurisdiction to carry on business in the ordinary course. Rather, the residual power to take such initiatives to gain relief under the CCAA rested with the receiver-manager. The issuance and registration of the trust deeds required a court order.

The probability of the meeting of secured creditors achieving some measure of success was another relevant consideration. Had there been a proper classification of creditors, the meeting would not have been productive. It was improper to create one class of creditors comprised of all secured creditors except the debenture creditors. There was no true community of interest among the former. The bank should have been classified in its own class. The companies had clearly intended to avoid having the bank designated as a separate class, because the companies knew that no plan of arrangement would succeed without the approval of the bank. The bank and R Inc. had opposing interests. It was in the commercial interest of the bank to collect and retain the accounts receivable while it was in R Inc.'s commercial interest to preserve the cash flow of the businesses and sell the businesses as going concerns. To have placed the bank and R Inc. in the same class would have enabled R Inc. to vote with the ODC to defeat the bank's prior claim.

There was no reason why the bank's legal interest in the receivables should be overridden by R Inc. as the second security holder in the receivables.

For the foregoing reasons, the application under the CCAA should be dismissed.

Per Doherty J.A. (dissenting in part): — The debentures and "instant" trust deeds sufficed to bring the companies within the requirements of s. 3 of the CCAA even if, in issuing those debentures, the companies breached a prior agreement with the bank.

Section 3 merely required that at the time of an application by the debtor company, an outstanding debenture or bond be issued under a trust deed. However, where a bond or debenture did not reflect a transaction which actually occurred and did not create a real debt owed by the company, such bond or debenture would not suffice for the purposes of s. 3. The statute should only be used for the purpose of attempting a legitimate reorganization. Where the application was brought for an improper purpose or the company acted in bad faith, the Court had means available to it, entirely apart from s. 3 of the CCAA, to prevent misuse of the Act. The contravention of the security agreement in creating the debentures without the bank's consent did not affect the status of the debentures for the purposes of s. 3, but could play a role in the Court's determination of what additional orders should be made under the statute.

The interim order regarding the receiver-manager effectively rendered the receiver-manager a monitor with rights of access but no further authority. Therefore, in light of the terms of the interim order, the existence of the receiver-manager installed by the bank did not preclude the application under s. 3 of the CCAA.

The Judge properly exercised his discretion in directing that a meeting of creditors should be held pursuant to s. 5 of the CCAA. Even though the chances of a successful reorganization were not good, the benefits flowing from the s. 5 order exceeded the risk inherent in the order. However, the bank and R Inc., as the two principal creditors, should not have been placed in the same class of secured creditors for the purposes of ss. 5 and 6 of the statute. Their interests were not only different, but opposed. The classification scheme created by the Judge effectively denied the bank any control over any plan of reorganization.

Table of Authorities

Cases considered:

Per Finlayson J.A. (Krever J.A. concurring)

Alberta Treasury Branches v. Hat Development Ltd. (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd (1989), 65 Alta. L.R. (2d) 374 (C.A.) — *applied*

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 166, 31 B.C.L.R. (2d) 35 (S.C.), aff'd (16 September 1988), Doc. No. Vancouver CA009772, Taggart, Lambert and Locke J.J.A. (B.C. C.A.) — *considered*

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (S.C.), aff'd 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.) — *referred to*

NsC Diesel Power Inc., Re (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.) — *considered*

Sovereign Life Assurance Co. v. Dodd, [1892] 2 Q.B. 573, [1891-4] All E.R. 246 (C.A.) — *applied*

Wellington Building Corp., Re, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626, [1934] O.W.N. 562 (S.C.) — *applied*

Per Doherty J.A. (dissenting in part)

Alberta Treasury Branches v. Hat Development Ltd. (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd (1989), 65 Alta. L.R. (2d) 374 (C.A.) — *considered*

Avery Construction Co., Re, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.) — *referred to*

Hongkong Bank of Canada v. Chef Ready Foods Ltd., [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84 (C.A.) — *considered*

Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce (1989), 102 A.R. 161 (Q.B.) — *referred to*

Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc. v. Nu-West Ltd., 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.) — *referred to*

Metals & Alloys Co., Re (16 February 1990), Houlden J.A. (Ont. C.A.) [unreported] — *considered*

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) — *referred to*

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (S.C.), aff'd 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.) — *referred to*

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 47 B.C.L.R. (2d) 193 (S.C.) — *referred to*

Reference re Residential Tenancies Act (Ontario), [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 158 — *referred to*

Stephanie's Fashions Ltd., Re (1990), 1 C.B.R. (3d) 248 (B.C.S.C.) — *considered*

United Maritime Fishermen Co-op., Re (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.), varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.), rev'd (1988), 69 C.B.R. (N.S.) 161, 51 D.L.R. (4th) 618, 88 N.B.R. (2d) 253, 224 A.P.R. 253 (C.A.) — *considered*

Statutes considered:

Bank Act, R.S.C. 1985, c. B-1 —

s. 178, as am. R.S.C. 1985 (3d Supp.), c. 25, s. 26

Companies' Creditors Arrangement Act, S.C. 1932-33, c. 36 —

s. 3, en. as s. 2A, S.C. 1952-53, c. 3, s. 2

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

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s. 14(2)

Courts of Justice Act, 1984, S.O. 1984, c. 11 —

s. 144(1)

Interpretation Act, R.S.C. 1985, c. I-21 —

s. 12

Municipal Act, R.S.O. 1980, c. 302 —

s. 369

APPEAL from order of Hoolihan J. dated September 11, 1990, allowing application under *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

FINLAYSON J.A. (KREVER J.A. concurring) (orally):

1 This is an appeal by the Bank of Nova Scotia (the "bank") from orders made by Mr. Justice Hoolihan [(11 September 1990), Doc. Nos. Toronto RE 1993/90 and RE 1994/90 (Ont. Gen. Div.)] as hereinafter described. The Bank of Nova Scotia was the lender to two related companies, namely, Elan Corporation ("Elan") and Nova Metal Products Inc. ("Nova"), which commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), for the purposes of having a plan of arrangement put to a meeting of secured creditors of those companies.

2 The orders appealed from are:

(i) An order of September 11, 1990, which directed a meeting of the secured creditors of Elan and Nova to consider the plan of arrangement filed, or other suitable plan. The order further provided that for 3 days until September 14, 1990, the bank be prevented from acting on any of its security or paying down any of its loans from accounts receivable collected by Elan and Nova, and that Elan and Nova could spend the accounts receivable assigned to the bank that would be received.

(ii) An order dated September 14, 1990, extending the terms of the order of September 11, 1990, to remain in effect until the plan of arrangement was presented to the Court no later than October 24, 1990. This order continued the stay against the bank and the power of Elan and Nova to spend the accounts receivable assigned to the bank. Further orders dated

September 27, 1990, and October 18, 1990, have extended the stay, and the power of Elan and Nova to spend the accounts receivable that have been assigned to the bank. The date of the meetings of creditors has been extended to November 9, 1990. The application to sanction the plan of arrangement must be heard by November 14, 1990.

(iii) An order dated October 18, 1990, directing that there be two classes of secured creditors for the purposes of voting at the meeting of secured creditors. The first class is to be comprised of the bank, RoyNat Inc. ("RoyNat"), the Ontario Development Corporation ("O.D.C."), the city of Chatham and the village of Glencoe. The second class is to be comprised of persons related to Elan and Nova that acquired debentures to enable the companies to apply under the CCAA.

3 There is very little dispute about the facts in this matter, but the chronology of events is important and I am setting it out in some detail.

4 The bank has been the banker to Elan and Nova. At the time of the application in August 1990, it was owed approximately \$1,900,000. With interest and costs, including receivers' fees, it is now owed in excess of \$2,300,000. It has a first registered charge on the accounts receivable and inventory of Elan and Nova, and a second registered charge on the land, buildings and equipment. It also has security under s. 178 of the *Bank Act*, R.S.C. 1985, c. B-1, as am. R.S.C. 1985 (3rd Supp.), c. 25, s. 26. The terms of credit between the bank and Elan as set out in a commitment agreement provide that Elan and Nova may not encumber their assets without the consent of the bank.

5 RoyNat is also a secured creditor of Elan and Nova, and it is owed approximately \$12 million. It holds a second registered charge on the accounts receivable and inventory of Elan and Nova, and a first registered charge on the land, buildings and equipment. The bank and RoyNat entered into a priority agreement to define with certainty the priority which each holds over the assets of Elan and Nova.

6 The O.D.C. guaranteed payment of \$500,000 to RoyNat for that amount lent by RoyNat to Elan. The O.D.C. holds debenture security from Elan and secure the guarantee which it gave to RoyNat. That security ranks third to the bank and RoyNat. The O.D.C. has not been called upon by RoyNat to pay under its guarantee. O.D.C. has not lent any money directly to Elan or Nova.

7 Elan owes approximately \$77,000 to the City of Chatham for unpaid municipal taxes. Nova owes approximately \$18,000 to the Village of Glencoe for unpaid municipal taxes. Both municipalities have a lien on the real property of the respective companies in priority to every claim except the Crown under s. 369 of the *Municipal Act*, R.S.O. 1980, c. 302.

8 On May 8, 1990, the bank demanded payment of all outstanding loans owing by Elan and Nova to be made by June 1, 1990. Extensions of time were granted and negotiations directed to the settlement of the debt took place thereafter. On August 27, 1990, the bank appointed Coopers & Lybrand Limited as receiver and manager of the assets of Elan and Nova, and as agent under the bank's security to realize upon the security. Elan and Nova refused to allow the receiver and manager to have access to their premises, on the basis that insufficient notice had been provided by the bank before demanding payment.

9 Later on August 27, 1990, the bank brought a motion in an action against Elan and Nova (Court File No. 54033/90) for an order granting possession of the premises of Elan and Nova to Coopers & Lybrand. On the evening of August 27, 1990, at approximately 9 p.m., Mr. Justice Saunders made an order adjourning the motion on certain conditions. The order authorized Coopers & Lybrand access to the premises to monitor Elan's business, and permitted Elan to remain in possession and carry on its business in the ordinary course. The bank was restrained in the order, until the motion could be heard, from selling inventory, land, equipment or buildings or from notifying account debtors to collect receivables, but was not restrained from applying accounts receivable that were collected against outstanding bank loans.

10 On Wednesday, August 29, 1990, Elan and Nova each issued a debenture for \$10,000 to a friend of the principals of the companies, Joseph Comiskey, through his brother Michael Comiskey as trustee, pursuant to a trust deed executed the same day. The terms were not commercial and it does not appear that repayment was expected. It is conceded by counsel for Elan that the sole purpose of issuing the debentures was to qualify as a "debtor company" within the meaning of s. 3 of the CCAA. Section 3 reads as follows:

3. This Act does not apply in respect of a debtor company unless

(a) the debtor company has outstanding an issue of secured or unsecured bonds of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee; and

(b) the compromise or arrangement that is proposed under section 4 or 5 in respect of the debtor company includes a compromise or an arrangement between the debtor company and the holders of an issue referred to in paragraph (a).

11 The debentures conveyed the personal property of Elan and Nova as security to Michael Comiskey as trustee. No consent was obtained from the bank as required by the loan agreements, nor was any consent obtained from the receiver. Cheques for \$10,000 each, representing the loans secured in the debentures, were given to Elan and Nova on Wednesday, August 29, 1990, but not deposited until 6 days later on September 4, 1990, after an interim order had been made by Mr. Justice Farley in favour of Elan and Nova staying the bank from taking proceedings.

12 On August 30, 1990 Elan and Nova applied under s. 5 of the CCAA for an order directing a meeting of secured creditors to vote on a plan of arrangement. Section 5 provides:

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

13 The application was heard by Farley J. on Friday, August 31, 1990, at 8 a.m. Farley J. dismissed the application on the grounds that the CCAA required that there be more than one debenture issued by each company. Later on the same day, August 31, 1990, Elan and Nova each issued two debentures for \$500 to the wife of the principal of Elan through her sister as trustee. The debentures provided for payment of interest to commence on August 31, 1992. Cheques for \$500 were delivered that day to the companies but not deposited in the bank account until September 4, 1990. These debentures conveyed the personal property in the assets of Elan and Nova to the trustee as security. Once again it is conceded that the debentures were issued for the sole purpose of meeting the requirements of s. 3 of the CCAA. No consent was obtained from the bank as required by the loan terms, nor was any consent obtained from the receiver.

14 On August 31, 1990, following the creation of the trust deeds and the issuance of the debentures, Elan and Nova commenced new applications under the CCAA which were heard late in the day by Farley J. He adjourned the applications to September 10, 1990, on certain terms, including a stay preventing the bank from acting on its security and allowing Elan to spend up to \$321,000 from accounts receivable collected by it.

15 The plan of arrangement filed with the application provided that Elan and Nova would carry on business for 3 months, that secured creditors would not be paid and could take no action on their security for 3 months, and that the accounts receivable of Elan and Nova assigned to the bank could be utilized by Elan and Nova for purposes of its day-to-day operations. No compromise of any sort was proposed.

16 On September 11, 1990, Hoolihan J. ordered that a meeting of the secured creditors of Elan and Nova be held no later than October 22, 1990, to consider the plan of arrangement that had been filed, or other suitable plan. He ordered that the plan of arrangement be presented to the secured creditors no later than September 27, 1990. He made further orders effective for 3 days until September 14, 1990, including orders:

(i) that the companies could spend the accounts receivable assigned to the bank that would be collected in accordance with a cash flow forecast filed with the Court providing for \$1,387,000 to be spent by September 30, 1990; and

(ii) a stay of proceedings against the bank acting on any of its security or paying down any of its loans from accounts receivable collected by Elan and Nova.

17 On September 14, 1990, Hoolihan J. extended the terms of his order of September 11, 1990, to remain in effect until the plan of arrangement was presented to the Court no later than October 24, 1990 for final approval. This order continued the power of Elan and Nova to spend up to \$1,387,000 of the accounts receivable assigned to the bank in accordance with the projected cash flow to September 30, 1990, and to spend a further amount to October 24, 1990, in accordance with a cash flow to be approved by Hoolihan J. prior to October 1, 1990. Further orders dated September 27 and October 18 have extended the power to spend the accounts receivable to November 14, 1990.

18 On September 14, 1990, the bank requested Hoolihan J. to restrict his order so that Elan and Nova could use the accounts receivable assigned to the bank only so long as they continued to operate within the borrowing guidelines contained in the terms of the loan agreements with the bank. These guidelines require a certain ratio to exist between bank loans and the book value of the accounts receivable and inventory assigned to the bank, and are designed in normal circumstances to ensure that there is sufficient value in the security assigned to the bank. Hoolihan J. refused to make the order.

19 On October 18, 1990, Hoolihan J. ordered that the composition of the classes of secured creditors for the purposes of voting at the meeting of secured creditors shall be as follows:

(a) The bank, RoyNat, O.D.C., the City of Chatham and the Village of Glencoe shall comprise one class.

(b) The parties related to the principal of Elan that acquired their debentures to enable the companies to apply under the CCAA shall comprise a second class.

20 On October 18, 1990, at the request of counsel for Elan and Nova, Hoolihan J. further ordered that the date for the meeting of creditors of Elan and Nova be extended to November 9, 1990, in order to allow a new plan of arrangement to be sent to all creditors, including unsecured creditors of those companies. Elan and Nova now plan to offer a plan of compromise or arrangement to the unsecured creditors of Elan and Nova as well as to the secured creditors.

21 There are five issues in this appeal.

(1) Are the debentures issued by Elan and Nova for the purpose of permitting the companies to qualify as applicants under the CCAA debentures within the meaning of s. 3 of the CCAA?

(2) Did the issue of the debentures contravene the provisions of the loan agreements between Elan and Nova and the bank? If so, what are the consequences for CCAA purposes?

(3) Did Elan and Nova have the power to issue the debentures and make application under the CCAA after the bank had appointed a receiver and after the order of Saunders J.?

(4) Did Hoolihan J. have the power under s. 11 of the CCAA to make the interim orders that he made with respect to the accounts receivable?

(5) Was Hoolihan J. correct in ordering that the bank vote on the proposed plan of arrangement in a class with RoyNat and the other secured creditors?

22 It is well established that the CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Such a resolution can have significant benefits for the company, its shareholders and employees. For this reason the debtor companies, Elan and Nova, are entitled to a broad and liberal interpretation of the jurisdiction of the Court under the CCAA. Having said that, it does not follow that in exercising its discretion to order a meeting of creditors under s. 5 of the CCAA that the Court should not consider the equities in this case as they relate to these companies and to one of its principal secured creditors, the bank.

23 The issues before Hoolihan J. and this Court were argued on a technical basis. Hoolihan J. did not give effect to the argument that the debentures described above were a "sham" and could not be used for the purposes of asserting jurisdiction.

Unfortunately, he did not address any of the other arguments presented to him on the threshold issue of the availability of the CCAA. He appears to have acted on the premise that if the CCAA can be made available, it should be utilized.

24 If Hoolihan J. did exercise any discretion overall, it is not reflected in his reasons. I believe, therefore, that we are in a position to look at the uncontested chronology of these proceedings and exercise our own discretion. To me, the significant date is August 27, 1990 when the bank appointed Coopers & Lybrand Limited as receiver and manager of the undertaking, property and assets mortgaged and charged under the demand debenture and of the collateral under the general security agreement, both dated June 20, 1979. On the same date, it appointed the same company as receiver and manager for Nova under a general security agreement dated December 5, 1988. The effect of this appointment is to divest the companies and their boards of directors of their power to deal with the property comprised in the appointment: Raymond Walton, *Kerr on the Law and Practice as to Receivers*, 16th ed. (London: Sweet & Maxwell, 1983), p. 292. Neither Elan nor Nova had the power to create further indebtedness, and thus to interfere with the ability of the receiver to manage the two companies: *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd (1989), 65 Alta. L.R. (2d) 374 (C.A.).

25 Counsel for the debtor companies submitted that the management powers of the receiver were stripped from the receiver by Saunders J. in his interim order, when he allowed the receiver access to the companies' properties but would not permit it to realize on the security of the bank until further order. He pointed out that the order also provided that the companies were entitled to remain in possession and "to carry on business in the ordinary course" until further order.

26 I do not agree with counsel's submission covering the effect of the order. It certainly restricted what the receiver could do on an interim basis, but it imposed restrictions on the companies as well. The issue of these disputed debentures in support of an application for relief as insolvent companies under the CCAA does not comply with the order of Saunders J. This is not carrying on business in the ordinary course. The residual power to take all of these initiatives for relief under the CCAA remained with the receiver, and if trust deeds were to be issued, an order of the Court in Action 54033/90 was required permitting their issuance and registration.

27 There is another feature which, in my opinion, affects the exercise of discretion, and that is the probability of the meeting achieving some measure of success. Hoolihan J. considered the calling of the meeting at one hearing, as he was asked to do, and determined the respective classes of creditors at another. This latter classification is necessary because of the provisions of s. 6(a) of the CCAA, which reads as follows:

6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

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

28 If both matters had been considered at the same time, as in my view they should have been, and if what I regard as a proper classification of the creditors had taken place, I think it is obvious that the meeting would not be a productive one. It was improper, in my opinion, to create one class of creditors made up of all the secured creditors save the so-called "sham" creditors. There is no true community of interest among them, and the motivation of Elan and Nova in striving to create a single class is clearly designed to avoid the classification of the bank as a separate class.

29 It is apparent that the only secured creditors with a significant interest in the proceeding under the CCAA are the bank and RoyNat. The two municipalities have total claims for arrears of taxes of less than \$100,000. They have first priority in the lands of the companies. They are in no jeopardy whatsoever. The O.D.C. has a potential liability in that it can be called upon by RoyNat under its guarantee to a maximum of \$500,000, and this will trigger default under its debentures with the companies, but its interests lie with RoyNat.

30 As to RoyNat, it is the largest creditor with a debt of some \$12 million. It will dominate any class it is in because, under s. 6 of the CCAA, the majority in a class must represent three-quarters in value of that class. It will always have a veto by reason of the size of its claim, but requires at least one creditor to vote for it to give it a majority in number (I am ignoring the municipalities). It needs the O.D.C.

31 I do not base my opinion solely on commercial self-interest, but also on the differences in legal interest. The bank has first priority on the receivables referred to as the "quick assets", and RoyNat ranks second in priority. RoyNat has first priority on the buildings and realty, the "fixed assets", and the bank has second priority.

32 It is in the commercial interests of the bank, with its smaller claim and more readily realizable assets, to collect and retain the accounts receivable. It is in the commercial interests of RoyNat to preserve the cash flow of the business and sell the enterprise as a going concern. It can only do that by overriding the prior claim of the bank to these receivables. If it can vote with the O.D.C. in the same class as the bank, it can achieve that goal and extinguish the prior claim of the bank to realize on the receivables. This it can do, despite having acknowledged its legal relationship to the bank in the priority agreement signed by the two. I can think of no reason why the legal interest of the bank as the holder of the first security on the receivables should be overridden by RoyNat as holder of the second security.

33 The classic statement on classes of creditors is that of Lord Esher M.R. in *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q.B. 573, [1891-4] All E.R. 246 (C.A.), at pp. 579-580 [Q.B.]:

The Act [*Joint Stock Companies Arrangement Act*, 1870] says that the persons to be summoned to the meeting (all of whom, be it said in passing, are creditors) are persons who can be divided into different classes — classes which the Act of Parliament recognises, though it does not define them. This, therefore, must be done: they must be divided into different classes. What is the reason for such a course? It is because the creditors composing the different classes have different interests; and, therefore, if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.

34 The *Sovereign Life* case was quoted with approval by Kingstone J. in *Re Wellington Building Corp.*, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626, [1934] O.W.N. 562 (S.C.), at p. 659 [O.R.]. He also quoted another English authority at p. 658:

In *In re Alabama, New Orleans, Texas and Pacific Junction Ry. Co.*, [1891] 1 Ch. 213, a scheme and arrangement under the Joint Stock Companies Arrangement Act (1870), was submitted to the Court for approval. Lord Justice Bowen, at p. 243, says:

Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation ... Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such.

35 Kingstone J. set aside a meeting where three classes of creditors were permitted to vote together. He said at p. 660:

It is clear that Parliament intended to give the three-fourths majority of any class power to bind that class, but I do not think the Statute should be construed so as to permit holders of subsequent mortgages power to vote and thereby destroy the priority rights and security of a first mortgagee.

36 We have been referred to more modern cases, including two decisions of Trainor J. of the British Columbia Supreme Court, both entitled *Re Northland Properties Ltd.* One case is reported in (1988), 73 C.B.R. (N.S.) 166, 31 B.C.L.R. (2d) 35, and the other in the same volume at p. 175 [C.B.R.]. Trainor J. was upheld on appeal on both judgments. The first judgment of the British Columbia Court of Appeal is unreported (16 September, 1988) [Doc. No. Vancouver CA009772, Taggart, Lambert and Locke J.J.A.]. The judgment in the second appeal is reported at 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122.

37 In the first *Northland* case, Trainor J. held that the difference in the terms of parties to and priority of different bonds meant that they should be placed in separate classes. He relied upon *Re Wellington Building Corp.*, supra. In the second *Northland* case, he dealt with 15 mortgagees who were equal in priority but held different parcels of land as security. Trainor J. held that their relative security positions were the same, notwithstanding that the mortgages were for the most part secured by charges against separate properties. The nature of the debt was the same, the nature of the security was the same, the remedies for default were the same, and in all cases they were corporate loans by sophisticated lenders. In specifically accepting the reasoning of Trainor J., the Court of Appeal held that the concern of the various mortgagees as to the quality of their individual securities was "a variable cause arising not by any difference in legal interests, but rather as a consequence of bad lending, or market values, or both" (p. 203).

38 In *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.), the Court stressed that a class should be made up of persons "whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest" (p. 8 [of C.B.R.]).

39 My assessment of these secured creditors is that the bank should be in its own class. This being so, it is obvious that no plan of arrangement can succeed without its approval. There is no useful purpose to be served in putting a plan of arrangement to a meeting of creditors if it is known in advance that it cannot succeed. This is another cogent reason for the Court declining to exercise its discretion in favour of the debtor companies.

40 For all the reasons given above, the application under the CCAA should have been dismissed. I do not think that I have to give definitive answers to the individual issues numbered (1) and (2). They can be addressed in a later case, where the answers could be dispositive of an application under the CCAA. The answer to (3) is that the combined effect of the receivership and the order of Saunders J. disentitled the companies to issue the debentures and bring the application under the CCAA. It is not necessary to answer issue (4), and the answer to (5) is no.

41 Accordingly, I would allow the appeal, set aside the three orders of Hoolihan J., and, in their place, issue an order dismissing the application under the CCAA. The bank should receive its costs of this appeal, the applications for leave to appeal, and the proceedings before Farley and Hoolihan JJ., to be paid by Elan, Nova and RoyNat.

42 Ernst & Young were appointed monitor in the order of Hoolihan J. dated September 14, 1990, to monitor the operations of Elan and Nova and give effect to and supervise the terms and conditions of the stay of proceedings in accordance with Appendix "C" appended to the order. The monitor should be entitled to be paid for all services performed to date, including whatever is necessary to complete its reports for past work, as called for in Appendix "C".

DOHERTY J.A. (dissenting in part):

I Background

43 On November 2, 1990, this Court allowed the appeal brought by the Bank of Nova Scotia (the "bank") and vacated several orders made by Hoolihan J. Finlayson J.A. delivered oral reasons on behalf of the majority. At the same time, I delivered brief oral reasons dissenting in part from the conclusion reached by the majority and undertook to provide further written reasons. These are those reasons.

44 The events relevant to the disposition of this appeal are set out in some detail in the oral reasons of Finlayson J.A. I will not repeat that chronology, but will refer to certain additional background facts before turning to the legal issues.

45 Elan Corporation ("Elan") owns the shares of Nova Metal Products Inc. ("Nova Inc."). Both companies have been actively involved in the manufacture of automobile parts for a number of years. As of March 1990, the companies had total annual sales of about \$30 million, and employed some 220 people in plants located in Chatham and Glencoe, Ontario. The operation of these companies no doubt plays a significant role in the economy of these two small communities.

46 In the 4 years prior to 1989, the companies had operated at a profit ranging from \$287,000 (1987) to \$1,500,000 (1986). In 1989, several factors, including large capital expenditures and a downturn in the market, combined to produce an operational loss of about \$1,333,000. It is anticipated that the loss for the year ending June 30, 1990, will be about \$2.3 million. As of August 1, 1990, the companies continued in full operation, and those in control anticipated that the financial picture would improve significantly later in 1990, when the companies would be busy filling several contracts which had been obtained earlier in 1990.

47 The bank has provided credit to the companies for several years. In January 1989, the bank extended an operating line of credit to the companies. The line of credit was by way of a demand loan that was secured in the manner described by Finlayson J.A. Beginning in May 1989, and from time to time after that, the companies were in default under the terms of the loan advanced by the bank. On each occasion, the bank and the companies managed to work out some agreement so that the bank continued as lender and the companies continued to operate their plants.

48 Late in 1989, the companies arranged for a \$500,000 operating loan from RoyNat Inc. It was hoped that this loan, combined with the operating line of \$2.5 million from the bank, would permit the company to weather its fiscal storm. In March 1990, the bank took the position that the companies were in breach of certain requirements under their loan agreements, and warned that if the difficulties were not rectified the bank would not continue as the company's lender. Mr. Patrick Johnson, the president of both companies, attempted to respond to these concerns in a detailed letter to the bank dated March 15, 1990. The response did not placate the bank. In May 1990, the bank called its loan and made a demand for immediate payment. Mr. Spencer, for the bank, wrote: "We consider your financial condition continues to be critical and we are not prepared to delay further making formal demand." He went on to indicate that, subject to further deterioration in the companies' fiscal position, the bank was prepared to delay acting on its security until June 1, 1990.

49 As of May 1990, Mr. Johnson, to the bank's knowledge, was actively seeking alternative funding to replace the bank. At the same time, he was trying to convince the union which represented the workers employed at both plants to assist in a co-operative effort to keep the plants operational during the hard times. The union had agreed to discuss amendment of the collective bargaining agreement to facilitate the continued operation of the companies.

50 The June 1, 1990 deadline set by the bank passed without incident. Mr. Johnson continued to search for new financing. A potential lender was introduced to Mr. Spencer of the bank on August 13, 1990, and it appeared that the bank, through Mr. Spencer, was favourably impressed with this potential lender. However, on August 27, 1990, the bank decided to take action to protect its position. Coopers & Lybrand was appointed by the bank as receiver-manager under the terms of the security agreements with the companies. The companies denied the receiver access to their plants. The bank then moved before the Honourable Mr. Justice E. Saunders for an order giving the receiver possession of the premises occupied by the companies. On August 27, 1990, after hearing argument from counsel for the bank and the companies, Mr. Justice Saunders refused to install the receivers and made the following interim order:

1. THIS COURT ORDERS that the receiver be allowed access to the property to monitor the operations of the defendants but shall not take steps to realize on the security of The Bank of Nova Scotia until further Order of the Court.
2. THIS COURT ORDERS that the defendants shall be entitled to remain in possession and to carry on business in the ordinary course until further Order of this Court.
3. THIS COURT ORDERS that until further order the Bank of Nova Scotia shall not take steps to notify account debtors of the defendants for the purpose of collecting outstanding accounts receivable. This Order does not restrict The Bank of Nova Scotia from dealing with accounts receivable of the defendants received by it.
4. THIS COURT ORDERS that the motion is otherwise adjourned to a date to be fixed.

51 The notice of motion placed before Saunders J. by the bank referred to "an intended action" by the bank. It does not appear that the bank took any further steps in connection with this "intended action."

52 Having resisted the bank's efforts to assume control of the affairs of the companies on August 27, 1990, and realizing that their operations could cease within a matter of days, the companies turned to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "Act"), in an effort to hold the bank at bay while attempting to reorganize their finances. Finlayson J.A. has described the companies' efforts to qualify under that Act, the two appearances before the Honourable Mr. Justice Farley on August 31, 1990, and the appearances before the Honourable Mr. Justice Hoolihan in September and October 1990, which resulted in the orders challenged on this appeal.

II The Issues

53 The dispute between the bank and the companies when this application came before Hoolihan J. was a straightforward one. The bank had determined that its best interests would be served by the immediate execution of the rights it had under its various agreements with the companies. The bank's best interest was not met by the continued operation of the companies as going concerns. The companies and their other two substantial secured creditors considered that their interests required that the companies continue to operate, at least for a period which would enable the companies to place a plan of reorganization before its creditors.

54 All parties were pursuing what they perceived to be their commercial interests. To the bank, these interests entailed the "death" of the companies as operating entities. To the companies, these interests required "life support" for the companies through the provisions of the Act to permit a "last ditch" effort to save the companies and keep them in operation.

55 The issues raised on this appeal can be summarized as follows:

- (i) Did Hoolihan J. err in holding that the companies were entitled to invoke the Act?
- (ii) Did Hoolihan J. err in exercising his discretion in directing that a meeting of creditors should be held under the Act?
- (iii) Did Hoolihan J. err in directing that the bank and RoyNat Inc. should be placed in the same class of creditors for the purposes of the Act?
- (iv) Did Hoolihan J. err in the terms of the interim orders he made pending the meeting of creditors and the submission to the court of a plan of reorganization?

III The Purpose and Scheme of the Act

56 Before turning to these issues, it is necessary to understand the purpose of the Act, and the scheme established by the Act for achieving that purpose. The Act first appeared in the midst of the Great Depression (S.C. 1932-33, c. 36). The Act was intended to provide a means whereby insolvent companies could avoid bankruptcy and continue as ongoing concerns through a reorganization of their financial obligations. The reorganization contemplated required the cooperation of the debtor companies' creditors and shareholders: *Re Avery Construction Co.*, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.); Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar Rev. 587, at pp. 592-593; David H. Goldman, "Reorganizations Under the Companies' Creditors Arrangement Act (Canada)" (1985) 55 C.B.R. (N.S.) 36, at pp. 37-39.

57 The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy- or creditor-initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

58 The purpose of the Act was artfully put by Gibbs J.A., speaking for the British Columbia Court of Appeal, in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, an unreported judgment released October 29, 1990 [Doc. No. Vancouver CA12944, Carrothers, Cumming and Gibbs J.J.A., now reported [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84], at pp. 11 and 6 [unreported, pp. 91 and 88 B.C.L.R.]. In referring to the purpose for which the Act was initially proclaimed, he said:

Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A. [the Act], to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

59 In an earlier passage, His Lordship had said:

The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business.

60 Gibbs J.A. also observed (at p. 13) that the Act was designed to serve a "broad constituency of investors, creditors and employees." Because of that "broad constituency", the Court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest. That interest is generally, but not always, served by permitting an attempt at reorganization: see S.E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act," at p. 593.

61 The Act must be given a wide and liberal construction so as to enable it to effectively serve this remedial purpose: *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, supra, at p. 14 [unreported, p. 92 B.C.L.R.].

62 The Act is available to all insolvent companies, provided the requirements of s. 3 of the Act are met. That section provides:

3. This Act does not apply in respect of a debtor company unless

(a) the debtor company has outstanding an issue of secured or unsecured bonds of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee; and

(b) the compromise or arrangement that is proposed under section 4 or 5 in respect of the debtor company includes a compromise or an arrangement between the debtor company and the holders of an issue referred to in paragraph (a).

63 A debtor company, or a creditor of that company, invokes the Act by way of summary application to the Court under s. 4 or s. 5 of the Act. For present purposes, s. 5 is the relevant section:

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

64 Section 5 does not require that the Court direct a meeting of creditors to consider a proposed plan. The Court's power to do so is discretionary. There will no doubt be cases where no order will be made, even though the debtor company qualifies under s. 3 of the Act.

65 If the Court determines that a meeting should be called, the creditors must be placed into classes for the purpose of that meeting. The significance of this classification process is made apparent by s. 6 of the Act:

6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

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

(b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy Act* or is in the course of being wound up under the *Winding-up Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

66 If the plan of reorganization is approved by the creditors as required by s. 6, it must then be presented to the Court. Once again, the Court must exercise a discretion, and determine whether it will approve the plan of reorganization. In exercising that discretion, the Court is concerned not only with whether the appropriate majority has approved the plan at a meeting held in accordance with the Act and the order of the Court, but also with whether the plan is a fair and reasonable one: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 at 182-185 (S.C.), aff'd 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.).

67 If the Court chooses to exercise its discretion in favour of calling a meeting of creditors for the purpose of considering a plan of reorganization, the Act provides that the rights and remedies available to creditors, the debtor company, and others during the period between the making of the initial order and the consideration of the proposed plan may be suspended or otherwise controlled by the Court.

68 Section 11 gives a court wide powers to make any interim orders:

11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,

(a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;

(b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and

(c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

69 Viewed in its totality, the Act gives the Court control over the initial decision to put the reorganization plan before the creditors, the classification of creditors for the purpose of considering the plan, conduct affecting the debtor company pending consideration of that plan, and the ultimate acceptability of any plan agreed upon by the creditors. The Act envisions that the rights and remedies of individual creditors, the debtor company and others may be sacrificed, at least temporarily, in an effort to serve the greater good by arriving at some acceptable reorganization which allows the debtor company to continue in operation: *Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce* (1989), 102 A.R. 161 at p. 165 (Q.B.).

IV Did Hoolihan J. Err in Holding that the Debtor Companies were Entitled to Invoke the Act?

70 The appellant advances three arguments in support of its contention that Elan and Nova Inc. were not entitled to seek relief under the Act. It argues first that the debentures issued by the companies after August 27, 1990, were "shams" and did not fulfil the requirements of s. 3 of the Act. The appellant next contends that the issuing of the debentures by the companies contravened their agreements with the bank, in which they undertook not to further encumber the assets of the companies without the consent of the bank. Lastly, the appellant maintains that once the bank had appointed a receiver-manager over the affairs of the companies on August 27, 1990, the companies had no power to create further indebtedness by way of debentures or to bring an application on behalf of the companies under the Act.

(i) Section 3 and "Instant" Trust Deeds

71 The debentures issued in August 1990, after the bank had moved to install a receiver-manager, were issued solely and expressly for the purpose of meeting the requirements of s. 3 of the Act. Indeed, it took the companies two attempts to meet those requirements. The debentures had no commercial purpose. The transactions did, however, involve true loans in the sense that moneys were advanced and debt was created. Appropriate and valid trust deeds were also issued.

72 In my view, it is inappropriate to refer to these transactions as "shams." They are neither false nor counterfeit, but rather are exactly what they appear to be, transactions made to meet jurisdictional requirements of the Act so as to permit an application for reorganization under the Act. Such transactions are apparently well known to the commercial Bar: B. O'Leary, "A Review of the Companies' Creditors Arrangement Act" (1987) 4 Nat. Insolvency Rev. 38, at p. 39; C. Ham, " 'Instant' Trust Deeds Under the C.C.A.A." (1988) 2 Commercial Insolvency Reporter 25; G.B. Morawetz, "Emerging Trends in the Use of the Companies' Creditors Arrangement Act" (1990) Proceedings, First Annual General Meeting and Conference of the Insolvency Institute of Canada.

73 Mr. Ham writes, at pp. 25 and 30:

Consequently, some companies have recently sought to bring themselves within the ambit of the C.C.A.A. by creating 'in stant' trust deeds, i.e., trust deeds which are created solely for the purpose of enabling them to take advantage of the C.C.A.A.

74 Applications under the Act involving the use of "instant" trust deeds have been before the Courts on a number of occasions. In no case has any court held that a company cannot gain access to the Act by creating a debt which meets the requirements of s. 3 for the express purpose of qualifying under the Act. In most cases, the use of these "instant" trust deeds has been acknowledged without comment.

75 The decision of Chief Justice Richard in *Re United Maritime Fishermen Co-op.* (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.), varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.), at 55-56 [67 C.B.R.], speaks directly to the use of "instant" trust deeds. The Chief Justice refused to read any words into s. 3 of the Act which would limit the availability of the Act depending on the point at which, or the purpose for which, the debenture or bond and accompanying trust deed were created. He accepted [at p. 56 C.B.R.] the debtor company's argument that the Act:

does not impose any time restraints on the creation of the conditions as set out in s. 3 of the Act, nor does it contain any prohibition against the creation of the conditions set out in s. 3 for the purpose of obtaining jurisdiction.

76 It should, however, be noted that in *Re United Maritime Fishermen Co-op.*, supra, the debt itself was not created for the purpose of qualifying under the Act. The bond and the trust deed, however, were created for that purpose. The case is therefore factually distinguishable from the case at Bar.

77 The Court of Appeal reversed the ruling of the Chief Justice ((1988), 69 C.B.R. (N.S.) 161, 51 D.L.R. (4th) 618, 88 N.B.R. (2d) 253, 224 A.P.R. 253) on the basis that the bonds required by s. 3 of the Act had not been issued when the application was made, so that on a precise reading of the words of s. 3 the company did not qualify. The Court did not go on to consider whether, had the bonds been properly issued, the company would have been entitled to invoke the Act. Hoyt J.A., for the majority, did, however, observe without comment that the trust deeds had been created specifically for the purpose of bringing an application under the Act.

78 The judgment of MacKinnon J. in *Re Stephanie's Fashions Ltd.*, unreported, Doc. No. Vancouver A893427, released January 24, 1990 (B.C. S.C.) [now reported 1 C.B.R. (3d) 248], is factually on all fours with the present case. In that case, as in this one, it was acknowledged that the sole purpose for creating the debt was to effect compliance with s. 3 of the Act. After considering the judgment of Chief Justice Richard in *Re United Maritime Fishermen Co-op.*, supra, MacKinnon J. held, at p. 251:

The reason for creating the trust deed is not for the usual purposes of securing a debt but, when one reads it, on its face, it does that. I find that it is a genuine trust deed and not a fraud, and that the petitioners have complied with s. 3 of the statute.

79 *Re Metals & Alloys Co.* (16 February 1990) is a recent example of a case in this jurisdiction in which "instant" trust deeds were successfully used to bring a company within the Act. The company issued debentures for the purpose of permitting the company to qualify under the Act, so as to provide it with an opportunity to prepare and submit a reorganization plan. The company then applied for an order, seeking, inter alia, a declaration that the debtor company was a corporation within the meaning of the Act. Houlden J.A., hearing the matter at first instance, granted the declaration request in an order dated February 16, 1990. No reasons were given. It does not appear that the company's qualifications were challenged before Houlden J.A.; however, the nature of the debentures issued and the purpose for their issue was fully disclosed in the material before him. The requirements of s. 3 of the Act are jurisdictional in nature, and the consent of the parties cannot vest a court with jurisdiction it does not have. One must conclude that Houlden J.A. was satisfied that "instant" trust deeds suffice for the purposes of s. 3 of the Act.

80 A similar conclusion is implicit in the reasons of the British Columbia Court of Appeal in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*. In that case, a debt of \$50, with an accompanying debenture and trust deed, was created specifically to enable the company to make application under the Act. The Court noted that the debt was created solely for that purpose in an effort to forestall an attempt by the bank to liquidate the assets of the debtor company. The Court went on to deal with the merits, and to dismiss an appeal from an order granting a stay pending a reorganization meeting. The Court could not have reached the merits without first concluding that the \$50 debt created by the company met the requirements of s. 3 of the Act.

81 The weight of authority is against the appellant. Counsel for the appellant attempts to counter that authority by reference to the remarks of the Minister of Justice when s. 3 was introduced as an amendment to the Act in the 1952-53 sittings of Parliament (House of Commons Debates, 1-2 Eliz. II (1952-53), vol. II, pp. 1268-1269). The interpretation of words found in a statute, by reference to speeches made in Parliament at the time legislation is introduced, has never found favour in our Courts: [Reference Re Residential Tenancies Act \(Ontario\)](#), [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 138, at 721 [S.C.R.], 561 [D.L.R.]. Nor, with respect to Mr. Newbould's able argument, do I find the words of the Minister of Justice at the time the present s. 3 was introduced to be particularly illuminating. He indicated that the amendment to the Act left companies with complex financial structures free to resort to the Act, but that it excluded companies which had only unsecured mercantile creditors. The Minister does not comment on the intended effect of the amendment on the myriad situations between those two extremes. This case is one such situation. These debtor companies had complex secured debt structures, but those debts were not, prior to the issuing of the debentures in August 1990, in the form contemplated by s. 3 of the Act. Like Richard C.J.Q.B. in *Re United Maritime Fishermen Co-op.*, supra, at pp. 52-53, I am not persuaded that the comments of the Minister of Justice assist in interpreting s. 3 of the Act in this situation.

82 The words of s. 3 are straightforward. They require that the debtor company have, at the time an application is made, an outstanding debenture or bond issued under a trust deed. No more is needed. Attempts to qualify those words are not only contrary to the wide reading the Act deserves, but can raise intractable problems as to what qualifications or modifications should be read into the Act. Where there is a legitimate debt which fits the criteria set out in s. 3, I see no purpose in denying a debtor company resort to the Act because the debt and the accompanying documentation was created for the specific purpose of bringing the application. It must be remembered that qualification under s. 3 entitles the debtor company to nothing more than consideration under the Act. Qualification under s. 3 does not mean that relief under the Act will be granted. The circumstances surrounding the creation of the debt needed to meet the s. 3 requirement may well have a bearing on how a court exercises its discretion at various stages of the application, but they do not alone interdict resort to the Act.

83 In holding that "instant" trust deeds can satisfy the requirements of s. 3 of the Act, I should not be taken as concluding that debentures or bonds which are truly shams, in that they do not reflect a transaction which actually occurred and do not create a real debt owed by the company, will suffice. Clearly, they will not. I do not, however, equate the two. One is a tactical device used to gain the potential advantages of the Act. The other is a fraud.

84 Nor does my conclusion that "instant" trust deeds can bring a debtor company within the Act exclude considerations of the good faith of the debtor company in seeking the protection of the Act. A debtor company should not be allowed to use the Act for any purpose other than to attempt a legitimate reorganization. If the purpose of the application is to advantage one creditor over another, to defeat the legitimate interests of creditors, to delay the inevitable failure of the debtor company, or for some other improper purpose, the Court has the means available to it, apart entirely from s. 3 of the Act, to prevent misuse of the Act. In cases where the debtor company acts in bad faith, the Court may refuse to order a meeting of creditors, it may deny interim protection, it may vary interim protection initially given when the bad faith is shown, or it may refuse to sanction any plan which emanates from the meeting of the creditors: see Lawrence J. Crozier, "[Good Faith and the Companies' Creditors Arrangement Act](#)" (1989) 15 Can. Bus. L.J. 89.

(ii) Section 3 and the Prior Agreement with the Bank Limiting Creation of New Debt

85 The appellant also argues that the debentures did not meet the requirements of s. 3 of the Act because they were issued in contravention of a security agreement made between the companies and the bank. Assuming that the debentures were issued in contravention of that agreement, I do not understand how that contravention affects the status of the debentures for the purposes of s. 3 of the Act. The bank may well have an action against the debtor company for issuing the debentures, and it may have remedies against the holders of the debentures if they attempted to collect on their debt or enforce their security. Neither possibility, however, negates the existence of the debentures and the related trust deeds. Section 3 does not contemplate an inquiry into the effectiveness or enforceability of the s. 3 debentures, as against other creditors, as a condition precedent to qualification under the Act. Such inquiries may play a role in a judge's determination as to what orders, if any, should be made under the Act.

(iii) Section 3 and the Appointment of a Receiver-Manager

86 The third argument made by the bank relies on its installation of a receiver-manager in both companies prior to the issue of the debentures. I agree with Finlayson J.A. that the placement of a receiver, either by operation of the terms of an agreement or by court order, effectively removes those formerly in control of the company from that position, and vests that control in the receiver-manager: *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd without deciding this point (1989), 65 Alta. L.R. (2d) 374 (C.A.). I cannot, however, agree with his interpretation of the order of Saunders J. I read that order as effectively turning the receiver into a monitor with rights of access, but with no authority beyond that. The operation of the business is specifically returned to the companies. The situation created by the order of Saunders J. can usefully be compared to that which existed when the application was made in *Hat Development Ltd.* Forsyth J., at p. 268 C.B.R., states:

The receiver-manager in this case and indeed in almost all cases is charged by the court with the responsibility of managing the affairs of a corporation. It is true that it is appointed pursuant, in this case, to the existence of secured indebtedness and at the behest of a secured creditor to realize on its security and retire the indebtedness. Nonetheless, this receiver-manager was court-appointed and not by virtue of an instrument. As a court-appointed receiver it owed the obligation and the duty to the court to account from time to time and to come before the court for the purposes of having some of its decisions ratified or for receiving advice and direction. *It is empowered by the court to manage the affairs of the company and it is completely inconsistent with that function to suggest that some residual power lies in the hands of the directors of the company to create further indebtedness of the company and thus interfere, however slightly, with the receiver-manager's ability to manage.*

[Emphasis added.]

87 After the order of Saunders J., the receiver-manager in this case was not obligated to manage the companies. Indeed, it was forbidden from doing so. The creation of the "instant" trust deeds and the application under the Act did not interfere in any way with any power or authority the receiver-manager had after the order of Saunders J. was made.

88 I also find it somewhat artificial to suggest that the presence of a receiver-manager served to vitiate the orders of Hoolihan J. Unlike many applications under s. 5 of the Act, the proceedings before Hoolihan J. were not ex parte and he was fully aware of the existence of the receiver-manager, the order of Saunders J., and the arguments based on the presence of the receiver-manager. Clearly, Hoolihan J. considered it appropriate to proceed with a plan of reorganization despite the presence of the receiver-manager and the order of Saunders J. Indeed, in his initial order he provided that the order of Saunders J. "remains extant." Hoolihan J. did not, as I do not, see that order as an impediment to the application or the granting of relief under the Act. Had he considered that the receiver-manager was in control of the affairs of the company, he could have varied the order of Saunders J. to permit the applications under the Act to be made by the companies: *Hat Development Ltd.*, at pp. 268-269 C.B.R. It is clear to me that he would have done so had he felt it necessary. If the installation of the receiver-manager is to be viewed as a bar to an application under this Act, and if the orders of Hoolihan J. were otherwise appropriate, I would order that the order of Saunders J. should be varied to permit the creation of the debentures and the trust deeds and the bringing of this application by the companies. I take this power to exist by the combined effect of s. 14(2) of the Act and s. 144(1) of the *Courts of Justice Act*, 1984, S.O. 1984, c. 11.

89 In my opinion, the debentures and "instant" trust deeds created in August 1990 sufficed to bring the company within the requirements of s. 3 of the Act, even if in issuing those debentures the companies breached a prior agreement with the bank. I am also satisfied that, given the terms of the order of Saunders J., the existence of a receiver-manager installed by the bank did not preclude the application under s. 3 of the Act.

V Did Hoolihan J. Err in Exercising his Discretion in Favour of Directing that a Creditors' Meeting be Held to Consider the Proposed Plan of Reorganization?

90 As indicated earlier, the Act provides a number of points at which the Court must exercise its discretion. I am concerned with the initial exercise of discretion contemplated by s. 5 of the Act, by which the Court may order a meeting of creditors for purposes of considering a plan of reorganization. Hoolihan J. exercised that discretion in favour of the debtor companies. The factors relevant to the exercise of that discretion are as variable as the fact situations which may give rise to the application. Finlayson J.A. has concentrated on one such factor, the chance that the plan, if put before a properly constituted meeting of the creditors, could gain the required approval. I agree that the feasibility of the plan is a relevant and significant factor to be considered in determining whether to order a meeting of creditors: S.E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act," at pp. 594-595. I would not, however, impose a heavy burden on the debtor company to establish the likelihood of ultimate success from the outset. As the Act will often be the last refuge for failing companies, it is to be expected that many of the proposed plans of reorganization will involve variables and contingencies which will make the plan's ultimate acceptability to the creditors and the Court very uncertain at the time the initial application is made.

91 On the facts before Hoolihan J., there were several factors which supported the exercise of his discretion in favour of directing a meeting of the creditors. These included the apparent support of two of the three substantial secured creditors, the companies' continued operation, and the prospect (disputed by the bank) that the companies' fortunes would take a turn for the better in the near future, the companies' ongoing efforts — that eventually met with some success — to find alternate financing, and the number of people depending on the operation of the company for their livelihood. There were also a number of factors pointing in the other direction, the most significant of which was the likelihood that a plan of reorganization acceptable to the bank could not be developed.

92 I see the situation which presented itself to Hoolihan J. as capable of a relatively straightforward risk-benefit analysis. If the s. 5 order had been refused by Hoolihan J., it was virtually certain that the operation of the companies would have ceased immediately. There would have been immediate economic and social damage to those who worked at the plants, and those who depended on those who worked at the plants for their well-being. This kind of damage cannot be ignored, especially when it occurs in small communities like those in which these plants are located. A refusal to grant the application would also have put the investments of the various creditors, with the exception of the bank, at substantial risk. Finally, there would have been obvious financial damage to the owner of the companies. Balanced against these costs inherent in refusing the order would be

the benefit to the bank, which would then have been in a position to realize on its security in accordance with its agreements with the companies.

93 The granting of the s. 5 order was not without its costs. It has denied the bank the rights it had bargained for as part of its agreement to lend substantial amounts of money to the companies. Further, according to the bank, the order has put the bank at risk of having its loans become undersecured because of the diminishing value of the accounts receivable and inventory which it holds as security and because of the ever-increasing size of the companies' debt to the bank. These costs must be measured against the potential benefit to all concerned if a successful plan of reorganization could be developed and implemented.

94 As I see it, the key to this analysis rests in the measurement of the risk to the bank inherent in the granting of the s. 5 order. If there was a real risk that the loan made by the bank would become undersecured during the operative period of the s. 5 order, I would be inclined to hold that the bank should not have that risk forced on it by the Court. However, I am unable to see that the bank is in any real jeopardy. The value of the security held by the bank appears to be well in excess of the size of its loan on the initial application. In his affidavit, Mr. Gibbons of Coopers & Lybrand asserted that the companies had overstated their cash flow projections, that the value of the inventory could diminish if customers of the companies looked to alternate sources for their product, and that the value of the accounts receivable could decrease if customers began to claim set-offs against those receivables. On the record before me, these appear to be no more than speculative possibilities. The bank has had access to all of the companies' financial data on an ongoing basis since the order of Hoolihan J. was made almost 2 months ago. Nothing was placed before this Court to suggest that any of the possibilities described above had come to pass.

95 Even allowing for some overestimation by the companies of the value of the security held by the bank, it would appear that the bank holds security valued at approximately \$4 million for a loan that was, as of the hearing of this appeal, about \$2.3 million. The order of Hoolihan J. was to terminate no later than November 14, 1990. I am not satisfied that the bank ran any real risk of having the amount of the loan exceed the value of the security by that date. It is also worth noting that the order under appeal provided that any party could apply to terminate the order at any point prior to November 14. This provision provided further protection for the bank in the event that it wished to make the case that its loan was at risk because of the deteriorating value of its security.

96 Even though the chances of a successful reorganization were not good, I am satisfied that the benefits flowing from the making of the s. 5 order exceeded the risk inherent in that order. In my view, Hoolihan J. properly exercised his discretion in directing that a meeting of creditors should be held pursuant to s. 5 of the Act.

VI Did Hoolihan J. Err in Directing that the Bank and RoyNat Inc. Should be Placed in the Same Class for the Purposes of the Act?

97 I agree with Finlayson J.A. that the bank and RoyNat Inc., the two principal creditors, should not have been placed in the same class of secured creditors for the purposes of ss. 5 and 6 of the Act. Their interests are not only different, they are opposed. The classification scheme created by Hoolihan J. effectively denied the bank any control over any plan of reorganization.

98 To accord with the principles found in the cases cited by Finlayson J.A., the secured creditors should have been grouped as follows:

— Class 1 — The City of Chatham and the Village of Glencoe

— Class 2 — The Bank of Nova Scotia

— Class 3 — RoyNat Inc., Ontario Development Corporation, and those holding debentures issued by the company on August 29 and 31, 1990.

VII Did Hoolihan J. Err in Making the Interim Orders He Made?

99 Hoolihan J. made a number of orders designed to control the conduct of all of the parties, pending the creditors' meeting and the placing of a plan of reorganization before the Court. The first order was made on September 11, 1990, and was to expire

on or before October 24, 1990. Subsequent orders varied the terms of the initial order somewhat, and extended its effective date until November 14, 1990.

100 These orders imposed the following conditions pending the meeting:

- (a) all proceedings with respect to the debtor companies should be stayed, including any action by the bank to realize on its security;
- (b) the bank could not reduce its loan by applying incoming receipts to those debts;
- (c) the bank was to be the sole banker for the companies;
- (d) the companies could carry on business in the normal course, subject to certain very specific restrictions;
- (e) a licensed trustee was to be appointed to monitor the business operations of the companies and to report to the creditors on a regular basis; and
- (f) any party could apply to terminate the interim orders, and the orders would be terminated automatically if the companies defaulted on any of the obligations imposed on them by the interim orders.

101 The orders placed significant restrictions on the bank for a 2-month period, but balanced those restrictions with provisions limiting the debtor companies' activities, and giving the bank ongoing access to up-to-date financial information concerning the companies. The bank was also at liberty to return to the Court to request any variation in the interim orders which changes in financial circumstances might merit.

102 These orders were made under the wide authority granted to the court by s. 11 of the Act. L.W. Houlden and C.H. Morawetz, in *Bankruptcy Law of Canada*, 3d ed. (Toronto: Carswell, 1989), at pp. 2-102 to 2-103, describe the purpose of the section:

The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. This aim is facilitated by s. 11 of the Act, which enables the court to restrain further proceedings in any action, suit or proceeding against the company upon such terms as the court sees fit.

103 A similar sentiment appears in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* Gibbs J.A., in discussing the scope of s. 11, said at p. 7 [unreported, pp. 88-89 B.C.L.R.]:

When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

104 Similar views of the scope of the power to make interim orders covering the period when reorganization is being attempted are found in *Meridian Developments Inc. v. Toronto-Dominion Bank*; *Meridian Developments Inc. v. Nu-West Ltd.*, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.) at 114-118 [C.B.R.]; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) at 12-15 [C.B.R.]; *Quintette Coal Ltd. v. Nippon Steel Corp.*, an unreported judgment of Thackray J., released June 18, 1990 [since reported (1990), 47 B.C.L.R. (2d) 193 (S.C.)], at pp. 5-9 [pp. 196-198 B.C.L.R.]; and B. O'Leary, "A Review of the Companies' Creditors Arrangement Act," at p. 41.

105 The interim orders made by Hoolihan J. are all within the wide authority created by s. 11 of the Act. The orders were crafted to give the company the opportunity to continue in operation, pending its attempt to reorganize, while at the same time providing safeguards to the creditors, including the bank, during that same period. I find no error in the interim relief granted by Hoolihan J.

VIII Conclusion

106 In the result, I would allow the appeal in part, vacate the order of Hoolihan J. of October 18, 1990, insofar as it purports to settle the class of creditors for the purpose of the Act, and I would substitute an order establishing the three classes referred to in Part VI of these reasons. I would not disturb any of the other orders made by Hoolihan J.

Appeal allowed.

2016 ONSC 316
Ontario Superior Court of Justice

Target Canada Co., Re

2016 CarswellOnt 589, 2016 ONSC 316, 263 A.C.W.S. (3d) 298, 32 C.B.R. (6th) 48

**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 Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

G.B. Morawetz R.S.J.

Heard: December 21-22, 2015

Judgment: January 15, 2016

Docket: CV-15-10832-00CL

Counsel: Jeremy Dacks, Shawn Irving, Tracy Sandler, for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC

Linda Galessiere, Gus Camelino, for 20 VIC Management Inc. (on behalf of various landlords), Morguard Investments Limited (on behalf of various landlords), Calloway Real Estate Investment Trust (on behalf of Calloway REIT (Hopedale) Inc.), Calloway REIT (Laurentian Inc.), Crombie REIT, Triovest Realty Advisors Inc. (on behalf of various landlords), Brad-Lea Meadows Limited and Blackwood Partners Management Corporation (on behalf of Surrey CC Properties Inc.)

Laura M. Wagner, Mathew P. Gottlieb, for KingSett Capital Inc.

Yannick Katirai, Daniel Hamson, for Eleven Points Logistics Inc.

Daniel Walker, for M.E.T.R.O. (Manufacture, Export, Trade, Research Office) Incorporated / Kerson Invested Limited

Jay A. Schwartz, Robin Schwill, for Target Corporation

Miranda Spence, for CREIT

Jay Carfagnini, Jesse Mighton, Alan Mark, Melaney Wagner, for Alvarez & Marsal Canada Inc. in its capacity as Monitor

James Harnum, for Employee

Harvey Chaiton, for Directors and Officers of the Applicants

Stephen M. Raicek, Mathew Maloley, for Faubourg Boisbriand Shopping Centre Limited and Sun Life Assurance Company of Canada

Vern W. DaRe, for Doral Holdings Limited and 430635 Ontario Inc.

Stuart Brotman, for Sobeys Capital Incorporated

Catherine Francis, for Primaris Reit

Kyla Mahar, for Centerbridge Partners and Davidson Kempner

William V. Sasso, for Pharmacist

Varoujan C. Arman, for Nintendo of Canada Ltd., Universal Studios Canada Inc., Thyssenkrupp Elevator (Canada) Limited, RPI Consulting Group Inc.

Brian Parker, for Montez (Cornerbrook) Inc., Admns Meadowlands Investment Corp, and Valiant Rental Inc.

Roger Jaipargas, for Glentel Inc., Bell Canada and BCE Nexxia

Nancy Tourgis for Issi Inc.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements

XIX.3.b Approval by court

XIX.3.b.iii Creditor approval

Headnote

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

T Canada sought protection under Companies' Creditors Arrangement Act (CCAA) — Certain landlords reached understanding with T Canada and its parent company T Corp. formalized through addition of paragraph 19A to Initial and Restated Order — Paragraph provided that CCAA proceedings would not be used to compromise guarantee claims landlords had against T Corp. — T Canada developed plan to present to affected creditors — T Canada negotiated structure with T Corp. whereby it would subordinate intercompany claims for benefit of remaining creditors and make other contributions — T Corp. required all claims including guarantees to landlords to be settled — T Canada brought motion to accept joint plan and compromise, establish class of affected creditors, authority to hold meeting of creditors, and to set date for hearing of sanction of plan if it was accepted — Motion dismissed — Plan failed to meet low threshold to authorize holding creditors meeting — There was no reasonable chance of success — Plan would not meet criteria at sanction hearing — Court was required to ensure that CCAA process unfolds in fair and transparent manner — Landlords should not be required through CCAA proceeding to release T Corp. from guarantees in exchange for consideration in plan in form of formula within plan — Landlords were concerned about effect CCAA proceedings would have on guarantees from very beginning — That T Corp. would only consider subordinating its intercompany claims as part of global settlement including landlord guarantees was not reason to approve plan — Without amendment landlords would have considered issuing bankruptcy proceedings as against T Canada — Paragraph 19A was incorporated into Initial and Restated Order with support of both T Corp. and monitor — Varying paragraph 19A so that plan could address guarantee claims landlords had as against T Corp. meant plan required court to completely ignore background that led to paragraph 19A and reliance that parties placed on it — Any change in economic landscape did not justify departure from agreed upon course of action as set out in paragraph 19A — T Canada and T Corp. were trying to use CCAA proceeding as means to secure release of T. Corp. from its liabilities — Proposal clearly contravened agreement memorialized and enforced in paragraph 19A — Paragraph 19A arose in post-CCAA filing environment, with each interested party carefully negotiating its position — All parties knew they were entering into binding agreements supported by binding orders — Agreements were heavily negotiated by sophisticated parties — Plan also established landlord formula amount which was not in original order.

Table of Authorities**Cases considered by G.B. Morawetz R.S.J.:**

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 2652, 42 C.B.R. (5th) 90, 45 B.L.R. (4th) 201 (Ont. S.C.J. [Commercial List]) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513 (Ont. C.A.) — referred to

Alternative Fuel Systems Inc., Re (2003), 2003 ABQB 745, 2003 CarswellAlta 1262, 46 C.B.R. (4th) 8, 20 Alta. L.R. (4th) 265, [2004] 5 W.W.R. 467, 46 C.B.R. (4th) 17, 20 Alta. L.R. (4th) 264 (Alta. Q.B.) — considered

Alternative Fuel Systems Inc., Re (2004), 2004 ABCA 31, 2004 CarswellAlta 64, 47 C.B.R. (4th) 1, 236 D.L.R. (4th) 155, 24 Alta. L.R. (4th) 1, [2004] 5 W.W.R. 475, (sub nom. *Remington Development Corp. v. Alternative Fuel Systems Inc.*) 346 A.R. 28, (sub nom. *Remington Development Corp. v. Alternative Fuel Systems Inc.*) 320 W.A.C. 28 (Alta. C.A.) — referred to

BlueStar Battery Systems International Corp., Re (2000), 2000 CarswellOnt 4837, [2001] G.S.T.C. 2, 10 B.L.R. (3d) 221, 25 C.B.R. (4th) 216 (Ont. S.C.J. [Commercial List]) — referred to

Crystallex International Corp., Re (2013), 2013 ONSC 823, 2013 CarswellOnt 3043, 3 C.B.R. (6th) 307 (Ont. S.C.J. [Commercial List]) — considered

Dairy Corp. of Canada Ltd., Re (1934), [1934] O.R. 436, [1934] 3 D.L.R. 347, [1934] O.W.N. 347, 1934 CarswellOnt 33 (Ont. C.A.) — referred to

Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp. (2015), 2015 ONSC 4004, 2015 CarswellOnt 9738, 27 C.B.R. (6th) 134 (Ont. S.C.J.) — referred to

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175, 1988 CarswellBC 558 (B.C. S.C.) — referred to

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

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

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re*) 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Ont. Gen. Div.) — referred to

Quintette Coal Ltd., Re (1992), 13 C.B.R. (3d) 146, 68 B.C.L.R. (2d) 219, 1992 CarswellBC 502 (B.C. S.C.) — referred to

ScoZinc Ltd., Re (2009), 2009 NSSC 163, 2009 CarswellNS 283, 55 C.B.R. (5th) 205 (N.S. S.C.) — referred to

Statutes considered:

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

s. 65.2(3) [en. 1992, c. 27, s. 30] — considered

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

Generally — referred to

s. 4 — considered

s. 11 — considered

s. 20(1)(a)(iii) — considered

MOTION to accept joint plan and compromise, to establish class of affected creditors to vote on plan, and authority to hold meeting of those creditors and vote on plan and related procedures, and to set date for hearing of sanction of plan of it was accepted.

G.B. Morawetz R.S.J.:

1 The Applicants Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp, Target Canada Pharmacy (Ontario) Corp, Target Canada Pharmacy Corp, Target Canada Pharmacy (Sk) Corp, and Target Canada Property LLC ("Target Canada") bring this motion for an order, *inter alia*:

(a) accepting the filing of a Joint Plan Compromise and Arrangement in respect of Target Canada Entities (defined below) dated November 27, 2015 (the "Plan");

(b) authorizing the Target Canada Entities to establish one class of Affected Creditors (as defined in the Plan) for the purpose of considering and voting on the Plan (the "Unsecured Creditors' Class");

(c) authorizing the Target Canada Entities to call, hold and conduct a meeting of the Affected Creditors (the "Creditors' Meeting") to consider and vote on a resolution to approve the Plan, and approving the procedures to be followed with respect to the Creditors' Meeting;

(d) setting the date for the hearing of the Target Canada Entities' motion seeking sanction of the Plan should the Plan be approved by the required majority of Affected Creditors of the Creditors Meeting.

2 On January 13, 2016, the Record was endorsed as follows: "The Plan is not accepted for filing. The Motion is dismissed. Reasons to follow."

3 These are the reasons.

4 The Applicants and Partnerships listed on Schedule "A" to the Initial Order (the "Target Canada Entities") were granted protection from their creditors under the *Companies' Creditors Arrangement Act* ("CCAA") pursuant to the Initial Order dated January 15, 2015 (as Amended and Restated, the "Initial Order"). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the Monitor.¹

5 The Target Canada Entities, with the support of Target Corporation as Plan Sponsor, have now developed a Plan to present to Affected Creditors.

6 The Target Canada Entities propose that the Creditors' Meeting will be held on February 2, 2016.

7 The requested relief sought by Target Canada is supported by Target Corporation, Employee Representative Counsel, Centerbridge Partners, L.P. and Davidson Kempner, CREIT, Glentel Inc., Bell Canada and BCE Nexxia, M.E.T.R.O. Incorporated, Eleven Points Logistics Inc., Issi Inc. and Sobeys Capital Incorporated.

8 The Monitor also supports the motion.

9 The motion was opposed by KingSett Capital, Morguard Investments Limited, Morguard Investment REIT, Smart REIT, Crombie REIT, Triovest, Faubourg Boisbriand and Sun Life Assurance, Primaris REIT, and Doral Holdings Limited (the "Objecting Landlords").

Background

10 In February 2015, the court approved the Inventory Liquidation Process and the Real Property Portfolio Sale Process ("RPPSP") to enable the Target Canada Entities to maximize the value of their assets for distribution to creditors.

11 By the summer of 2015, the processes were substantially concluded and a claims process was undertaken. The Target Canada Entities began to develop a plan that would distribute the proceeds and complete the orderly wind-down of their business.

12 The Target Canada Entities discussed the development of the Plan with representatives of Target Corporation.

13 The Target Canada Entities negotiated a structure with Target Corporation whereby Target Corporation would subordinate significant intercompany claims for the benefit of remaining creditors and would make other contributions under the Plan.

14 Target Corporation maintained that it would only consider subordinating these intercompany claims and making other contributions as part of a global settlement of all issues relating to the Target Canada Entities including a settlement and release of all Landlord Guarantee Claims where Target Corporation was the Guarantor.

15 The Plan as structured, if approved, sanctioned and implemented will

- (i) complete the wind-down of the Target Canada Entities;
- (ii) effect a compromise, settlement and payment of all Proven Claims; and
- (iii) grant releases of the Target Canada Entities and Target Corporation, among others.

16 The Plan provides that, for the purposes of considering and voting on the plan, the Affected Creditors will constitute a single class (the "Unsecured Creditors' Class").

17 In the majority of CCAA proceedings, motions of this type are procedural in nature and more often than not they proceed without any significant controversy. This proceeding is, however, not the usual proceeding and this motion has attracted significant controversy. The Objecting Landlords have raised concerns about the terms of the Plan.

18 The Objecting Landlords take the position that this motion deals with not only procedural issues but substantive rights. The Objecting Landlords have two major concerns.

Objection # 1 — Breach of paragraph 19A of the Amended and Restated Order

19 First, in February 2015, an Amended and Restated Order was sought by Target Canada. Paragraph 19A was incorporated into the Amended and Restated Order, which provides that the claims of any landlord against Target Corporation relating to any lease of real property (the "Landlord Guarantee Claims") shall not be determined in this CCAA proceeding and shall not be released or affected in any way in any plan filed by the Applicants.

20 Paragraph 19A provides as follows:

19A. THIS COURT ORDERS that, without in any way altering, increasing, creating or eliminating any obligation or duty to mitigate losses or damages, the rights, remedies and claims (collectively, the "Landlord Guarantee Claims") of any landlord against Target US pursuant to any indemnity, guarantee, or surety relating to a lease of real property, including, without limitation, the validity, enforceability or quantum of such Landlord Guarantee Claims: (a) shall be determined by a judge of the Ontario Superior Court of Justice (Commercial List), whether or not the within proceeding under the CCAA continue (without altering the applicable and operative governing law of such indemnity, guarantee or surety) and notwithstanding the provisions of any federal or provincial statutes with respect to procedural matters relating to the Landlord Guarantee Claims; provided that any landlord holding such guarantees, indemnities or sureties that has not consented to the foregoing may, within fifteen (15) days of the making of this Order, bring a motion to have the matter of the venue for the determination of its Landlord Guarantee Claim adjudicated by the Court; (b) shall not be determined, directly or indirectly, in the within CCAA proceedings; (c) shall be unaffected by any determination (including any findings of fact, mixed fact and law or conclusions of law) of any rights, remedies and claims of such landlords as against Target Canada Entities, whether made in the within proceedings under the CCAA or in any subsequent proposal or bankruptcy proceedings under the BIA, other than that any recoveries under such proceedings received by such landlords shall constitute a reduction and offset to any Landlord Guarantee Claims; and (d) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by the Target Canada Entities, or any of them, under the CCAA, or any proposal filed by the Target Canada Entities, or any of them, under the BIA.

21 The evidence of Target Canada in support of the requested change consisted of the Affidavit of Mark Wong, who stated at the time:

A component of obtaining the consent of the Landlord Group for approval of the Real Property Portfolio Sales Process ("RPPSP") was the agreement of The Target Canada Entities to seek approval of certain changes to the initial order in the form of an amended and restated initial order...[T]hese proposed changes were the subject of significant negotiation between the Landlord Group and The Target Canada Entities, with the assistance and input of the Monitor and Target Corporation.

22 The Monitor, in its second report dated February 9, 2015, stated:

(3.4) Counsel to the Landlord Group advised that the Real Property Portfolio Sales Process proceeding on a consensual basis as described below is conditional on the proposed changes to the initial order.

(3.5) The Monitor recommends approval of the amended and restated initial order as it reflects;

(a) revisions negotiated as among The Target Canada Entities, the Landlord Group and Target U.S. (in conjunction with revisions to the Real Property Portfolio Sales Process), with the assistance of the Monitor; and

(b) a fair and reasonable balancing of interests.

23 Thus, Objecting Landlords contend that the agreement resulting in Paragraph 19A of the Amended and Restated Initial Order was not just a condition of the Landlord Group's agreement to the RPPSP — it was also a condition of the Landlord Group withdrawing both its opposition to the CCAA process and its intention to commence a bankruptcy application to put the Applicants into bankruptcy at the come back hearing.

24 The Objecting Landlords contend that the Applicants now seek to file a plan that releases the Landlord Guarantee Claims. This, in their view, is a clear breach of paragraph 19A, which Target Canada sought and the Monitor supported.

Objection # 2 — Breach of paragraph 55 of the Claim Procedure Order

25 Second, the Objecting Landlords contend that the Plan violates the Claims Procedure Order and the CCAA. They argue that the Claims Procedure Order was also settled after prolonged negotiations between the Target Canada Entities and their creditors, including the landlords and that this order sets out a comprehensive claims process for determining all claims, including landlords' claims.

26 The Objecting Landlords contend that Paragraph 55 of the Claims Procedure Order expressly excludes Landlord Guarantee Claims and provides that nothing in the Claims Procedure Order shall prejudice, limit, or otherwise affect any claims, including under any guarantee, against Target Corporation or any predecessor tenant. Paragraph 55 also ends with the *proviso* that "[f]or greater certainty, this Order is subject to and shall not derogate from paragraph 19A of the Initial Order."

27 The Objecting Landlords take the position that, in clear breach of Paragraph 55 and of the Claims Procedure Order generally, the Plan provides for a set formula to determine landlord claims, including claims against Target Corporation under its guarantees. KingSett further contends that the formula not only purports to determine landlords' claims for distribution purposes, it also purports to determine their claims for voting purposes, with no ability to challenge either. KingSett contends that this violates the terms of the Claims Procedure Order that was sought by the Applicants and supported by the Monitor.

28 In summary, the Objecting Landlords take the position that the foregoing issues are crucial threshold issues and are not merely "procedural" questions and as such the court has to determine whether it can accept a plan for filing if that plan in effect permits Target Canada to renege on their agreements with creditors, violate court orders and the CCAA.

29 In my view the issues raised by the Objecting Landlords are significant and they should be determined at this time.

Position of Target Canada

30 Target Canada takes the position that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

31 Target Canada submits that the Plan has been the subject of numerous discussions and/or negotiations with Target Corporation (leading to a structure based on Target Corporation serving as Plan Sponsor), the Monitor and a wide variety of stakeholders. Target Canada states that if approved, the Plan will effect a compromise, settlement and payment of all proven claims in the near term in a manner that maximizes and accelerates stakeholder recovery.

32 Target Corporation, as Plan Sponsor and a creditor of Target Canada, has agreed to subordinate approximately \$5 billion in intercompany claims to the claims of other Affected Creditors. Based on the Monitor's preliminary analysis, the Plan provides for recoveries for Affected Creditors generally in the range of 75% to 85% of their proven claims.

33 Target Canada contends that recent case law supports the jurisdiction of the CCAA court to provide that third party claims be addressed within the CCAA and leaves it open to a debtor company to address such claims in a plan.

34 The Plan provides that Affected Creditors will vote on the Plan as a single unsecured class. Target Canada submits that this is appropriate on the basis that all Affected Creditors have the required commonality of interest (i.e. an unsecured claim) in relation to the claims against Target Canada and the Plan will compromise and release all of their claims.

35 Target Canada is of the view that fragmentation of these creditors into separate classes would jeopardize the ability to achieve a successful plan.

36 The Plan values the Landlord Restructuring Period Claims of landlords whose leases have been disclaimed by applying a formula ("Landlord Formula Amount") derived from the formula provided under s. 65.2 (3) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA" and "BIA Formula"). The Landlord Formula Amount enhances the BIA Formula by permitting recovery of an additional year of rent. Target Corporation intends to contribute funds necessary to pay this enhancement (the "Landlord Guarantee Top-Up Amounts") Target Canada contends that the use of the BIA Formula to value landlord claims for voting and distribution purposes has been approved in other CCAA proceedings.

37 With respect to the Landlord Formula Amount to calculate the Landlord Restructuring Period Claims, the formula provides for, in effect, Landlord Restructuring Period Claims to be valued at the lesser of either:

- (i) rent payable under the lease for the two years following the disclaimer plus 15% of the rent for the remainder of the lease term; or
- (ii) four years rent.

38 Target Canada further contends that the court has the jurisdiction to modify the Initial Order on Plan Implementation to permit the Target Canada Entities to address Landlord Guarantee Claims in the Plan and that it is appropriate to do so in these circumstances. This justification is based on the premise that the landscape of the proceedings has been significantly altered since the filing date, particularly in light of the material contributions that Target Corporation prepared to make as Plan Sponsor in order to effect a global resolution of issues. Further, they argue that Landlord Guarantee Creditors are appropriately compensated under the Plan for their Landlord Guarantee Claims by means of the Landlord Guarantee Creditor Top-Up amounts, which will be funded by Target Corporation. As such, Landlord Guarantee Creditors will be paid 100% of their Landlord Restructuring Period Claims, valued in accordance with the Landlord Formula Amount.

39 The Applicants contend that they seek to achieve a fair and equitable balance in the Plan. The Applicants submit that questions as to whether the Plan is in fact balanced, and fair and reasonable towards particular stakeholders, are matters best assessed by Affected Creditors who will exercise their business judgment in voting for or against the Plan. Until Affected Creditors have expressed their views, considerations of fairness are premature and are not matters that are required to be considered by the court in granting the requested Creditors' Meeting. If the Plan is approved by the requisite majority of the Affected Creditors, the court will then be in a position to fully evaluate the fairness and reasonableness of the Plan as a whole, with the benefit of the business judgment of Affected Creditors as reflected in the vote of the Creditors' Meeting.

40 The significant features of the Plan include:

- (i) the Plan contemplates that a single class of Affected Creditors will consider and vote on the plan.
- (ii) the Plan entitles Affected Creditors holding proven claims that are less than or equal to \$25,000 ("Convenience Class Creditors") to be paid in full;
- (iii) the Plan provides that all Landlord Restructuring Period Claims will be calculated using the Landlord Formula Amount derived from the BIA Formula;
- (iv) As a result of direct funding from Target Corporation of the Landlord Guarantee Creditor Top-Up amounts, Landlord Guarantee Creditors will be paid the full value of their Landlord Restructuring Period Claims;
- (v) Intercompany Claims will be valued at the amount set out in the Monitor's Intercompany Claims Report;
- (vi) If approved and sanctioned, the Plan will require an amendment to Paragraph 19A of the Initial Order which currently provides that the Landlord Guarantee Claims are to be dealt with outside these CCAA proceedings. The Plan provides

that this amendment will be addressed at the sanction hearing once it has been determined whether the Affected Creditors support the Plan.

(vii) In exchange for Target Corporations' economic contributions, Target Corporation and certain other third parties (including Hudson's Bay Company and Zellers, which have indemnities from Target Corporation) will be released, including in relation to all Landlord Guarantee Claims.

41 If the Plan is approved and implemented, Target Corporation will be making economic contributions to the Plan. In particular:

(a) In addition to the subordination of the \$3.1 billion intercompany claim that Target Corporation agreed to subordinate at the outset of these CCAA proceedings, on Plan Implementation Date, Target Corporation will cause Property LLP to subordinate almost all of the Property LLP ("Propco") Intercompany Claim which was filed against Propco in an additional amount of approximately \$1.4 billion;

(b) In turn, Propco will concurrently subordinate the Propco Intercompany Claim filed against TCC in an amount of approximately \$1.9 billion (adjusted by the Monitor to \$1.3 billion);

(c) Target Corporation will contribute funds necessary to pay the Landlord Guarantee Creditor Top-Up Amounts.

42 Target Canada points out that in discussions with Target Corporation to establish the structure for the Plan, Target Corporation maintained that it would only consider subordinating these remaining intercompany claims as part of a global settlement of all issues relating to the Target Canada Entities, including all Landlord Guarantee Claims.

43 The issue on this motion is whether the requested Creditors' Meeting should be granted. Section 4 of the CCAA provides:

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

44 Counsel cites *Nova Metal Products* for the proposition that the feasibility of a plan is a relevant significant factor to be considered in determining whether to order a meeting of creditors. However, the court should not impose a heavy burden on a debtor company to establish the likelihood of ultimate success at the outset (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.)).

45 Counsel submit that the court should order a meeting of creditors unless there is no hope that the plan will be approved by the creditors or, if approved, the plan would not for some other reason be approved by the court (*ScoZinc Ltd., Re*, 2009 NSSC 163, 55 C.B.R. (5th) 205 (N.S. S.C.)).

46 Counsel also submits that the court has described the granting of the Creditors' Meeting as essentially a "procedural step" that does not engage considerations of whether the debtors' plan is fair and reasonable. Thus, counsel contends, unless it is abundantly clear the plan will not be approved by its creditors, the debtor company is entitled to put its plan before those creditors and to allow the creditors to exercise their business judgment in determining whether to support or reject it.

47 Target Canada takes the position that there is no basis for concluding that the Plan has, no hope of success and the court should therefore exercise its discretion to order the Creditors Meeting.

48 Counsel to Target Canada submits that the flexibility of the CCAA allows the Target Canada Entities to apply a uniform formula for valuing Landlord Restructuring Period Claims for voting and distribution purposes, including Landlord Guarantee Claims, in the interests of ensuring expeditious distributions to all Affected Creditors

49 Counsel contends that if each Landlord Restructuring Period Claim had to be individually calculated based on the unique facts applicable to each lease, including future prospects for mitigation and uncertain collateral damage, the resulting disputes would embroil disputes between landlords and the Target Canada Entities in lengthy proceedings. Counsel contends that the issue relating to the Landlord Guarantee Claims is more properly a matter of the overall fairness and reasonableness of the Plan and should be addressed at the sanction hearing.

50 The Plan also contemplates releases for the benefit of Target Corporation and other third parties to recognize the material economic contribution that have resulted in favourable recoveries for Affected Creditors. These releases, Target Canada contends, satisfy the well established test for the CCAA court to approve third party releases. (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 42 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]), affirmed 2008 ONCA 587 (Ont. C.A.), (sub nom. Re *Metcalfe & Mansfield Alternative Investments II Corp.*)

51 Likewise, the issue of Third Party Claims and Third Party Releases is a matter that can be addressed at sanction.

52 With respect to the amendment to Paragraph 19A of the Initial Order, counsel submits that since the date of the Initial Order, and since this paragraph was included in the Initial Order, the landscape of the restructuring has shifted considerably, most notably in the form of the economic contributions that are being offered by Target Corporation, as Plan Sponsor.

53 The Target Entities propose that on Plan Implementation, Paragraph 19A of the Initial Order will be deleted. Counsel submits that the court has the jurisdiction to amend the Initial Order through its broad jurisdiction under s. 11 of the CCAA to make any order that it considers appropriate in the circumstances and further, the court would be exercising its discretion to amend its own order, on the basis that it is just and appropriate to do so in these particular circumstances. Counsel submits that the requested amendment is essential to the success of the Plan and to maximize and expedite recoveries for all stakeholders. Further, the notion that a post-filing contract cannot be amended despite subsequent events fails to do justice to the flexible and "real time" nature of a CCAA proceeding.

54 As such, counsel contends that no further information is necessary in order for the landlords to determine whether the Plan is fair and reasonable and they are in a position to vote for or against the Plan.

Position of the Objecting Landlords

55 At the outset of this proceeding, Target Canada, Target Corporation and Target Canada's landlords agreed that Landlord Guarantee Claims would not be affected by any Plan. In exchange, several landlords with Landlord Guarantee Claims agreed to withdraw their opposition to Target Canada proceeding with the liquidation under the CCAA and the RPPSP.

56 Counsel to the landlords submit that 10 months after having received the benefit of the landlords not opposing the RPPSP and the continuation of the CCAA, Target Canada seeks the court's approval to unequivocally renege on the agreement that violates the Amended Order by filing a Plan that compromises Landlord Guarantee Claims.

57 The Objecting Landlords also contend that the proposed plan violates the Amended Order and the Claims Procedure Order by purporting to value the landlords' claims, including all Landlord Guarantee Claims, using a formula.

58 Objecting Landlords take the position that they have claims against Target Canada as a result of its disclaimer of long term leases, guaranteed by Target Corporation, in excess of the amount that the Plan values these claim. One example is the claim of KingSett. KingSett insists they have a claim of at least \$26 million which has been valued for Plan purposes at \$4 million plus taxes.

59 The Objecting Landlords submit that the court cannot and should not allow a plan to be filed that violates the court's orders and agreements made by the Applicant. Further, if the motion is granted, the CCAA will no longer allow for a reliable process pursuant to which creditors can expect to negotiate with an Applicant in good faith. Counsel contends that the amendment of the Initial Order to buttress the agreement between the parties not to compromise the Landlord Guarantee Claims was intended

to strengthen, not weaken, the landlords' ability to enforce Target Canada and Target Corporation's contractual obligation not to file a plan that compromises Landlord Guarantee Claims and it would be a perverse outcome for the court to hold otherwise.

60 With respect to claims procedure, the Claims Procedure Order provides in Paragraph 32 that a claim that is subject to a dispute "shall" be referred to a claims officer of the court for adjudication. The Objecting Landlords submit that the Claims Procedure Order reaffirms the agreement between Target Canada, Target Corporation and the Landlord Group with respect to Landlord Guarantee Claims; they refer to Paragraph 55 which specifically provides that nothing in the order shall prejudice, limit, bar, extinguish or otherwise affect any rights or claims, including under any guarantee or indemnity, against Target Corporation or any predecessor tenant.

61 Counsel for the Objecting Landlords submit that the Plan provides the basis for Target Corporation to avoid its obligation to honour guarantees to landlords, which Target Corporation agreed would not be compromised as part of the CCAA proceedings. Counsel contends that the Plan seeks to use the leverage of the "Plan Sponsor" against the creditors to obtain approval to renege on its obligations. This, according to counsel, amounts to an economic decision by Target Corporation in its own financial interest.

62 In support of its proposition that the court cannot accept a plan's call for a meeting where the plan cannot be sanctioned, counsel references *Crystalex International Corp., Re*, 2013 ONSC 823, 2013 CarswellOnt 3043 (Ont. S.C.J. [Commercial List]). Counsel submits that the court should not allow the Applicants to file a plan that from the outset cannot be sanctioned because it violates court orders or is otherwise improper.

63 In this case, counsel submits that the Plan cannot be accepted for filing because it violates Paragraph 19A of the Amended Order and Paragraph 55 of the Claims Procedure Order. The Objecting Landlords stated as follows:

Paragraph 19A of the Amended Order is unequivocal. Landlord Guarantee Claims:

- (a) shall not be determined, directly or indirectly, in the CCAA proceeding;
- (b) shall be unaffected by any determination of claims of landlords against Target Canada; and,
- (c) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by Target Canada under the CCAA.

Likewise, the Claims Procedure Order, as amended, clearly provides that:

- (a) disputed creditors' claims shall be adjudicated by a Claims Officer or the Court;
- (b) creditors have until February 12, 2016 to object to intercreditor claims; and,
- (c) the claims process shall not affect Landlord Guarantee Claims and shall not derogate from paragraph 19A of the Amended Order.

There is no dispute that the Plan that Target Canada now seeks to file violates these terms of the Amended Order and the Claims Procedure Order...

64 With respect to the issue of Paragraph 19A, counsel submits that this provision benefits Target Canada's creditors who have guarantees from Target Corporation. Further, under the plan, these creditors gain nothing from subordination of Target Corporation's intercompany claim, which only benefits creditors who did not obtain guarantees from Target Corporation. Counsel referred to *Alternative Fuel Systems Inc., Re*, 2003 ABQB 745, 20 Alta. L.R. (4th) 264 (Alta. Q.B.), aff'd 2004 ABCA 31, 346 A.R. 28 (Alta. C.A.), where both courts emphasized the importance of following a claims procedure and complying with ss. 20(1)(a)(iii) to determine landlord claims.

65 Accordingly, counsel submits that barring landlord consent at the claims process stage of the CCAA proceeding, the court cannot unilaterally impose a cookie cutter formula to determine landlord claims at the plan stage.

Analysis

66 Target Canada submits that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

67 In my view, it is not necessary to comment on this submission insofar as this Plan is flawed to the extent that even the low threshold test has not been met.

68 Simply put, I am of the view that this Plan does not have even a reasonable chance of success, as it could not, in this form, be sanctioned.

69 As such, I see no point in directing Target Canada to call and conduct a meeting of creditors to consider this Plan, as proceeding with a meeting in these circumstances would only result in a waste of time and money.

70 Even if the Affected Creditors voted in favour of the Plan in the requisite amounts, the court examines three criteria at the sanction hearing:

- (i) Whether there has been strict compliance with all statutory requirements;
- (ii) Whether all materials filed and procedures carried out were authorized by the CCAA;
- (iii) Whether the Plan is fair and reasonable.

(See *Quintette Coal Ltd., Re* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.); *Dairy Corp. of Canada Ltd., Re*, [1934] O.R. 436 (Ont. C.A.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.); *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at p. 182, aff'd (1989), (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *BlueStar Battery Systems International Corp., Re* (2000), 25 C.B.R. (4th) 216 (Ont. S.C.J. [Commercial List]).

71 As explained below, the Plan cannot meet the required criteria.

72 It is incumbent upon the court, in its supervisory role, to ensure that the CCAA process unfolds in a fair and transparent manner. It is in this area that this Plan falls short. In considering whether to order a meeting of creditors to consider this Plan, the relevant question to consider is the following: Should certain landlords, who hold guarantees from Target Corporation, a non-debtor, be required, through the CCAA proceedings of Target Canada, to release Target Corporation from its guarantee in exchange for consideration in the Plan in the form of the Landlord Formula Amount?

73 The CCAA proceedings of Target Canada were commenced a year ago. A broad stay of proceedings was put into effect. Target Canada put forward a proposal to liquidate its assets. The record establishes that from the outset, it was clear that the Objecting Landlords were concerned about whether the CCAA proceedings would be used in a manner that would affect the guarantees they held from Target Corporation.

74 The record also establishes that the Objecting Landlords, together with Target Canada and Target Corporation, reached an understanding which was formalized through the addition of paragraph 19A to the Initial and Restated Order. Paragraph 19A provides that these CCAA proceedings would not be used to compromise the guarantee claims that those landlords have as against Target Corporation.

75 The Objecting Landlords take the position that in the absence of paragraph 19A, they would have considered issuing bankruptcy proceedings as against Target Canada. In a bankruptcy, landlord claims against Target Canada would be fixed by the BIA Formula and presumably, the Objecting Landlords would consider their remedies as against Target Corporation as guarantor. Regardless of whether or not these landlords would have issued bankruptcy proceedings, the fact remains that

paragraph 19A was incorporated into the Initial and Restated Order in response to the concerns raised by the Objecting Landlords at the motion of the Target Corporation, and with the support of Target Corporation and the Monitor.

76 Target Canada developed a liquidation plan, in consultation with its creditors and the Monitor, that allowed for the orderly liquidation of its inventory and established the sale process for its real property leases. Target Canada liquidated its assets and developed a plan to distribute the proceeds to its creditors. The proceeds are being made available to all creditors having Proven Claims. The creditors include trade creditors and landlords. In addition, Target Corporation agreed to subordinate its claim. The Plan also establishes a Landlord Formula Amount. If this was all that the Plan set out to do, in all likelihood a meeting of creditors would be ordered.

77 However, this is not all that the plan accomplishes. Target Canada proposes that paragraph 19A be varied so that the Plan can address the guarantee claims that landlords have as against Target Corporation. In other words, Target Canada has proposed a Plan which requires the court to completely ignore the background that led to paragraph 19A and the reliance that parties placed in paragraph 19A.

78 Target Canada contends that it is necessary to formulate the plan in this matter to address a change in the landscape. There may very well have been changes in the economic landscape, but I fail to see how that justifies the departure from the agreed upon course of action as set out in paragraph 19A. Even if the current landscape is not favourable for Target Corporation, this development does not justify this court endorsing a change in direction over the objections the Objecting Landlords.

79 This is not a situation where a debtor is using the CCAA to compromise claims of creditor. Rather, this is an attempt to use the CCAA as a means to secure a release of Target Corporation from its liabilities under the guarantees in exchange for allowing claims of Objecting Landlords in amounts calculated under the Landlord Formula Amount. The proposal of Target Canada and Target Corporation clearly contravenes the agreement memorialized and enforced in paragraph 19A.

80 Paragraph 19A arose in a post-CCAA filing environment, with each interested party carefully negotiating its position. The fact that the agreement to include paragraph 19A in the Amended and Restated Order was reached in a post-filing environment is significant (see *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2015 ONSC 4004, 27 C.B.R. (6th) 134 (Ont. S.C.J.) at paras. 33-35). In my view, there was never any doubt that Target Canada and Target Corporation were aware of the implications of paragraph 19A and by proposing this Plan, Target Canada and Target Corporation seek to override the provisions of paragraph 19A. They ask the court to let them back out of their binding agreement after having received the benefit of performance by the landlords. They ask the court to let them try to compromise the Landlord Guarantee Claims against Target Corporation after promising not to do that very thing in these proceedings. They ask the court to let them eliminate a court order to which they consented without proving that they having any grounds to rescind the order. In my view, it is simply not appropriate to proceed with the Plan that requires such an alteration.

81 The CCAA process is one of building blocks. In this proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made number of orders. It is essential that court orders made during CCAA proceedings be respected. In this case, the Amended Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.

82 The parties raised the issue of whether the court has the jurisdiction to vary paragraph 19A. In view of my decision that it is not appropriate to vary the Order, it is not necessary to address the issue of jurisdiction.

83 A similar analysis can also be undertaken with respect to the Claims Procedure Order. The Claims Procedure Order establishes the framework to be followed to quantify claims. The Plan changes the basis by which landlord claims are to be quantified. Instead of following the process set forth in the Claims Procedure Order, which provides for appeal rights to the court or claims officer, the Plan provides for quantification of landlord claims by use of Landlord Formula Amount, proposed by Target Canada.

84 In my view, it is clear that this Plan, in its current form, cannot withstand the scrutiny of the test to sanction a Plan. It is, in my view, not appropriate to change the rules to suit the applicant and the Plan Sponsor, in midstream.

85 It cannot be fair and reasonable to ignore post-filing agreements concerning the CCAA process after they have been relied upon by counter-parties or to rescind consent orders of the court without grounds to do so.

86 Target Canada submits that the foregoing issues can be the subject of debate at the sanction hearing. In my view, this is not an attractive alternative. It merely postpones the inevitable result, namely the conclusion that this Plan contravenes court orders and cannot be considered to be fair and reasonable in its treatment of the Objecting Landlords. In my view, this Plan is improper (see *Crystallex*).

Disposition

87 Accordingly, the Plan is not accepted for filing and this motion is dismissed.

88 The Monitor is directed to review the implications of this Endorsement with the stakeholders within 14 days and is to schedule a case conference where various alternatives can be reviewed.

89 At this time, it is not necessary to address the issue of classification of creditors' claim, nor is it necessary to address the issue of non-disclosure of the RioCan Settlement.

Motion dismissed.

Footnotes

¹ Capitalized terms not defined herein have the same meaning as set out in the Plan.

2013 ONSC 823
Ontario Superior Court of Justice [Commercial List]

Crystallex International Corp., Re

2013 CarswellOnt 3043, 2013 ONSC 823, 228 A.C.W.S. (3d) 19

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

In the Matter of a Plan of Compromise or Arrangement of Crystallex International Corporation

Newbould J.

Heard: January 31, 2013
Judgment: February 5, 2013
Docket: CV-11-9532-00CL

Counsel: Markus Koehnen, Jeffrey Levine for Crystallex International Corporation
Jay A. Carfagnini, Fred Myers, Christopher Armstrong for Computershare Trust Company of Canada
David R. Byers, Maria Konyukhova for Monitor, Ernst & Young Inc.
R. Shayne Kukulowicz, Jane O. Dietrich, Ryan C. Jacobs for Tenor Special Situations Fund LP
John T. Porter for J.A. Reyes
Erik Penz for Forbes & Manhattan Inc., Aberdeen International Inc.

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

[XVII Practice and procedure in courts](#)

[XVII.4 Stay of proceedings](#)

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

November 2012 order established claims procedure for determining claims against debtor, officers and directors — Noteholders' claims not subject to November 2012 order — Debtor alleged noteholders mis-used confidential information received from debtor in earlier litigation contrary to implied undertaking — Debtor's position was that court could deny noteholders ability to propose plan, vote on plan, or limit recovery on notes — Debtor brought motion to extend stay of proceedings under Initial Order, and for directions, and noteholders moved for meeting of creditors to vote on their plan of arrangement and for stay of any debtor proceedings against noteholders — It was ordered that stay of proceedings be extended to May 2013 on conditions — Debtor was to deliver response to noteholders' plan by February 2013 — Parties were to attend further mediation within one month, and if there was no resolution, further appointment was to be held with judge.

Table of Authorities

Cases considered by Newbould J.:

Crystallex International Corp., Re (2012), 2012 CarswellOnt 15588, 2012 ONSC 6812 (Ont. S.C.J. [Commercial List]) — referred to

Doman Industries Ltd., Re (2003), 2003 BCSC 376, 2003 CarswellBC 538, 14 B.C.L.R. (4th) 153, 41 C.B.R. (4th) 29 (B.C. S.C. [In Chambers]) — considered

Sino-Forest Corp., Re (2012), 2012 ONCA 816, 2012 CarswellOnt 14701 (Ont. C.A.) — considered

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C.

1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

Statutes considered:

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

Generally — referred to

MOTIONS by parties for various relief.

Newbould J.:

1 Crystallex moves to extend the stay of proceedings originally granted in the Initial Order and for directions on how to proceed in this CCAA application. The Noteholders move for an order directing a meeting of creditors to vote on a plan of arrangement delivered by the Noteholders with their motion record and staying Crystallex from commencing or continuing any proceedings against the Noteholders by way of claim, defence or set off.

2 On November 30, 2012 [2012 CarswellOnt 15588 (Ont. S.C.J. [Commercial List])] I approved a claims procedure order to establish a process for the identification and determination of claims against Crystallex and its current and former officers and directors except for the debt claims of the Noteholders which were to be dealt with in a subsequent order. At that time the issue regarding the debt claims of the Noteholders was not made apparent. It now appears from the material filed that Crystallex asserts that the Noteholders may have mis-used confidential information received from Crystallex in earlier litigation contrary to the implied undertaking rule and that as a penalty the Court has the power to deny the Noteholders the ability to propose a plan, vote on a plan and/or limit Noteholder recovery to the principal amount they paid for their Notes.

3 Thus the directions that Crystallex seeks on its motion deal with the procedure for the Noteholders proving their claims and the resolution of the alleged improper use of information by the Noteholders.

4 Crystallex says that it would like to complete a plan of arrangement and that it has tried without success to negotiate a plan with the Noteholders. It says that the next logical step in the process would be to have creditors prove their claims but that the Noteholders have taken steps in the general proof of claim process to make that extremely expensive. They have filed proofs of claim against Crystallex and 25 present and former directors and officers asserting a number of causes of action and have reserved their rights to discovery for all of those claims. In accordance with the claims procedure order of November 30, 2012, the proof of claim against Crystallex does not include a claim on the debt owing under the Notes.

5 In the proofs of claim by the Ad Hoc Committee of Noteholders of Crystallex against Crystallex and against 12 directors and 13 officers of Crystallex, the claims filed are for unliquidated claims that are described in the proofs of claim as:

all Claims it may hold... Including, without limitation, any Claims it may hold for negligence, oppression, defamation, unlawful interference with economic interest, intimidation, abuse of process, derivative actions, malicious prosecution, breach of all duties owed by Crystallex to the Creditor by statute, by agreement, at law or in equity and any Claims arising as a result of any action or omission of Crystallex (but excluding, for the avoidance of doubt, the Noteholder Claim, which is not subject to the Claims Procedure Order), all plus interest and costs on a full indemnity basis.

6 It became apparent during argument on the motions that these claims filed by the Ad Hoc Committee of Noteholders were made as a matter of retaliatory tactics to the claim of Crystallex.

7 There have been without prejudice negotiations between Crystallex and the Noteholders for several months, some taking place in mediations with Justice Campbell. Each side has plenty of criticism of the other and blames the other side for the lack of progress in the negotiations. If there is a resolution between Crystallex and the Noteholders, the Crystallex claim of mis-use of information and the damage claims by the Ad Hoc Committee of Noteholders will go away. It is unfortunate that these competing claims have been made at this late date in the negotiations. They are not helpful to a resolution. All sides agree that

a resolution between Crystallex and the Noteholders is critical so that the main business of Crystallex will be to pursue the arbitration against Venezuela and the expense of litigating against each other will stop.

8 The Noteholders say that the best way to create a framework is for a meeting of creditors to be called to vote on their plan of arrangement. They ask that the meeting be held on March 6, 2013 and that if the plan is approved the sanction hearing be scheduled for March 19, 2013. That process, it is said, will put a tight timeline on Crystallex and the Noteholders which will facilitate a settlement. In my view, ordering a meeting of creditors to vote on the Noteholders' plan of arrangement is not appropriate at this time, for a number of reasons.

9 First, the plan contains a number of provisions that are contrary to the terms of the DIP facility with Tenor and thus the plan could not be implemented in its present form. I am in agreement with Tysoe J. (as he then was) in *Doman Industries Ltd., Re* (2003), 41 C.B.R. (4th) 29 (B.C. S.C. [In Chambers]) that if the court does not have jurisdiction to approve a plan, it would be inappropriate to authorize the calling of a meeting of creditors to consider the plan. Mr. Myers says that the Noteholders are now negotiating with Tenor to see if the issues can be resolved, but in my view the process proposed by the Noteholders puts the cart before the horse. The plan appears to have been quickly drafted without due regard to all applicable circumstances.

10 Second, the Noteholders sprung their plan on Crystallex and the other stakeholders only a few days before the motion by including it in their motion record. It was not preceded by a term sheet or discussed with Crystallex and apparently its contents are entirely new to Crystallex. This is hardly a preferred way to have done it. The plan is complex and Crystallex has given it to its financial expert to review. This is not a situation in which the creditors can say that all avenues for a resolution with the debtor have been exhausted and that they require their plan to be voted on in the absence of a plan by the debtor being put forward.

11 Third, there are large issues outstanding in the present state of play that should be dealt with if a vote is to take place. The claims against Crystallex and the officers and directors now made by the Noteholders would need to be dealt with. The officers and directors would be expected to make indemnity claims against Crystallex. The issue raised by Crystallex regarding the alleged mis-use of information and the effect on the right of the Noteholders to vote would also need to be dealt with.

12 The Noteholders say that all of this can be dealt with at the stage of the court application for sanction approval. They point to *Sino-Forest Corp., Re*, 2012 ONCA 816 (Ont. C.A.) in which a number of issues, including the validity and quantum of any claim, had not been determined and yet an order was made requiring the holding of a meeting to vote on a plan. However, that was an unusual case and the order was made on the consent of all parties. That is not the situation here at all.

13 In my view the motion by the Noteholders to now have a meeting to vote on its plan of arrangement is tactical and raised to get a perceived leg up in negotiations. It is dismissed, without prejudice to the Noteholders to later bring it back on if so advised. I decline to deal with the issue raised by Crystallex as to whether a plan would require the consent of Crystallex.

14 I am also of the view that the request of Crystallex to require the Noteholders to disclose records should not be granted at this time. The parties should concentrate on negotiating if at all possible a resolution leading to a consensual plan. There should be a down tooling on both sides of litigation threats in order to facilitate further negotiations.

15 I have of course not been a party to any of the negotiations between Crystallex and the Noteholders, and thus do not know what has been discussed. I do not wish, however, to leave the impression that I view the fault of unsuccessful negotiations to lie at the feet of only one side. From what I can discern, it appears to me that both sides bear some blame.

16 The Monitor has been involved in the negotiations of Crystallex and the Noteholders and is of the view that their positions are not so far apart as to be insurmountable and that the entrenchment of the parties may be softening. There is evidence that the parties are still willing to negotiate.

17 Mr. Near, the designated director of Crystallex responsible for conducting negotiations with the Noteholders, views the new plan by the Noteholders as an opportunity for a fresh start. Mr. Koehnen said that Crystallex intends to deliver a response to the Noteholders within three weeks from the date of the hearing of this motion. Mr. Myers in his letter to Mr. Kent of January

24, 2013 referred to the possibility of a consensual plan and in court stated that the parties should be put in a room under time pressure in order to negotiate. I agree with that sentiment so long as the playing field is as level as may be possible.

18 An extension of the stay of proceedings is required. At the conclusion of the hearing I reserved my decision but ordered that the stay be continued pending the release of this decision.

19 Crystallex in its factum takes the position that an extended stay while Crystallex pursues an arbitration award or settlement would be the least costly as it would obviate the need to litigate the claims filed by the Noteholders and would preserve the rights of the Noteholders to pursue their claim when they knew the results of the arbitration. Mr. Koehnen did not push this during argument. Mr. Reyes, a shareholder, also takes this position and relies on a statement of Deschamps J. in *Ted Leroy Trucking Ltd., Re*, [2010] 3 S.C.R. 379 (S.C.C.) at para. 14 that the best outcome of a CCAA proceeding is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the CCAA process terminates without reorganization being needed.

20 In my view, without deciding whether such an order is legally possible, to make such an order now would not be helpful to the process. This should not, however, be viewed as any indication that serious negotiations on the part of both parties are not expected to occur in a timely fashion.

21 The stay of proceedings was last ordered in December to be extended on consent to January 31, 2013. The motion that day had requested an extension to May 17, 2013 and the cash flow prepared by Crystallex and contained in the Monitor's report indicated sufficient cash to carry on to at least May 31, 2013. An updated cash flow has been prepared for the period up to May 31, 2013 which Crystallex and the Monitor believe remains appropriate.

22 In my view, it is appropriate to extend the stay of proceedings to May 17, 2013 on the following conditions:

(a) Crystallex is to deliver its response to the Noteholders's plan no later than February 21, 2013.

(b) The parties are directed to attend a further mediation session with Campbell J., to be held subject to Campbell J.'s schedule, within one month from today's date.

(c) If there is no resolution of all issues, a 9:30 appointment is to be held with me to discuss further steps that need be taken. No motion by either side is to be brought without my approval.

23 Order to go in accordance with these reasons.

Order accordingly.

2015 ONCA 681
Ontario Court of Appeal

Nortel Networks Corp., Re

2015 CarswellOnt 15461, 2015 ONCA 681, 127 O.R. (3d) 641, 259
A.C.W.S. (3d) 15, 32 C.B.R. (6th) 21, 340 O.A.C. 234, 391 D.L.R. (4th) 283

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

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

Janet Simmons, E.E. Gillese, Paul Rouleau JJ.A.

Heard: April 29, 2015
Judgment: October 13, 2015
Docket: CA C59703

Proceedings: affirming *Nortel Networks Corp., Re* (2014), 121 O.R. (3d) 228, 2014 ONSC 4777, 2014 CarswellOnt 17193
(Ont. S.C.J. [Commercial List])

Counsel: Richard B. Swan, S. Richard Orzy, Gavin H. Finlayson, for Appellant, Ad Hoc Group of Bondholders
Andrew Kent, Brett Harrison, for Respondent, Bank of New York Mellon
Edmond Lamek, for Respondent, Law Debenture Trust Company of New York
Benjamin Zarnett, Graham D. Smith, for Monitor and Respondent, Canadian Debtors
Kenneth D. Kraft, John J. Salmas, for Respondent, Wilmington Trust, National Association
Kenneth T. Rosenberg, Ari N. Kaplan, for Respondent, Canadian Creditors' Committee
Tracy Wynne, for Joint Administrators (EMEA)
Scott A. Bomhof, Adam M. Slavens, for Nortel Networks Inc./U.S. Debtors

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.4 Appeals](#)

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.5 Miscellaneous](#)

Headnote

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

Groups of companies were subject to proceedings under Companies' Creditors Arrangement Act (CCAA) — Appellants were ad hoc group of bondholders holding crossover bonds that were issued or guaranteed by Canadian entities of companies and they provided for continuing accrual of interest until payment — Holders of crossover bonds filed claims for principal and pre-filing interest in amount of US\$4.092 billion and they also claimed they were entitled to post-filing interest under terms of crossover bonds — In context of joint allocation trial, CCAA judge found that the common law "interest stops rule" applied in context of CCAA and holders of crossover bond claims were not legally entitled to claim or receive any amounts under relevant indentures above and beyond outstanding principal debt and pre-petition interest — Bondholders' appealed — Appeal dismissed — Main

purposes of interest stops rule were fairness to creditors and achieving orderly administration of insolvent debtor's estate — Interest stops rule had been consistently applied in bankruptcy and winding-up proceedings — While there were differences between CCAA and other insolvency schemes, same principles supporting conclusion that interest stops rule was necessary in bankruptcy and insolvency proceedings, namely, fair treatment of creditors and orderly administration of insolvent debtor's estate, applied with equal force to CCAA proceedings — As interest stops rule applied upon bankruptcy under Bankruptcy and Insolvency Act, it should also apply in CCAA proceedings unless rule was ousted by CCAA, which it was not — If interest stops rule did not apply in CCAA proceedings then creditors who did not have contractual right to post-filing interest would have skewed incentives against reorganization under CCAA — CCAA created conditions for preserving status quo and if post filing interest was available to only one set of creditors then status quo was not preserved — If interest stops rule did not apply to CCAA proceedings then key objective of CCAA, to facilitate restructuring of corporations through flexibility and creativity, might be undermined due to uneven entitlement to interest that might be created — Principle of fairness supported application of interest stops rule — Interest stops rule was not contrary to established CCAA practice and it did not prevent CCAA plan from providing for post-filing interest — There were rational reasons for adopting interest stops rule in CCAA context.

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

Groups of companies were subject to proceedings under Companies' Creditors Arrangement Act (CCAA) — Appellants were ad hoc group of bondholders holding crossover bonds that were issued or guaranteed by Canadian entities of companies and they provided for continuing accrual of interest until payment — Holders of crossover bonds filed claims for principal and pre-filing interest in amount of US\$4.092 billion and they also claimed they were entitled to post-filing interest under terms of crossover bonds — In context of joint allocation trial, CCAA judge found that the common law "interest stops rule" applied in context of CCAA and holders of crossover bond claims were not legally entitled to claim or receive any amounts under relevant indentures above and beyond outstanding principal debt and pre-petition interest — Bondholders' appealed — Appeal dismissed — Main purposes of interest stops rule were fairness to creditors and achieving orderly administration of insolvent debtor's estate — Interest stops rule had been consistently applied in bankruptcy and winding-up proceedings — While there were differences between CCAA and other insolvency schemes, same principles supporting conclusion that interest stops rule was necessary in bankruptcy and insolvency proceedings, namely, fair treatment of creditors and orderly administration of insolvent debtor's estate, applied with equal force to CCAA proceedings — As interest stops rule applied upon bankruptcy under Bankruptcy and Insolvency Act, it should also apply in CCAA proceedings unless rule was ousted by CCAA, which it was not — If interest stops rule did not apply in CCAA proceedings then creditors who did not have contractual right to post-filing interest would have skewed incentives against reorganization under CCAA — CCAA created conditions for preserving status quo and if post filing interest was available to only one set of creditors then status quo was not preserved — If interest stops rule did not apply to CCAA proceedings then key objective of CCAA, to facilitate restructuring of corporations through flexibility and creativity, might be undermined due to uneven entitlement to interest that might be created — Principle of fairness supported application of interest stops rule — Interest stops rule was not contrary to established CCAA practice and it did not prevent CCAA plan from providing for post-filing interest — There were rational reasons for adopting interest stops rule in CCAA context.

The group of companies were subject to proceedings under the Companies' Creditors Arrangement Act (CCAA). The appellants were an ad hoc group of bondholders holding crossover bonds, which were unsecured bonds that were issued or guaranteed by the Canadian entities of the companies. The indentures provided for the continuing accrual of interest until payment, at contractually specified interest rates, as well as other post-filing payment obligations. Other claimants, including pensioners and former employees, did not have a provision for interest on amounts owing. The holders of the crossover bonds filed claims for principal and pre-filing interest in the amount of US\$4.092 billion. They also claimed they were entitled to post-filing interest and related claims under the terms of the crossover bonds of approximately US\$1.6 billion.

In the context of a joint allocation trial, the CCAA judge found that the common law "interest stops rule" applied in the context of the CCAA. The CCAA judge found that the holders of the crossover bond claims were not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest, namely, above and beyond US\$4.092 billion. The crossover bondholders appealed.

Held: The appeal was dismissed.

Per Rouleau J.A. (Simmons and Gillese JJ.A. concurring): The *pari passu* principle provided that the assets of an insolvent debtor were to be distributed amongst classes of creditors rateably and equally as those assets were found at the date of insolvency. The *pari passu* principle was the foremost principle in insolvency law. The *pari passu* principle was grounded in the need to

treat all creditors fairly and to ensure an orderly distribution of assets. A necessary corollary of the *pari passu* principle was the interest stops rule. The interest stops rule was a fundamental tenant of insolvency law. Absent the interest stops rule, the fair and orderly distribution sought by the *pari passu* principle could not be achieved. The main purposes behind the interest stops rule were fairness to creditors and to achieve the orderly administration of an insolvent debtor's estate. The interest stops rule had been consistently applied in bankruptcy and winding-up proceedings.

There were differences between the CCAA and other insolvency schemes. However, the same principles supporting the conclusion that the interest stops rule was necessary in bankruptcy and insolvency proceedings, namely, the fair treatment of creditors and the orderly administration of an insolvent debtor's estate, applied with equal force to CCAA proceedings. The CCAA was an integrated insolvency regime, which included the Bankruptcy and Insolvency Act (Act). In keeping with the idea of harmonization, as the interest stops rule applied upon bankruptcy under the Act, it should also apply in CCAA proceedings unless the rule was ousted by the CCAA, which it was not. If the interest stops rule did not apply in CCAA proceedings then the creditors who did not have a contractual right to post-filing interest would have skewed incentives against reorganization under the CCAA. Such creditors would have an incentive to proceed under the Act or the Winding-up and Restructuring Act where the interest stops rule applied to prevent creditors who had a contractual right to interest from improving their proportionate claim against the debtor at the expense of other creditors. The CCAA created conditions for preserving the status quo and if post filing interest was available to only one set of creditors then the status quo was not preserved.

If the interest stops rule did not to apply CCAA proceedings then the key objective of the CCAA, to facilitate the restructuring of corporations through flexibility and creativity, might be undermined due to the uneven entitlement to interest that might be created. Creditors who had an entitlement to post-filing interest might be less motivated to compromise. The ability to find a compromise acceptable to all creditors would be more challenging if the amount of a creditor's legal entitlement was constantly shifting as post-interest accrued. The principle of fairness supported the application of the interest stops rule. The interest stops rule was not contrary to established CCAA practice and it did not prevent a CCAA plan from providing for post-filing interest. There were rational reasons for adopting the interest stops rule in the CCAA context.

The interest stops rule did not preclude the payment of post-filing interest under a plan of compromise or arrangement. Nothing in the CCAA judge's reasons prevented the bondholders from seeking and obtaining post-filing interest through a negotiated plan.

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Cases considered by *Paul Rouleau J.A.*:

Canada (Attorney General) v. Confederation Life Insurance Co. (2001), 2001 CarswellOnt 2299, [2001] O.T.C. 486 (Ont. S.C.J. [Commercial List]) — considered

Canada 3000 Inc., Re (2002), 2002 CarswellOnt 1598, 33 C.B.R. (4th) 184, 5 P.P.S.A.C. (3d) 272, [2002] O.T.C. 310 (Ont. S.C.J.) — followed

Canada 3000 Inc., Re (2004), 2004 CarswellOnt 149, 235 D.L.R. (4th) 618, 183 O.A.C. 201, (sub nom. *Greater Toronto Airports Authority v. International Lease Finance Corp.*) 69 O.R. (3d) 1, 3 C.B.R. (5th) 207 (Ont. C.A.) — referred to
Humber Ironworks & Shipbuilding Co., Re (1869), 4 Ch. App. 643 (Eng. Ch. Div.) — considered

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers*) [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — followed

NAV Canada c. Wilmington Trust Co. (2006), 2006 SCC 24, 2006 CarswellQue 4890, 2006 CarswellQue 4891, 20 C.B.R. (5th) 1, (sub nom. *Canada 3000 Inc., (Bankrupt), Re*) 349 N.R. 1, (sub nom. *Greater Toronto Airports Authority v. International Lease Finance Corp.*) 80 O.R. (3d) 558 (note), (sub nom. *Canada 3000 Inc. (Bankrupt), Re*) 212 O.A.C. 338, (sub nom. *Canada 3000 Inc., Re*) 269 D.L.R. (4th) 79, (sub nom. *Canada 3000 Inc., Re*) [2006] 1 S.C.R. 865, 10 P.P.S.A.C. (3d) 66 (S.C.C.) — followed

Nortel Networks Corp., Re (2015), 2015 ONSC 2987, 2015 CarswellOnt 7072, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2015), 2015 ONSC 2987, 2015 CarswellOnt 7072, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) — referred to

R. v. Henry (2005), 2005 SCC 76, 2005 CarswellBC 2972, 2005 CarswellBC 2973, 33 C.R. (6th) 215, 202 C.C.C. (3d) 449, 260 D.L.R. (4th) 411, 49 B.C.L.R. (4th) 1, 219 B.C.A.C. 1, 361 W.A.C. 1, 376 A.R. 1, 360 W.A.C. 1, 136 C.R.R. (2d) 121, [2006] 4 W.W.R. 605, (sub nom. *R. c. Henry*) [2005] 3 S.C.R. 609, 342 N.R. 259 (S.C.C.) — considered
Stelco Inc., Re (2006), 2006 CarswellOnt 4857, 24 C.B.R. (5th) 59, 20 B.L.R. (4th) 286 (Ont. S.C.J. [Commercial List]) — followed
Stelco Inc., Re (2007), 2007 ONCA 483, 2007 CarswellOnt 4108, 32 B.L.R. (4th) 77, 35 C.B.R. (5th) 174, 226 O.A.C. 72 (Ont. C.A.) — 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.) — followed

Statutes considered:

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Generally — referred to

Airport Transfer (Miscellaneous Matters) Act, S.C. 1992, c. 5

Generally — referred to

s. 9 — considered

s. 9(1) — considered

Bankruptcy Code, 11 U.S.C.

Chapter 11 — referred to

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

Generally — referred to

s. 121 — considered

s. 122 — considered

Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20

Generally — referred to

s. 55 — considered

s. 56 — considered

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

Generally — referred to

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

APPEAL by bondholders from judgment reported at *Nortel Networks Corp., Re* (2014), 2014 ONSC 4777, 2014 CarswellOnt 17193, 121 O.R. (3d) 228 (Ont. S.C.J. [Commercial List]), finding interest stops rule applied in *Companies' Creditors Arrangement Act* proceedings and that bondholders were not legally entitled to claim or receive any amounts beyond outstanding principal debt and pre-petition interest.

Paul Rouleau J.A.:

A. Overview

1 This appeal represents another chapter in the Nortel proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), which has been on-going since January 2009. A parallel proceeding under Chapter 11 of the United States *Bankruptcy Code* has also been on-going in Delaware since that time.

2 The *Ad Hoc* Group of Bondholders (the "appellant") brings this appeal with leave. The group represents substantial holders of "crossover bonds", which are unsecured bonds either issued or guaranteed by certain of the Canadian Nortel entities. The relevant indentures provide for the continuing accrual of interest until payment, at contractually specified interest rates, as well as other post-filing payment obligations, such as make-whole provisions and trustee fees.

3 In contrast, the claims of other claimants, such as Nortel pensioners and former employees, do not have a provision for interest on amounts owing to them.

4 Holders of the crossover bonds have filed claims for principal and pre-filing interest in the amount of US\$4.092 billion against each of the Canadian and U.S. Nortel estates. They also claim they are entitled to post-filing interest and related claims under the terms of the crossover bonds. As of December 31, 2013, the amount of this claim was approximately US\$1.6 billion. The total of these two amounts represents a significant portion of the proceeds generated from the worldwide sale of Nortel's business lines and other Nortel assets, totalling approximately \$7.3 billion. This latter amount is apparently not growing at any appreciable rate because of the conservative nature of the investments made with it pending the outcome of the insolvency proceedings.

5 In the context of a joint allocation trial, the *CCAA* judge directed that two issues be argued:

1. whether the holders of the crossover bond claims are legally entitled ... to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US\$4.092 billion); and
2. if it is determined that the crossover bondholders are so entitled, what additional amounts are such holders entitled to so claim and receive.

6 The *CCAA* judge answered the first question in the negative and so he did not need to answer the second question. In reaching that conclusion, he accepted that the common law "interest stops rule", which has been held to be a fundamental tenet of insolvency law, applies in the *CCAA* context. He disagreed with the appellant's submission that the Supreme Court of Canada's decision in *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24, [2006] 1 S.C.R. 865 (S.C.C.) [hereinafter *Canada 3000*], and this court's subsequent decision in *Stelco Inc., Re*, 2007 ONCA 483, 35 C.B.R. (5th) 174 (Ont. C.A.), are binding authority that the interest stops rule does not apply in the *CCAA* context.

7 On appeal, the appellant raises two related issues — whether the *CCAA* judge erred in concluding that an interest stops rule applies in *CCAA* proceedings and, if not, whether he erred in concluding that the holders of Crossover Bond Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest.

8 I would dismiss the appeal. As I will explain, there are sound legal and policy reasons for applying the interest stops rule in the *CCAA* context, and as I read *Stelco Inc., Re* and *Canada 3000*, they do not preclude such a result. Nor do I see a basis for varying the order that he made.

B. Background

9 In the *CCAA* court's initial order of January 14, 2009, the Canadian Debtors¹ were directed, subject to certain exceptions, to make no payments of principal or interest on account of amounts owing by the Canadian Debtors to any of their creditors as of the filing date, unless approved by the Monitor. Further, all proceedings and enforcement processes, and all rights and

remedies of any person against the Canadian Debtors were stayed absent consent of the Canadian Debtors and the Monitor, or leave of the court.

10 In accordance with a claims procedure order dated July 30, 2009, claims against the Canadian Debtors were required to be filed by a claims bar date. Under a subsequent claims resolution order dated September 16, 2010, a disputed claim could be brought before the *CCAA* court for final determination.

11 As previously noted, holders of the crossover bonds filed proofs of claim that included not only the principal amount of the debt and interest accrued to the date of insolvency but also contractual claims for interest and other amounts post-filing.

12 In May 2014, a joint allocation trial, conducted by way of video-link by the *CCAA* judge in Ontario and Judge Gross in Delaware, commenced on the issue of the allocation of the sale proceeds among the debtor estates, including the Canadian and U.S. estates. In his 2015 decision, the *CCAA* judge, citing the "fundamental tenet of insolvency law that all debts shall be paid *pari passu*" and that "all unsecured creditors receive equal treatment" held that the \$7.3 billion in funds generated from the Nortel liquidation should be allocated on a *pro rata* basis as among the estates: 2015 ONSC 2987, 23 C.B.R. (6th) 249 (Ont. S.C.J. [Commercial List]), at para. 209. He ordered, at para. 258, that the funds be allocated among the debtor estates in accordance with a number of principles, including the principle that each debtor estate "is to be allocated that percentage of the [liquidation proceeds] that the total allowed claims against that Estate bear to the total allowed claims against all Debtor Estates." A number of parties have sought leave to appeal that decision.

13 It was on June 24, 2014, while the joint allocation trial was proceeding, that the *CCAA* judge directed that the two issues set out above be decided.

C. Decision Below

14 The *CCAA* judge began his analysis with a review of cases applying the interest stops rule in the bankruptcy and winding-up context. He noted the relationship between the interest stops rule and the *pari passu* principle, which he described as "a fundamental tenet of insolvency law" that requires equal treatment of unsecured creditors. He found there was "no reason to not apply the [common law] interest stops rule to a *CCAA* proceeding because the *CCAA* does not expressly provide for its application." The issue was "whether the rule should apply to this *CCAA* proceeding."

15 He went on to conclude that "[t]here is no controlling authority in Canada in a case such as this in which there is a contested claim being made by bondholders for post-filing interest against an insolvent estate under the *CCAA*, let alone under a liquidating *CCAA* process, or in which the other creditors are mainly pensioners with no contractual right to post-filing interest." In reaching this conclusion, he distinguished *Stelco* and *Canada 3000* and found that the application of the interest stops rule was supported by the more recent decisions in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter *Century Services*], and *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.).

16 The *CCAA* judge thus ordered that "holders of Crossover Bond Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US\$4.092 billion)."

D. Issues on Appeal

17 The appellant raises two related issues:

1. Did the *CCAA* judge err in concluding that an interest stops rule applies in *CCAA* proceedings?
2. If the *CCAA* judge did not err in concluding that an interest stops rule applies in *CCAA* proceedings, did he err in holding that holders of Crossover Bonds Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest?

E. Analysis

(1) Did the CCAA judge err in concluding that an interest stops rule applies in CCAA proceedings?

18 The appellant, supported by the Bank of New York Mellon and the Law Debenture Trust Company of New York as indenture trustees, submits that the CCAA judge erred in concluding that the interest stops rule applies.

19 First, the appellant submits he applied inapplicable case law and misinterpreted case law in concluding that the rule did and should apply. Among other things, the appellant criticizes the CCAA judge's application of the Supreme Court of Canada's decisions in *Century Services* and *Indalex*, which deal with the inter-play between the CCAA and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA").

20 The appellant also submits that the application of the interest stops rule in the CCAA context is inconsistent with the CCAA and would have negative practical consequences.

21 Finally, the appellant submits that *Canada 3000* and *Stelco* are binding authority that preclude the application of the interest stops rule in the CCAA context and that the CCAA judge violated the principle of *stare decisis* in refusing to follow them.

22 I will deal with these submissions in turn, beginning with a discussion of the interest stops rule and the related *pari passu* principle.

(a) Should the interest stops rule apply in CCAA proceedings?**(i) Origin and scope of the interest stops rule**

23 It is well settled that the *pari passu* principle applies in insolvency proceedings. This principle, to the effect that "the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of insolvency" is said to be one of the "governing principles of insolvency law" in Canada: *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.T.C. 486 (Ont. S.C.J. [Commercial List]), at para. 20, *per* Blair J.² In fact, the *pari passu* principle has been said to be the foremost principle in the law of insolvency not just in Canada but around the world: Rizwaan J. Mokhal "Priority as Pathology: The *Pari Passu* Myth" (2001) 60:3 Cambridge L.J. 581, at p. 581. According to an article in the Cambridge Law Journal, "[c]ommentators claim to have found [the *pari passu*] principle entrenched in jurisdictions far removed ... in geography and time": Mokhal, at pp. 581-582.

24 The *pari passu* principle is rooted in the need to treat all creditors fairly and to ensure an orderly distribution of assets.

25 As explained in *Humber Ironworks & Shipbuilding Co., Re* (1869), 4 Ch. App. 643 (Eng. Ch. Div.), nearly 150 years ago, a necessary corollary of the *pari passu* principle is the interest stops rule. Absent the interest stops rule, the fairness and orderly distribution sought by the *pari passu* principle could not be achieved. Selwyn L.J. explained the rationale for the interest stops rule, at pp. 645-646:

In the present case we have to consider what are the positions of the creditors of the company, when, as here, there are some creditors who have a right to receive interest, and others having debts not bearing interest.

.....

It is very difficult to conceive a case in which the assets of a company could be ... immediately realized and divided; but suppose they had a simple account at a bank, which could be paid the next day, that would be the course of proceeding. Justice, I think, requires that that course of proceeding should be followed, and that no person should be prejudiced by the accidental delay which, in consequence of the necessary forms and proceedings of the Court, actually takes place in realizing the assets; but that, in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding-up. I, therefore, think that nothing should be allowed for interest after that date.

26 Giffard L.J. similarly stated, at p. 647-648:

That rule ... works with equality and fairness between the parties; and if we are to consider convenience, it is quite clear that, where an estate is insolvent, convenience is in favour of stopping all the computations at the date of the winding-up.

.....

I may add another reason, that I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

27 Thus, the primary purpose behind the common law interest stops rule is fairness to creditors. Another purpose is to achieve the orderly administration of an insolvent debtor's estate.

28 The common law interest stops rule has been consistently applied in proceedings under bankruptcy and winding-up legislation. In fact, as explained by Blair J. in *Confederation Life Insurance Co.* at paras. 22-23, the rule has been applied even when the legislation might be read to the contrary:

This common law principle has been applied consistently in Canadian bankruptcy and winding-up proceedings. This is so notwithstanding the language of subsection 71(1) of the *Winding-Up Act* and section 121 of the *BIA*, which might be read to the contrary, in my view.

.....

Yet, the "interest stops" principle has always applied to the payment of post-insolvency interest, and the provisions of subsection 71(1) have never been interpreted to trump the common law insolvency "interest stops rule".

29 I will now turn to the question of whether the interest stops rule should be applied in the *CCAA* context.

(ii) Should the interest stops rule apply in *CCAA* proceedings?

30 The respondents³ maintain that one would expect the interest stops rule to apply in *CCAA* proceedings given that *CCAA* proceedings are insolvency proceedings to which the common law *pari passu* principle applies. Consistent with the *pari passu* principle and the related interest stops rule, creditors in *CCAA* proceedings must surely expect to be treated fairly and not see creditors with interest entitlements have their claims grow, post-insolvency, disproportionately to those with no, or lesser, interest entitlements. In the respondents' submission, the same reasoning used by courts to conclude that the interest stops rule applies in winding-up and bankruptcy proceedings leads to the conclusion that the interest stops rule applies in *CCAA* proceedings.

31 The appellant, on the other hand, submits that *CCAA* proceedings are different from other insolvency proceedings in that they do not immediately or permanently alter the rights of creditors. The filing is intended to give the debtor breathing space so that a plan of compromise or arrangement can be negotiated with creditors and the business can continue. The objective of a *CCAA* proceeding is a consensual, statutory compromise in the form of a *CCAA* plan. Such a *CCAA* plan can provide for any kind of distribution, provided it is approved by the requisite majority of creditors and the court.

32 In the appellant's submission, until a plan is negotiated or the proceeding is converted to bankruptcy or winding-up, the rights of creditors are not altered; rather, their rights to execute on them are simply stayed. In the appellant's view, therefore, unless and until this sought-after compromise of rights is negotiated, only the exercise of the rights is stayed. The *CCAA* filing does not affect the right to accrue interest; it only stays the collection of that interest.

33 The appellant further argues that the *CCAA* judge's decision is contrary to the established *CCAA* practice and the reasonable expectations of the parties in this proceeding. In particular, the appellant notes that a *CCAA* plan may, and often does, provide for the recovery of post-filing interest. The appellant also submits that the application of the interest stops rule would allow debtors to obtain a permanent interest holiday simply by filing for *CCAA* protection, even if the filing were later withdrawn, causing a permanent prejudice to the creditors not contemplated by the *CCAA*. And, the appellant submits that an interest stops rule would create a disincentive for creditors to participate in *CCAA* proceedings since they would not be compensated for delays under the *CCAA* even if there were ultimately assets available to do so

34 I do not accept the appellant's submissions on this point. Admittedly, there are differences between the *CCAA* and other insolvency schemes, including that the *CCAA* does not provide for a fixed scheme of distribution. Further, assuming a plan of compromise or arrangement under the *CCAA* is negotiated it may or may not result in a distribution to creditors. Nevertheless, in my view, the same principles that underpin the conclusion that the interest stops rule is necessary in bankruptcy and winding-up proceedings — namely, the fair treatment of creditors and the orderly administration of an insolvent debtor's estate - apply with equal force to *CCAA* proceedings. I say so for several reasons.

35 First, the *CCAA* is part of an integrated insolvency regime, which also includes the *BIA*. The Supreme Court of Canada in *Century Services* considered the *CCAA* regime and opined, at para. 24, that "[w]ith parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation". The court went on to explain, at para. 78, that the *CCAA* and *BIA* are related and "no 'gap' exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy".

36 Consistent with the notion of harmonization, because the common law interest stops rule applies upon bankruptcy under the *BIA*, it should follow that the common law rule also applies in a *CCAA* proceeding unless, of course, the rule is ousted by the *CCAA*. The *CCAA* does not address entitlement to claim post-filing interest let alone oust the common law rule with clear wording.

37 Second, if the interest stops rule were not to apply in *CCAA* proceedings, the creditors who do not have a contractual right to post-filing interest would, as the Supreme Court explained in *Century Services* at para. 47, have "skewed incentives against reorganizing under the *CCAA*" and this would "only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert." This concern over skewed incentives was confirmed in *Indalex* where the Supreme Court held, at para. 51, that "[i]n order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those they would receive under the *BIA*.

38 Without an interest stops rule under the *CCAA*, the creditors with no claim to post-filing interest would have an incentive to proceed under the *BIA* or the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, where the interest stops rule operates to prevent creditors, such as the appellant, who have a contractual right to interest from improving their proportionate claim against the debtor at the expense of other creditors.

39 Third, as recognized by the Supreme Court in *Century Services* at para. 77, the "*CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all". This is achieved through grouping all claims within a single proceeding and staying all actions against the debtor, thus putting creditors on an equal footing: *Century Services*, para. 22.

40 As submitted by the Canadian Creditors' Committee, if post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights to sue the debtor and obtaining a judgment that bears interest, the *status quo* has not been preserved.

41 Fourth, if the interest stops rule were not to apply in *CCAA* proceedings, the key objective of that statute — to facilitate the restructuring of corporations through flexibility and creativity — may be undermined. This is because of the asymmetrical entitlement to interest that would be created. Creditors with an entitlement to post-filing interest may be less motivated to compromise than those creditors without such an entitlement. Using the case under appeal as an example, if post-filing interest is allowed to accrue, the delay and failure to reach a compromise will see the appellant's proportionate claim against the assets of the debtors rise very significantly at the expense of other creditors. One could well understand that if the urgency for reaching a compromise and the incentive to compromise are significantly lower for one group of unsecured creditors than for the balance of the unsecured creditors, restructuring will be more difficult to achieve and the ability to reach creative solutions will be lessened.

42 Furthermore, if the amount of an unsecured creditor's legal entitlement is constantly shifting as post-filing interest accrues, the ability to find a compromise that is acceptable to all creditors at any one point in time will pose a greater challenge than if the entitlements are fixed as of the date of filing.

43 Fifth, the principle of fairness supports the application of the interest stops rule. Insolvency proceedings are intended to be fair processes for liquidating or restructuring insolvent corporations. How, one may ask, is it fair if the appellant, an unsecured creditor, sees its claim against the assets of the debtor balloon from \$4.092 billion to \$5.692 billion (as of December 31, 2013) because of contractual provisions when the claims of unsecured creditors, who have no such contractual provisions and who have been prevented for almost seven years by the *CCAA* stay from converting their claims into court judgments that would bear interest, have seen no increase at all? Delays in liquidating the Nortel assets have helped the Monitor achieve the very significant recoveries made (\$7.3 billion) and, in fairness, this achievement should be for the benefit of all creditors.

44 Finally, I wish to respond to the appellant's concerns.

45 As to past practice and the reasonable expectations of the parties, I do not view the existence of an interest stops rule as being contrary to established *CCAA* practice or as preventing a *CCAA* plan from providing for post-filing interest. Parties may negotiate for a plan that provides for payments of more or less than a creditor's legal entitlement in lieu of the foregone interest. Thus, I do not accept the appellant's submission that there would be a disincentive to participate in *CCAA* proceedings, which is based on the premise that post-filing interest may not be recovered under a *CCAA* plan.

46 The appellant also raised the concern that a debtor company could obtain a permanent interest holiday, resulting in unfairness. The appellant says that if there are proceeds over and above the amounts needed to satisfy the pre-filing claims of creditors, those proceeds would be for the benefit of the shareholders of the debtor. This follows from the fact that the *CCAA* contains no provision for the payment of a "surplus" to creditors and the interest stops rule would prevent the unsecured creditors from recovering any post-filing interest. The debtor could therefore resort to the *CCAA* to stop interest from accruing and operate his business interest free.

47 This hypothetical raises the same concern about the loss of post-filing interest but in a somewhat different way. The concern is that a debtor may seek *CCAA* protection to avoid the obligation to pay interest.

48 There may well be exceptional situations where, at some point in a *CCAA* proceeding, the common law interest stops rule risks working an unfairness of some sort. I leave for another day what orders, if any, might be made by a *CCAA* judge in cases such as the hypothetical presented by the appellant where a debtor might be considered to benefit unfairly as a result of the common law interest stops rule. I note, however, that in order to achieve the remedial purpose of the *CCAA*, *CCAA* courts have been innovative in their interpretation of their stay power and in the exercise of their authority in the administration of *CCAA* proceedings. This approach has been specifically endorsed by the Supreme Court of Canada in *Century Services* and would no doubt guide the court should the need arise: see, for example, paras. 61 and 70.

49 In conclusion, there are sound reasons for adopting an interest stops rule in the *CCAA* context. I now turn to the argument that *Canada 3000* and *Stelco* preclude the application of the rule.

(b) Are Canada 3000 and Stelco binding authorities to the effect that the interest stops rule does not apply in CCAA proceedings?

50 The appellant vigorously maintains that the *CCAA* judge was bound by *Canada 3000* and *Stelco*, which both confirm that the interest stops rule does not apply in *CCAA* proceedings.

51 I would not give effect to this submission. As I will explain, both of these decisions should be read narrowly and do not constitute a precedent with respect to the issue raised in this appeal — whether the common law interest stops rule applies in *CCAA* proceedings.

(i) Canada 3000

Background and lower court decisions

52 The decision in *Canada 3000* arose out of the collapse of three airlines — Canada 3000 Airlines Ltd. and Royal Aviation Inc. (collectively "Canada 3000"), and Inter-Canadian (1991) Inc. ("Inter-Canadian"). Canada 3000 filed for protection under the *CCAA* and, three days later, filed for bankruptcy. Inter-Canadian filed a *BIA* proposal but the proposal ultimately failed and so it too was placed into bankruptcy effective as of the date it filed its notice of intention to make a proposal.

53 At the time the airlines collapsed, they owed significant amounts in unpaid airport and navigation charges. As a result, various airport authorities and NAV Canada sought remedies under the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c. 5 ("*Airports Act*") and the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20 ("*CANSCA*"). In particular, they sought orders seizing and detaining aircraft leased by the bankrupt airlines. While the lessors of the planes retained legal title to the aircraft, the bankrupt airlines were the registered owner for the purposes of the *Aeronautics Act*, R.S.C. 1985, c. A-2.

54 The airport authorities and NAV Canada brought proceedings in Ontario and Quebec.

55 In Ontario, Ground J. dismissed motions for orders permitting the airport authorities and NAV Canada to seize and detain the aircraft leased by Canada 3000: *Canada 3000 Inc., Re* (2002), 33 C.B.R. (4th) 184 (Ont. S.C.J.). On the question of interest, he concluded, at para. 73, that the airport authorities and NAV Canada were entitled to charge interest on the unpaid charges up to the date of payment or the posting of security for payment.

56 On appeal from Ground J.'s decision, this court held that the interest question need not be determined since the airport authorities and NAV Canada did not have the right to detain the aircraft: *Canada 3000 Inc., Re* (2004), 69 O.R. (3d) 1 (Ont. C.A.), at para. 197.

Supreme Court's decision

57 On appeal to the Supreme Court of Canada, the court determined that the airport authorities and NAV Canada had the right to detain the aircraft leased and operated by the bankrupt airlines. The issue of post-filing interest was, therefore, an issue the court had to decide.

58 In deciding that issue, Binnie J. made the following comment at para. 96:

While a CCAA filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].

[Emphasis added.]

59 The appellant submits that the underlined words are binding *ratio* and must be followed in this case.

60 While I agree that Binnie J.'s comment about the *CCAA* is not *obiter*, I am not convinced that it should be read as broadly as the appellant contends. In *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 (S.C.C.), Binnie J. warned, at para. 57, against reading "each phrase in a judgment ... as if enacted in a statute". Rather, the question to be asked is "what did the case decide?".

61 To answer what *Canada 3000* decided about post-filing interest under the *CCAA*, it is important to consider the context in which Binnie J. made his comment, including the facts of the case, the issues before the court, the structure of his reasons, the wording he used, and what he said as well as what he did not say.

62 At para. 40., Binnie J. defined the "two major questions raised by the appeals" as follows: (1) "are the *legal titleholders* liable for the debt incurred by the registered owners and operators of the failed airlines to the service providers?" and (2) "even if they are not so liable, are *the aircraft* to which they hold title subject on the facts of this case to judicially issued seizure and detention orders to answer for the unpaid user charges incurred by Canada 3000 and Inter-Canadian?" (emphasis in original).

The answer to those two questions turned on the interpretation of the *Airports Act* and *CANSCA*. As Binnie J. noted at para. 36, the case was "from first to last an exercise in statutory interpretation".

63 After engaging in a lengthy exercise of statutory interpretation, he concluded that: (1) under s. 55 of *CANSCA*, the legal titleholders were not jointly and severally liable for the charges due to NAV Canada; and (2) under s. 56 of *CANSCA* and s. 9 of the *Airports Act*, the airport authorities and NAV Canada were entitled to apply for an order detaining the aircraft operated by the failed airlines.

64 Binnie J. then addressed eight additional arguments made by the parties and just before his last paragraph on disposition, he included a section simply entitled "Interest", starting at para. 93.

65 He began his analysis of the interest issue by outlining the statutory authority for charging interest: s. 9(1) of the *Airports Act* expressly provided for the payment of interest, and while *CANSCA* did not explicitly provide for interest, a regulation under *CANSCA* imposed interest: para. 93.

66 "The question then", said Binnie J. at para. 95, was "how long the interest can run". He addressed that question as follows, at paras. 95-96:

The airport authorities and NAV Canada have possession of the aircraft until the charge or amount in respect of which the seizure was made is paid. It seems to me that this debt must be understood in real terms and must include the time value of money.

Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. While a CCAA filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].

[Emphasis added.]

67 Significantly, Binnie J. made no mention in his reasons of the common law interest stops rule or the related *pari passu* principle. Nor did he cite any case law dealing with those issues. In fact, even though it is well established that the interest stops rule applies under the *BIA*, he did not rely on the common law rule in support of his finding that interest stopped on bankruptcy. Instead, he relied on ss. 121 and 122 of the *BIA* in concluding that the interest payable under the *Airports Act* and the regulation under *CANSCA* did not accrue post-bankruptcy.

68 Binnie J.'s analysis of the issue is rooted in the factual and statutory context of the case. In discussing the accrual of interest under the *CCAA*, he specified that the interest was on "unpaid charges", namely charges under *CANSCA* and the *Airports Act*. Binnie J. was not answering an abstract legal question but rather deciding how long interest ran in the particular factual and statutory context.

69 In effect, I read Binnie J. as saying that a *CCAA* filing does not stop the accrual of interest under *CANSCA* or the *Airports Act* but the statutory provisions of the *BIA* ss. 121 and 122 do. He was not deciding whether, in the absence of the right to interest under *CANSCA* and the *Airports Act*, interest would have accrued or been stopped by the common law interest stops rule.

70 Let me add that I agree with the *CCAA* judge's comment that Binnie J.'s statement in *Canada 3000* should "now be construed in light of *Century Services* and *Indalex*". In fact, one can well imagine that the court's interpretation of *CANSCA* and the *Airports Act* as allowing the accrual of interest in a *CCAA* proceeding but not in a *BIA* proceeding might have been different had it reached the Supreme Court after these two more recent cases. That question, however, is for another day. For now, I turn to this court's decision in *Stelco*.

(ii) Stelco***Background and motion judge's decision***

71 The post-filing interest issue in *Stelco* arose in "the final chapter of the financial restructuring of Stelco" under the *CCAA*: *Stelco Inc., Re* (2006), 24 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]), at para. 1. The final chapter involved competing claims to a portion of the amount payable to the holders of subordinated notes (the "Junior Noteholders") pursuant to Stelco's plan of arrangement (the "Plan"). The claim to these funds ("Turnover Proceeds") was made by the "Senior Debentureholders".

72 The dispute over the Turnover Proceeds arose after Stelco's Plan had been sanctioned and Stelco had emerged from restructuring with its debt reorganized. The Senior Debentureholders claimed the Turnover Proceeds on the basis of subordination provisions contained in the Note Indenture under which Stelco had issued convertible unsecured subordinated debentures to the Junior Noteholders.

73 Under the terms of the Note Indenture, the Junior Noteholders expressly agreed that, in the event that the debtor became insolvent, they would subordinate their right of repayment until after repayment in full of "Senior Debt".

[74] The plan of arrangement that had been approved was a "no interest" plan, meaning that distribution from Stelco to the creditors did not include or account for post-filing interest. The Plan, however, provided that the rights as between the Senior Debentureholders and the Junior Noteholders were preserved. The Senior Debentureholders, who had not received payment of post-filing interest from Stelco under the Plan, demanded payment of it from the Junior Noteholders pursuant to the terms of the Note Indenture. The Junior Noteholders argued, among other things, that the subordination provisions did not survive the Plan's implementation and that the Senior Debentureholders were not entitled to claim post-filing interest from them.

75 The motion judge, and on appeal, this court ruled in favour of the Senior Debentureholders. The courts found that the Plan was expressly drafted to preserve the subordination provisions and that the *CCAA* does not purport to affect rights as between creditors to the extent that they do not directly involve the debtor.

How to read Stelco?

76 The appellant and the respondents offer different readings of *Stelco*.

77 The appellant argues that this court's decision is binding authority for the proposition that the interest stops rule does not apply in the *CCAA* context. The passages relied on by the appellant include para. 67:

[T]here is no persuasive authority that supports an Interest Stops Rule in a *CCAA* proceeding. Indeed, the suggested rule is inconsistent with the comment of Justice Binnie in [*Canada 3000*] at para. 96, where he said:

While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].

78 The respondents, for their part, read the case more narrowly as a resolution of an inter-creditor dispute. They submit that the *ratio* of the case is that there was no rule that prohibited giving effect to the agreed upon inter-creditor postponement. To the extent that this court discussed the interest stops rule in the abstract, its comments are *obiter*.

79 I agree with the respondents. In my view, the court in *Stelco* did not need to decide whether the interest stops rule applies in *CCAA* proceedings for it to decide the inter-creditor dispute before the court and so its statements about the rule's application are not binding.

80 This court expressly noted, at para. 44, that it was dealing with an inter-creditor dispute. The Junior Noteholders had accepted the subordination terms in the Note Indenture. They had agreed not to be paid anything, in the event of insolvency,

until those who held Senior Debt were paid principal and interest in full. The court affirmed, at para. 44, that the *CCAA* does not change the relationship among creditors where it does not directly involve the debtor.

81 As noted, this was a "no interest" plan, meaning that the Senior Debentureholders received no post-filing interest from Stelco. Rather, they sought and eventually received payment of post-filing interest from the Junior Noteholders' share of the proceeds. The court found that the Stelco Plan contemplated the continued accrual of interest to Senior Debentureholders for the purpose of their rights as against the Junior Noteholders after the *CCAA* filing date: paras. 59 and 70. It noted that *CCAA* plans can and sometimes do provide for payments in excess of claims filed in *CCAA* proceedings. There was no rule precluding the payment of post-filing interest to the Senior Debentureholders in accordance with the Stelco Plan: para. 70.

82 The court's conclusion that the Junior Noteholders could not rely on the interest stops rule is consistent with the traditional interest stops rule. The interest stops rule relates to claims by creditors against the debtor. It does not deal with arrangements as between creditors. In other words, whether or not the interest stops rule applies in *CCAA* proceedings did not need to be decided because the agreement between creditors fell outside the scope of that rule.

83 The appellant makes two further submissions based on its interpretation of s. 6.2(1) of the Note Indenture. That paragraph reads as follows:

6.2 Distribution on Insolvency or Winding-up.

.....

(1) the holders of all Senior Debt will first be entitled to receive payment in full of the principal thereof, premium (or any other amount payable under such Senior Debt), if any, and interest due thereon, before the Debentureholders will be entitled to receive any payment or distribution of any kind or character, whether in cash, property or securities, which may be payable or deliverable in any such event in respect of any of the Debentures;

[Emphasis added.]

84 The first argument is that the Senior Debentureholders were only entitled to receive principal, premium and interest "which may be payable or deliverable in any such event", the event being insolvency or bankruptcy proceedings. Therefore, the court must have concluded, at least implicitly, that the Senior Debentureholders would have been entitled to maintain their claim for post-filing interest against Stelco.

85 The second argument is that, by the terms of s. 6.2(1), the Senior Debentureholders were only entitled to interest "due thereon" and so they could not claim post-filing interest from the Junior Noteholders unless they could claim post-filing interest from Stelco.

86 I would not give effect to either submission.

87 In *Stelco*, the court did not address either argument and we do not have a copy of the entire agreement nor do we have the other agreements that form part of the factual matrix. Without that context, this court is not in the position to interpret s. 6.2(1).

88 In my view, the key question for this court is not how to properly interpret s. 6.2(1) but, rather, how we should read the reasons in *Stelco*. What did the *Stelco* court decide, and specifically, should we read the panel as implicitly deciding that the Senior Debentureholders could not recover post-filing interest from the Junior Noteholders unless they could claim post-filing interest against Stelco?

89 In discussing post-filing interest, the court's only mention of the Senior Debentureholders' claim as against Stelco is found at paras. 57-59, where the panel expressly rejected the argument that "any claim the Senior [Debentureholders] have for interest must be based on a "claim" [as defined in the Plan] they have against Stelco for such interest" and that "[i]f the Senior Debt does not include post-filing interest, there can be no claim against the [Junior] Noteholders for such amounts": see paras. 58-59.

90 Admittedly, the panel made this comment in discussing the effect of the Stelco Plan as opposed to the effect of the interest stops rule. However, as I read the section on post-filing interest as a whole, the court is saying that the Junior Noteholders agreed to be bound by the deal they made. They had agreed to the subordination provisions that guaranteed full payment to the Senior Debentureholders in the event of insolvency, and the Plan affirmed that the Senior Noteholders could claim the full amount that would have been owing had there been no *CCAA* filing. In this court's words at para. 70, there is no interest stops rule "that precludes such a result." In my view, therefore, this court did not make an implicit finding that the Senior Debentureholders had to be able to claim post-filing interest from Stelco in order to claim post-filing interest from the Junior Noteholders.

91 In conclusion, I consider the comment that there is no persuasive authority that supports an interest stops rule in *CCAA* proceedings to be *obiter*. *Stelco* dealt with the effect of an agreement as between creditors as to how, between them, they would share distributions. Whether or not interest stops upon a *CCAA* filing was of no import in answering that question.

(2) If the CCAA judge did not err in concluding that an interest stops rule applies in CCAA proceedings, did he err in holding that holders of Crossover Bonds Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest?

92 The appellant objects to the wording of the *CCAA* judge's order. It provides that "holders of Crossover Bond Claims are not legally entitled to claim *or receive* any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest" (emphasis added). While the appellant asked the *CCAA* judge to amend his order to delete "or receive", he refused. The appellant submits that, to the extent this precludes the bondholders from receiving post-filing interest under a *CCAA* plan, the *CCAA* judge erred. The appellant notes that all the parties in this proceeding agree that a *CCAA* plan may provide for post-filing interest.

93 As I explained above, the interest stops rule does not preclude the payment of post-filing interest under a plan of compromise or arrangement.

94 As I read the *CCAA* judge's reasons and order, he did not decide otherwise. His decision confirms that the common law interest stops rule applies in *CCAA* proceedings. If a plan of compromise or arrangement is concluded, it should not, for example, be read as limiting any right to recover post-filing interest creditors may have as amongst themselves, as existed in *Stelco*, or from non-parties. Nor does it dictate what any creditor may seek in bargaining for a fair plan of compromise or arrangement. In that regard, I do not interpret the *CCAA* judge's use of the words "or receive" as preventing the appellant from seeking and obtaining such a result in a negotiated plan. In particular, I note the *CCAA* judge's comment at para. 35 of his reasons that "the parties would of course be free to include post-filing interest payments in a plan of arrangement, as is sometimes done."

95 The appellant also seeks clarification as to the effect of the words "*any amounts* under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest" (emphasis added). The appellant notes that, without clarification, the wording of the order could potentially preclude the recovery of other contractual entitlements under the relevant indentures, such as costs and make-whole provisions, even though no arguments were advanced before the *CCAA* judge with respect to any amounts other than post-filing interest.

96 The issue the *CCAA* judge was directed to answer was "whether the holders of the crossover bond claims ... [were] legally entitled ... to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest". As indicated in the appellant's factum, the only arguments advanced before the *CCAA* judge related to post-filing interest and not any other amounts under the indentures. The appellant does not appear to have made submissions to the *CCAA* judge with respect to the costs and make-whole fees it now raises in its factum. This court is in no position to deal with the new argument raised by the appellant. Further, beyond making the broad submission noted above, the appellant did not expand on that submission and direct the court to the specific claims or indenture provisions it relies on in support of its argument or explain why the claims should not be caught by the order.

97 As I have already indicated, the *CCAA* judge's order confirms that the interest stops rule, and the limits imposed by the rule, apply in *CCAA* proceedings. To the extent that the appellant maintains that there are other contractual entitlements

under the relevant indentures not covered by the interest stops rule, it is up to the *CCAA* court to decide if those can now be raised and ruled upon.

F. Final Comments

98 I acknowledge that the Nortel *CCAA* proceedings are exceptional, particularly with respect to the length of the delay. The amount the appellant claims for post-filing interest and related claims under the indentures, and the resulting impact on other unsecured creditors is so great because of the length of that process. The principle, however, is the same whether the *CCAA* process is short or long. After the imposition of a stay in *CCAA* proceedings, allowing one group of unsecured creditors to accumulate post-filing interest, even for a relatively short period of time, would constitute unfair treatment vis-à-vis other unsecured creditors whose right to convert their claim into an interest-bearing judgment is stayed.

99 This decision does not purport to change or limit the powers of *CCAA* judges. Although the decision clearly settles at the outset of a *CCAA* proceeding whether there is a legal entitlement to post-filing interest, it does not dictate how the proceeding will progress thereafter until a plan of compromise or arrangement is approved, or the *CCAA* proceeding is otherwise brought to an end.

100 The determination of legal entitlement is important as it clearly establishes the starting point in a *CCAA* proceeding. It tells creditors, debtors and the court what legal claim a particular creditor has. Its significance is not only for purposes of setting the voting rights of creditors on any proposed plan of compromise or arrangement, it also ensures that, in assessing any such proposed plan, the parties will know what they are or are not compromising and the court will be equipped to consider the fairness of such a plan.

G. Disposition

101 For these reasons, I would dismiss the appeal. Pursuant to the agreement of the parties, I would award the respondent Monitor, as successful party, costs as against the appellant fixed in the amount of \$40,000, inclusive of disbursements and applicable taxes. I would make no other order as to costs.

Janet Simmons J.A.:

I agree

E.E. Gillese J.A.:

I agree

Appeal dismissed.

Footnotes

- 1 There are five Canadian Debtors: Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation.
- 2 As explained in Roderick J. Wood's text on bankruptcy and insolvency law, "insolvency law is the wider concept, encompassing bankruptcy law but also including non-bankruptcy insolvency systems.": Roderick J. Wood, *Bankruptcy & Insolvency Law* (Toronto: Irwin Law Inc., 2009), at p. 1.
- 3 The respondents are the Monitor, the Canadian Debtors, the Canadian Creditors' Committee and the Wilmington Trust, National Association. While technically The Bank of New York Mellon and the Law Debenture Trust Company of New York are also respondents, they support the appellant's position and so my use of the term "respondents" excludes them.

Most Negative Treatment: Check subsequent history and related treatments.

2019 ONCA 181
Ontario Court of Appeal

Endean v. St. Joseph's General Hospital

2019 CarswellOnt 3301, 2019 ONCA 181, 305 A.C.W.S. (3d) 405, 54 C.C.L.T. (4th) 183

Paulette M. Endean, Frank William Endean and Debbie Endean (Plaintiffs / Appellants / Respondents by way of cross-appeal) and St. Joseph's General Hospital (Defendant / Respondent / Appellant by way of cross-appeal)

Janet Hearsey by her Litigation Guardian Leslie Hearsey and Leslie Hearsey
(Plaintiffs / Appellants / Respondents by way of cross-appeal) and St. Joseph's
General Hospital (Defendant / Respondent / Appellant by way of cross-appeal)

Stephen Karam, Estate Trustee of the Estate of Andrew Karam (Plaintiff / Appellant / Respondent by way of cross-appeal) and St. Joseph's General Hospital (Defendant / Respondent / Appellant by way of cross-appeal)

Sherry Lind, Gino Deamicis, Lorraine Lind by her Litigation Administrator Crystal Lind, Lauri Lind, Crystal Lind, Donald Deamicis and Daniel Deamicis (Plaintiffs / Appellants / Respondents by way of cross-appeal) and St. Joseph's General Hospital (Defendant / Respondent / Appellant by way of cross-appeal)

Paul Rouleau, K. van Rensburg, B. Zarnett JJ.A.

Heard: January 9, 2019
Judgment: March 8, 2019
Docket: CA C63751

Proceedings: reversing in part *Endean v. St. Joseph's General Hospital* (2017), 2017 ONSC 2632, 2017 CarswellOnt 7433, F. Bruce Fitzpatrick J. (Ont. S.C.J.); additional reasons at *Endean et al. v. St. Joseph's General Hospital* (2017), 2017 CarswellOnt 20606, 2017 ONSC 7190, Fitzpatrick J. (Ont. S.C.J.); and affirming *Endean et al. v. St. Joseph's General Hospital* (2017), 2017 CarswellOnt 20606, 2017 ONSC 7190, Fitzpatrick J. (Ont. S.C.J.); additional reasons to *Endean v. St. Joseph's General Hospital* (2017), 2017 ONSC 2632, 2017 CarswellOnt 7433, F. Bruce Fitzpatrick J. (Ont. S.C.J.)

Counsel: Brian Moher, Monica Zamfir, for Appellants / Respondents by way of cross-appeal
Stephen Wojciechowski, Dawne Latta, for Respondent / Appellant by way of cross-appeal

Subject: Civil Practice and Procedure; Contracts; Public; Torts

Related Abridgment Classifications

Civil practice and procedure

[VII](#) Limitation of actions

[VII.4](#) Actions in contract or debt

[VII.4.a](#) Statutory limitation periods

[VII.4.a.iii](#) When statute commences to run

[VII.4.a.iii.C](#) Miscellaneous

Civil practice and procedure

[XXIV](#) Costs

[XXIV.10](#) Costs of particular proceedings

[XXIV.10.k](#) Jury trial

Health law

V Malpractice**V.2 Negligence****V.2.a Types of malpractice****V.2.a.xiii Apportionment of liability****Health law****V Malpractice****V.2 Negligence****V.2.b Duty of care****Headnote**

Civil practice and procedure --- Limitation of actions — Actions in contract or debt — Statutory limitation periods — When statute commences to run — Miscellaneous

Plaintiffs were four patients of defendant hospital, who received jaw surgery in mid 1980's from oral surgeons practicing at hospital, and device had to be implanted in patients' heads as part of surgery — Device was defective and broke down over time, causing injuries to plaintiffs' skulls, and patients had to reattend hospital between 1987 and 1996 to have devices removed — Actions were commenced by patients in 1996 and 1997, and defendants claimed that actions of patients were statute-barred, as they were commenced two years after last treatment — Patients brought action against hospital in negligence, with result that actions of patients E, K, and L were dismissed as statute-barred under Public Hospitals Act, and action of patient H was allowed in part — Patients appealed on basis that trial judge erred in dismissing actions as statute-barred, and hospital cross-appealed on basis that H's action should also have been dismissed as statute-barred — Appeal allowed in part on other grounds; cross-appeal dismissed — Trial judge did not err in applying limitation period under Act or in rejecting argument of fraudulent concealment — Negligent act by hospital before patient received care or treatment, which became actionable only because it enabled treatment at hospital that caused injury, was negligence in care or treatment of patient within meaning of Act's limitation provision — Fact that hospital contacted surgeons to ensure they knew about issue with implants and had been in touch with distributor and advised that it already had names of surgeons for further communication was not consistent with concealment in sense required by doctrine of fraudulent concealment — Hospital's argument that tomogram procedure that H had done was not "treatment" under Act was rejected — Nothing in Act's limitation provision supported distinction between diagnostic procedure and treatment that hospital sought to make.

Health law --- Malpractice — Negligence — Duty of care

Plaintiffs were four patients of defendant hospital, who received jaw surgery in mid 1980's from oral surgeons practicing at hospital, and device had to be implanted in patients' heads as part of surgery — Device was defective and broke down over time, causing injuries to plaintiffs' skulls, and patients had to reattend hospital between 1987 and 1996 to have devices removed — Actions were commenced by patients in 1996 and 1997, and defendants claimed that actions of patients were statute-barred, as they were commenced two years after last treatment — Trial judge accepted evidence from hospital CEO that recall of patients was to be initiated only by oral surgeons, and expert evidence that there was no precedent for any hospital in Canada self-initiating recall of patients — Patients brought action against hospital in negligence, with result that actions of patients E, K, and L were dismissed as statute-barred under Public Hospitals Act, and action of patient H was allowed in part — Patients appealed on basis that trial judge erred in rejecting argument that hospital was liable for breaching duty to recall patients once it was advised of problems with implant — Appeal allowed in part on other grounds — Trial judge did not err in rejecting argument that hospital had duty to recall patients — Trial judge's findings that it was reasonable for hospital to assume that distributor and oral surgeons would deal with issue and that there was no basis to elevate hospital to oversight role over surgeons, were entitled to deference.

Health law --- Malpractice — Negligence — Types of malpractice — Apportionment of liability

Plaintiffs were four patients of defendant hospital, who received jaw surgery in mid 1980's from oral surgeons practicing at hospital, and device had to be implanted in patients' heads as part of surgery — Device was defective and broke down over time, causing injuries to plaintiffs' skulls, and patients had to reattend hospital between 1987 and 1996 to have devices removed — Actions were commenced by patients in 1996 and 1997, and defendants claimed that actions of patients were statute-barred, as they were commenced two years after last treatment — Patients brought action against hospital in negligence, with result that actions of patients E, K, and L were dismissed as statute-barred under Public Hospitals Act, and action of patient H was allowed in part — Trial judge apportioned 50 per cent of liability to manufacturer of device, 25 per cent of liability to distributor

of device, 20 per cent of liability to surgeons, and 5 per cent of liability to hospital — Patients appealed on basis that trial judge erred in apportioning fault to manufacturer and distributor, resulting in hospital being restricted to only 5 per cent of damages to be assessed — Appeal allowed in part — Liability was reapportioned as 20 per cent liability to hospital and 80 per cent liability to surgeons — Trial judge erred in law by relying on decision in caselaw as authority to apportion fault to non-parties manufacturer and distributor — Approach used in caselaw was context specific and context was not present in current case.

Civil practice and procedure --- Costs — Costs of particular proceedings — Jury trial

Plaintiffs were three separate patients of defendant doctors who brought medical malpractice action in 1996 or 1997, in regard of treatment which commenced in 1988 — Action was dismissed as statute-barred at joint trial, and doctors sought costs of actions — Doctors indicated they had made offer to settle, which was more favourable to patients than trial result — Patients claimed that they should receive costs as result of misconduct of doctors in litigation or, in alternative, patients claimed there should be no costs due to their financial situations — Patients were ordered to pay \$186,440.93, \$174,803.72, and \$179,359.44 in fees and disbursements to doctors — Hospital cross-appealed on basis that trial judge erred in failing to include HST in costs award made in its favour — Cross-appeal dismissed — There was no error in principle in trial judge's award of costs — Trial judge had not limited himself to mechanical calculation of costs dependent on inclusion or lack of inclusion of any specific item — Trial judge had stepped back to determine whether amounts he calculated were reasonable given magnitude of matter and other relevant considerations.

Table of Authorities

Cases considered by *B. Zarnett J.A.*:

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Guerin v. R. (1984), [1984] 6 W.W.R. 481, (sub nom. *Guerin v. Canada*) [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, (sub nom. *Guerin v. Canada*) 55 N.R. 161, [1985] 1 C.N.L.R. 120, 20 E.T.R. 6, 36 R.P.R. 1, 59 B.C.L.R. 301, 1984 CarswellNat 813, 1984 CarswellNat 693 (S.C.C.) — considered

Hay v. Canadian Red Cross Society (2004), 2004 CarswellOnt 2766, [2004] O.T.C. 598 (Ont. S.C.J.) — referred to

M. (J.) v. Bradley (2004), 2004 CarswellOnt 2243, 240 D.L.R. (4th) 435, 47 C.P.C. (5th) 234, 187 O.A.C. 201, (sub nom. *M. (J.) v. B. (W.)*) 71 O.R. (3d) 171 (Ont. C.A.) — referred to

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Peixeiro v. Haberman (1997), 1997 CarswellOnt 2928, 1997 CarswellOnt 2929, 151 D.L.R. (4th) 429, 103 O.A.C. 161, 30 M.V.R. (3d) 41, [1997] 3 S.C.R. 549, 12 C.P.C. (4th) 255, 46 C.C.L.I. (2d) 147, 217 N.R. 371 (S.C.C.) — considered

Pierringer v. Hoger (1963), 124 N.W.2d 106, 21 Wis. 2d 182 (U.S. Wis. S.C.) — considered

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Purtell v. Royal Ottawa Hospital (2005), 2005 CarswellOnt 3033 (Ont. S.C.J.) — referred to

Purtell v. Royal Ottawa Hospital (2007), 2007 ONCA 367, 2007 CarswellOnt 3076 (Ont. C.A.) — referred to

Purtell v. Royal Ottawa Hospital (2007), 2007 CarswellOnt 7437, 2007 CarswellOnt 7438, 383 N.R. 382 (note), 248 O.A.C. 396 (note) (S.C.C.) — referred to

Sable Offshore Energy Inc. v. Ameron International Corp. (2013), 2013 SCC 37, 2013 CarswellINS 428, 2013 CarswellINS 429, 359 D.L.R. (4th) 381, 37 C.P.C. (7th) 225, 22 C.L.R. (4th) 1, 446 N.R. 35, 1052 A.P.R. 1, 332 N.B.R. (2d) 1, [2013] 2 S.C.R. 623 (S.C.C.) — referred to

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Cramm v. Riverside Hospital of Ottawa) 12 C.P.C. (2d) 164, (sub nom. *Von Cramm v. Riverside Hospital of Ottawa*) 25 E.T.R. 75, 1986 CarswellOnt 429 (Ont. C.A.) — referred to
Zeppa v. Woodbridge Heating & Air-Conditioning Ltd. (2019), 2019 ONCA 47, 2019 CarswellOnt 1342 (Ont. C.A.) — considered

Statutes considered:

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Generally — referred to

Negligence Act, R.S.O. 1990, c. N.1

Generally — referred to

s. 1 — considered

Public Hospitals Act, R.S.O. 1980, c. 410

Generally — referred to

s. 28 — considered

Public Hospitals Act, R.S.O. 1990, c. P.40

Generally — referred to

s. 31 — considered

Real Property Limitations Act, R.S.O. 1990, c. L.15

Generally — referred to

APPEAL by patients and CROSS-APPEAL by hospital from judgment reported at *Endean v. St. Joseph's General Hospital* (2017), 2017 ONSC 2632, 2017 CarswellOnt 7433 (Ont. S.C.J.), dismissing three actions as being statute barred and allowing fourth action in part; CROSS-APPEAL by hospital from judgment reported at *Endean et al. v. St. Joseph's General Hospital* (2017), 2017 ONSC 7190, 2017 CarswellOnt 20606 (Ont. S.C.J.), awarding costs in favour of hospital.

B. Zarnett J.A.:

Introduction

1 The appellants Paulette Endean, Janet Hearsey, Andrew Karam and Sherry Lind each had surgery at the respondent St. Joseph's General Hospital ("the hospital") in the mid 1980's. Each was implanted with a Vitek Proplast Teflon Interpositional implant ("the implant"), a device designed to replace a meniscus inside the temporomandibular joint (TMJ). The TMJ is a complex load bearing joint located between the skull and jaw which is central to, among other things, a person's ability to talk, chew, swallow, and yawn.

2 The implant caused injury to each of these individuals. It delaminated inside the TMJ, leaving particulate residue which, over time, caused degenerative bone loss. All four individuals had perforations in their skull in the area of their TMJ.

3 In 1996 and 1997, the appellants commenced actions against the hospital and the oral surgeons who actually did the implant surgery and follow up care ("the Endean, Karam, Lind, and Hearsey Actions"). The hospital and the oral surgeons cross-claimed against one another in all four actions.

4 In 2013, the appellants reached settlements with the oral surgeons. A Pierringer Order was made in each action, which affected the way the actions would continue against the hospital. The Pierringer Orders dismissed the actions against the oral surgeons and the cross-claims between the hospital and the oral surgeons. They provided that each of the appellants' claims "are restricted such that [the appellants] will only claim those damages, if any, arising from the actions or omissions of the Defendant Hospital."

5 The Pierringer Orders required the statement of claim in each action to be amended to limit the claim against the hospital to its several liability or proportionate share of joint liability to the appellants. The appellants' recovery would be limited to

the damages, costs and interest attributable to the hospital's several liability, or proportionate share of joint liability, as may be proven at trial. And the Pierringer Orders required the appellants to acknowledge, in their amended pleadings, that the court at trial had the authority to adjudicate upon the apportionment of fault among all defendants who had been named in each action, i.e., the hospital and the oral surgeons. The Pierringer Orders made specific provision for the obtaining and use of evidence by and about the oral surgeons at a trial between the appellants and the hospital.

6 In 2016, the actions came to trial together. The parties agreed at the outset to bifurcate the trial, dealing first with the issue of liability.

7 The trial judge:

a) Dismissed the Endean, Karam, and Lind Actions on the basis that each had been commenced beyond the two year limitation period in the *Public Hospitals Act* ("the *PHA*"), R.S.O. 1980 c. 410, s. 28 and R.S.O. 1990, c. P.40, s. 31;

b) Held that the Hearsey Action was not barred by the *PHA* limitation period, because Ms. Hearsey had received a follow up treatment at the hospital within two years of the commencement of her action;

c) Found that the hospital was negligent in acquiring the implants and the oral surgeons were negligent in failing to take due care when assessing the viability of the implant and in the manner they followed up with patients after becoming aware of problems. He apportioned fault between them as follows: 5% of the fault to the hospital, 20% of the fault to the oral surgeons. He also apportioned 50% of the fault to the manufacturer of the implant, Vitek Inc., for making a defective product, and 25% of the fault to the distributor of the implant, Instrumentarium, who purchased it from the manufacturer and sold it to the hospital without due enquiry as to whether it was an approved product. Neither the manufacturer nor the distributor were ever parties to the actions and both were bankrupt;

d) Granted judgment in the Hearsey Action against the hospital for 5% of the damages that were to be assessed in the second phase of the trial; and

e) Granted costs in favour of the hospital in each of the Endean, Karam and Lind Actions.

8 The appellants appeal, raising the following grounds:

a) The trial judge erred in dismissing the Endean, Karam and Lind Actions on the basis of the *PHA* limitation period. They raise two points under this issue. First, they say that the two year limitation period in the *PHA* did not apply, because the limitation period related only to actions for negligence in the admission, care, treatment or discharge of a patient. The trial judge, they argue, situated the negligence of the hospital in its purchase of the implant, which should have been subject to the six year limitation period in the former *Limitations Act*, R.S.O. 1990, c. L.15. Second, they argue that even if the *PHA* applied, the trial judge should have found that the limitation period was extended under the doctrine of fraudulent concealment.

b) The trial judge erred in rejecting their argument that the hospital was liable for breaching a duty to recall patients once it was advised of problems with the implant. They say that if this theory of liability were accepted, it would affect the apportionment of liability and the limitation period.

c) The trial judge erred in apportioning fault to the manufacturer and the distributor, and thus restricting recovery in the Hearsey Action (and the other actions if they were improperly dismissed) to only 5% of the damages to be assessed.

9 The hospital cross-appeals. It argues that the Hearsey Action should also have been dismissed on the basis of the *PHA* limitation period. What the trial judge relied upon to bring the action within time was not "treatment", but simply a diagnostic test. Second, it argues that the trial judge erred in failing to include HST in the cost awards made in its favour in the Endean, Lind, and Karam Actions.

10 For the reasons that follow I would allow the appeal in part. I would not disturb the trial judge's finding that the Endean, Karam, and Lind Actions were barred by the *PHA* limitation period. In my view, the trial judge did not err in applying that limitation period or in rejecting the argument of fraudulent concealment. Nor did the trial judge err in rejecting the argument that the hospital breached a duty to recall. The trial judge did err, however, in apportioning fault to the manufacturer and distributor and reducing the recovery of the appellants in the Hearsey Action as a result of that apportionment. I would vary the judgment in the Hearsey action as described below.

11 I would dismiss the cross-appeal. Contrary to the assertions of the hospital, in the circumstances of this case Ms. Hearsey's follow up appointment should not be ignored in determining when her treatment ceased and thus when the *PHA* limitation period commenced to run. Nor is there an error in principle in the trial judge's award of costs.

Analysis

12 In light of the nature of the grounds of appeal the facts relevant to determining the issues (other than those in the outline above) are set out in relation to each issue discussed below.

(1) The Limitation Period Issues

The Approach of the Trial Judge

13 Because of the dates the actions were commenced, the argument about limitation periods concerns provisions which are not currently in force but were at the relevant times.

14 The *PHA* limitation period applied by the trial judge provided as follows:

Any action against a hospital or any nurse or person employed therein for damages for injury caused by negligence in the admission, care, treatment or discharge of a patient shall be brought within two years after the patient is discharged from or ceases to receive treatment at the hospital and not afterwards.

(Between 1985 and 1990 this was s. 28 of the *PHA*, R.S.O. 1980, c. 410. From 1990 forward, this was s. 31 of the *PHA*, R.S.O. 1990, c. P.40. The limitation period provision was repealed in 2004, as a result of the enactment of the *Limitations Act*, 2002, S.O. 2002, c. 24.)

15 The trial judge rejected the appellants' argument the *PHA* limitation period is subject to a discoverability principle. Thus, it was irrelevant that the appellants had no idea anything was wrong with them until 1994 at the earliest and commenced their actions within two years of knowing the implant had failed and caused them damage. For the non-applicability of the discoverability principle to the *PHA*, the trial judge relied upon: *Von Cramm Estate v. Riverside Hospital of Ottawa* (1986), 32 D.L.R. (4th) 314, 17 O.A.C. 218 (Ont. C.A.); *Hay v. Canadian Red Cross Society*, [2004] O.J. No. 2887 (Ont. S.C.J.); and *Purtell v. Royal Ottawa Hospital*, [2005] O.J. No. 2965 (Ont. S.C.J.), aff'd 2007 ONCA 367 (Ont. C.A.), leave to appeal denied, [2007] S.C.C.A. No. 362 (S.C.C.).

16 In *Von Cramm*, Cory J.A. (as he then was) made it clear that the discoverability principle did not apply to the *PHA*. He noted the harshness of applying a limitation period in a situation where, as was the case in *Von Cramm* and is the case here, a plaintiff could not have known or reasonably known of the negligence of the hospital until after any limitation period had expired. But that result was the product of the clear wording of the *PHA*. The limitation provision was enacted to protect public institutions. Any amelioration of the harshness of it expiring before a cause of action was discoverable was required to come from the Legislature, not the courts: see p. 318.

17 Although *Von Cramm* was decided before *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.), in my view the trial judge was correct to find that the discoverability principle did not apply to the *PHA*. *Peixeiro* approved the application of the discoverability principle to limitation provisions which, properly interpreted, turned in some way on the injured person's knowledge for their commencement: see pp. 562-566. But the courts in both *Hay* and *Purtell* held that *Peixeiro* did not make

the discoverability principle applicable to the *PHA*, because its limitation period runs from a fixed event unrelated to either the plaintiff's knowledge or the basis of the cause of action: see *Hay*, at paras. 14-16, and *Purtell*, at paras. 36-37. In this court, the appellants did not challenge the conclusion that the discoverability principle was inapplicable to the *PHA*.

18 The trial judge then considered when a person ceases to receive "care" or "treatment" for the purpose of determining when the *PHA* limitation period commenced. The trial judge held that the appellants' treatment or care ceased upon their being discharged on the last occasion each attended for a TMJ implant issue. He reasoned that where a later treatment in a hospital can be connected to the one about which negligence is alleged, the time limit runs from the date of the latest treatment, following *Fiorelli v. St. Mary's General Hospital*, [1995] O.J. No. 631 (Ont. C.A.).

19 The trial judge made the following findings on the limitation issue:

a. Ms. Lind received "care" and "treatment" from the hospital on June 17, 1985, June 5, 1986 and November 26, 1991. This included the placement and removal of the implant, and the removal of certain debris from the TMJ that had been at the site of the implant. Although there was evidence that she had attended at the hospital on a number of occasions thereafter, the trial judge made a factual finding that these attendances related to other issues, not the implant or care or treatment of its effects. These findings are not challenged on appeal. Accordingly, the trial judge used November 26, 1991 as the date Ms. Lind ceased to receive care or treatment from the hospital, and thus as the date the *PHA* limitation period began to run. He held that her claim became statute barred on November 27, 1993. The Lind Action, commenced on August 20, 1996, was thus out of time.

b. Ms. Endean attended the hospital only once, for her implant surgery, on October 8, 1985. The removal of the implant was done elsewhere and there were no other treatments at the hospital related to the implant or its effects. Accordingly, the trial judge held that October 8, 1985 was the commencement of the *PHA* limitation period, and it expired on October 9, 1987. The Endean Action, commenced July 11, 1997, was thus out of time.

c. Mr. Karam attended the hospital only once, for his implant surgery, on November 21, 1985. The removal of the implant was done elsewhere and there were no other treatments at the hospital related to the implant or its effects. The trial judge found that November 21, 1985 was the commencement of the *PHA* limitation period, which expired on November 22, 1987. The Karam Action, commenced on March 14, 1997, was therefore out of time.

d. Ms. Hearsey had her implant surgery on March 5, 1986, but attended the hospital for a follow up radiological procedure - a tomogram - on June 9, 1994. The trial judge found the tomogram was related to the failure of the implant, and thus was related to the original treatment she received in 1986. Although no negligence was alleged against the hospital for the way it conducted the tomogram, it was done as a result of the original implant and therefore was clearly connected to the negligence alleged. The trial judge held the tomogram was "treatment", and therefore the *PHA* limitation period commenced on June 9, 1994 and did not expire until June 10, 1996. The Hearsey Action, commenced on March 21, 1996, was thus in time.

20 The trial judge considered and rejected the argument that the limitation period should be extended by operation of the doctrine of fraudulent concealment. He observed that the issue was raised late and not referred to in the appellants' pleadings. But he went on to state that:

[M]ost importantly, I am not persuaded that the evidence at this trial has proven, or even suggested, that the Hospital was an unscrupulous defendant or that the acts or even failings of any of its employees or directors or agents came anywhere close to what any reasonable person could describe as constituting "fraud" or a "fraudulent concealment".

The Limitation Period Appeal regarding the Endean, Karam and Lind Actions

21 The appellants attack the trial judge's limitation period conclusions that led him to dismiss the Endean, Karam and Lind Actions on two bases.

22 First, they argue that the *PHA* limitation period does not apply to the wrong found to have been committed by the hospital; they contend it was not negligence in the care, treatment or discharge of the appellants. They argue that the *PHA* limitation period, a provision that restricts rights of action, must be strictly interpreted: *Fenton v. North York Hydro-Electric Commission* (1996), 29 O.R. (3d) 481, 92 O.A.C. 53 (Ont. C.A.), at pp. 11-12. The trial judge found the only negligence of the hospital was its decision to purchase the implants, at a time when they were not approved for sale or use in Canada, without enquiring whether they had received any such approval. For example, the trial judge stated "I agree with the argument of counsel for the plaintiffs that a reasonable person would think 'maybe we should check to see if the device is approved' before it was acquired." The appellants argue that if one gives the *PHA* a strict reading, the hospital's decision to purchase the implants was not negligence in the treatment or care of a patient, but negligence in a purchasing decision, made before the surgeries of the appellants were even contemplated. That negligence, they argue, would be subject to the limitation period in the former *Limitations Act*, and its overlay of discoverability.

23 The difficulty with this argument is that the negligence of the hospital in purchasing the implants was not actionable by any of the appellants on its own. It was only actionable because the implants were made available for use by oral surgeons for surgeries performed on Ms. Endean, Ms. Hearsey, Mr. Karam and Ms. Lind at the hospital. The appellants had a claim for negligence against the hospital only because each became a patient of the hospital, receiving treatment and care (that is, a surgical procedure), using devices that had been negligently acquired by the hospital for just such a use.

24 The trial judge's findings are illustrative of the integral connection between the purchase of the implants, the appellants' care and treatment, the appellants' injuries and the negligence of the hospital. The trial judge found that:

Given that the device at issue would be placed in a person's body potentially for life and given that there was a government regulatory regime in place allowing or not allowing distribution of a device by manufacturers, failing to inquire about the use of the device is evidence of negligence.

And he found that the negligence in the purchase caused damage to the appellants exactly because "[b]ut for the acquisition of the device, the oral surgeons could not have done the procedure, at least not at [the respondent] Hospital."

25 In my view, giving the *PHA* the strict reading contemplated by cases like *Fenton* does not alter the conclusion that the *PHA* limitation provision applies here. A negligent act by a hospital before a patient receives care or treatment, which becomes actionable only because it enables a treatment at the hospital that causes injury, is negligence in the care or treatment of the patient within the meaning of the *PHA* limitation provision.

26 Accordingly, I would not give effect to this ground of appeal.

27 Second, the appellants argue that the trial judge erred in rejecting their argument of fraudulent concealment. They point to the hospital having become aware of problems with the implants five years before the appellants. The trial judge's error, they say, flowed from his having approached the issue as though what was required was conduct that was "fraudulent" in the common law sense.

28 I agree with the appellants that the doctrine of fraudulent concealment does not require common law fraud. As the Supreme Court of Canada said in *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), at p. 390:

[W]here there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud.

29 I also agree with the appellants that the doctrine of fraudulent concealment could apply to the *PHA* limitation period. In this court's decision in *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd.*, 2019 ONCA 47 (Ont. C.A.), the majority held that the doctrine of fraudulent concealment has no room to operate where the provisions of the *Limitations Act, 2002*, which

are subject to a codified discoverability test, apply: see para. 71. But, at para. 64, the majority did not question the applicability of the doctrine of fraudulent concealment to other statutes:

This court has held that the principle of fraudulent concealment is available in cases involving limitation periods contained in statutes other than the (*Limitations Act*, 2002) including: s. 38(3) of the *Trustee Act*, R.S.O. 1990, c. T.23: *Giroux Estate; Roulston v. McKenny*, 2017 ONCA 9, 135 O.R. (3d) 632; the limitation period under the *Real Property Limitations Act*, R.S.O. 1990, c. L.15: *Anderson v. McWatt*, 2015 ONSC 3784, at para. 77, appeal dismissed 2016 ONCA 553; and the limitation period created by s. 82(2) of the former *Employment Standards Act*, R.S.O. 1990, c. E.14: *Halloran v. Ontario (Employment Standards Act Referee)* (2002), 217 D.L.R. (4th) 327 (C.A.), at para. 35.

30 However, I disagree with the appellants that the doctrine applies in the circumstances of this case. In *Zeppa*, the majority adopted the following description of the doctrine at para. 62:

A succinct, but comprehensive, summary of the elements of the principle is found in the decision of Perell J. in *Colin v. Tan*, 2016 ONSC 1187, 81 C.P.C. (7th) 130 at paras. 44-47:

Fraudulent concealment will suspend a limitation period until the plaintiff can reasonably discover his or her cause of action.

The constituent elements of fraudulent concealment are threefold: (1) the defendant and plaintiff have a special relationship with one another; (2) given the special or confidential nature of the relationship, the defendant's conduct is unconscionable; and (3) the defendant conceals the plaintiff's right of action either actively or the right of action is concealed by the manner of the wrongdoing. Fraudulent concealment includes conduct that having regard to some special relationship between the parties) concerned is unconscionable. For fraudulent concealment, the defendant must hide, secret, cloak, camouflage, disguise, cover-up the conduct or identity of the wrongdoing. [Emphasis added.]

31 The trial judge's findings of fact preclude any conclusion that the hospital was hiding, secreting, cloaking, camouflaging, disguising or covering up anything. The appellants point to the hospital's receipt of a notification in May, 1990 from the Emergency Care Research Institute ("ECRI") that indicated that the implant can contribute to progressive bone degeneration, should not be used anymore, existing stocks of the implant should be returned to the manufacturer, and persons who had received the implant required monitoring and follow up. They also point to the hospital, in August of 1990, having received correspondence from the distributor recalling the implants and asking for the names of oral surgeons who had patients with the implants, so that safety information could be provided by the distributor to the oral surgeons.

32 The facts found by the trial judge, which are referred to in the section below on the duty to recall, show that the hospital contacted the oral surgeons to ensure they knew about the issue with the implants. The hospital was advised that the oral surgeons were aware of the issue, and the hospital had the reasonable expectation that any follow up with patients would be done by the oral surgeons. The hospital was also in touch with the distributor and was advised that it already had the names of the oral surgeons for further communication. Those facts are not consistent with the hospital hiding, secreting, cloaking, camouflaging, disguising or covering up anything. In other words, they are not consistent with concealment in the sense required by the doctrine.

33 Accordingly I would reject this ground of appeal.

The Limitation Period Cross-Appeal regarding the Hearsey Action

34 By cross-appeal, the hospital argues that the trial judge erred in not dismissing the Hearsey Action as barred by the PHA limitation period. It argues that the diagnostic procedure that Ms. Hearsey had in 1994, the tomogram, was not "treatment". In the hospital's view, the trial judge erred in using it to determine the start date of the limitation period for the Hearsey Action. The hospital concedes, per *Fiorelli*, that it is the most recent treatment that is the operative commencement of the limitation period, as long as it has a connection to the care or treatment in which the negligence is alleged to have occurred. The hospital also concedes that the tomogram was connected to the implant surgery. Its point is that a diagnostic procedure is not treatment.

35 I would reject this argument. Nothing in the *PHA* limitation provision supports the distinction between a diagnostic procedure and treatment the hospital seeks to make, especially if one reads the provision so as to minimize the extent to which it interferes with rights of action, as cases such as *Fenton* require. Treatment is a term that encompasses investigation necessary to determine a future course of care and treatment, as well as investigation to monitor the effect of previous care and treatment. The tomogram in these circumstances was treatment.

36 Accordingly, I would not give effect to this ground of the cross-appeal.

(2) The Duty to Recall

37 The appellants argue that the trial judge failed to give effect to the correct duty of care. Although he criticized the oral surgeons for their delay in calling back patients after becoming aware of implant problems, the appellants say the trial judge should have recognized that when the hospital received the 1990 ECRI warning and the August 1990 letter from the distributor, it owed a duty of care to "contain the risks". In oral argument, this was sometimes called a "duty to warn", but before the trial judge, in their factum in this court, and in the substance of their oral argument before this court, it was articulated as more than a simple duty to give the appellants some sort of warning or notification. Rather, it was framed as an obligation on the part of the hospital to notify the appellants of the need for follow up care and to provide that follow up care — independently of anything the oral surgeons were doing. The trial judge properly described the contended for duty as a duty to recall the patients.

38 In my view, on the facts he found, the trial judge did not err in rejecting this theory of liability.

39 The trial judge found that upon receiving the 1990 ECRI warning and the distributor's letter, the hospital contacted the oral surgeons to ensure both that they did not book any further implant surgeries and to confirm that they knew about the warning. He found that the oral surgeons advised the hospital that they were aware of the warning, and he found that the oral surgeons were aware of the problems with the implant by 1990. He also found that the hospital had contacted the distributor and confirmed in 1991 that the distributor was aware of and had been directly in touch with the oral surgeons — one of the requests in the distributor's letter.

40 The appellants were the patients of the oral surgeons. The trial judge accepted the evidence of the CEO of the hospital that a recall of patients was something to be initiated only by the oral surgeons, given their medical training, ability to order tests, and ability to treat patients. The trial judge also accepted expert evidence that there was no precedent for any hospital in Canada self-initiating a recall of patients. He accepted evidence that the hospital could not order an oral surgeon to do any procedure on a patient or call people in for treatment; nor could it write orders for tests or book patients for treatment absent a physician's approval. He held that it was reasonable for the hospital to assume that the distributor and the oral surgeons, who had knowledge superior to that of the hospital about the implant and about what to do for patients if the implant failed, would deal appropriately with the issue. He concluded that there was no basis to elevate the hospital to an oversight role over the oral surgeons. These findings are entitled to deference. In light of them, the appellants' proposition that a duty to recall existed and was breached by the hospital must be rejected.

41 In my view, the trial judge also did not err in determining that the decision in *Pittman Estate v. Bain* (1994), 112 D.L.R. (4th) 257 (Ont. Gen. Div.) did not assist the appellants. *Pittman* held that a hospital that undertakes a program to notify patients of a problem must do so without negligence. That proposition is not applicable here, given that the hospital did not undertake any notification program. On the trial judge's findings of fact, nothing in *Pittman* requires a different conclusion to the one he reached.

42 Accordingly I would reject this ground of appeal.

(3) Apportionment

43 The appellants argue that the trial judge erred by apportioning 75% of the liability to two non-parties. This limited the recovery of the appellants whose claims were not barred by a limitation period - that is, the Hearsey appellants - to 5% of their

assessed damages. The manufacturer, who the trial judge found to be 50% at fault, and the distributor, held to be 25% at fault, were never parties to the action, were never the subject of third party proceedings by the hospital, and were both bankrupt. As such, the appellants say that apportionment of fault to them in a way that reduced the appellants' recovery from the hospital was improper.

44 The hospital supports the trial judge's approach.

45 There were two planks to the hospital's argument, (a) the Pierringer Order and the resulting amended statement of claim; and (b) this court's decision in *Taylor v. Canada (Attorney General)*, 2009 ONCA 487, 95 O.R. (3d) 561 (Ont. C.A.). In my view, neither supports the trial judge's approach.

46 In order to understand why I reject the hospital's argument, it is important to review some principles which set the background for consideration of both the Pierringer Order and the consequential amendment to the statement of claim, and the decision in *Taylor*.

Concurrent Liability and Pierringer Orders

47 At law, where more than one wrongdoer has caused or contributed to the plaintiff's injury, they are each liable to compensate the plaintiff in full, subject only to the rule that the plaintiff cannot recover more than 100% of their damages: see *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.), at para. 25. In practical terms, this means the plaintiff can recover 100% of their losses from any defendant who caused or contributed to the particular injury regardless of the degree of fault of that defendant, and regardless of whether others, parties or non-parties, were also at fault.

48 Pursuant to s. 1 of the *Negligence Act*, R.S.O. 1990, c. N.1, wrongdoers have a right of contribution from each other. In other words, although each remains jointly and severally liable to pay the plaintiff 100% of the plaintiff's damages, each can exercise the statutory right to have fault apportioned among the wrongdoers so that each wrongdoer will indemnify the others in accordance with the share of fault apportioned to them. Thus, if a defendant found 50% at fault pays the plaintiff 100% of their damages, that defendant can recover the 50% overpayment from the other wrongdoer(s) to whom the other 50% of fault was apportioned: see *Martin v. Listowel Memorial Hospital* (2000), 192 D.L.R. (4th) 250, 138 O.A.C. 77 (Ont. C.A.), at paras. 34-35.

49 It is important, however, to note that the right of indemnity is not something which affects the plaintiff. The entire risk that a wrongdoer, liable to pay 100% of the plaintiff's damages while not 100% at fault, will be able to actually recover indemnity from another wrongdoer, is on that first wrongdoer — not the plaintiff. If the second wrongdoer is not pursued by cross-claim, third party action or separate action, or if the second wrongdoer pursued is not creditworthy or insured, the first wrongdoer will still have to pay 100% of the plaintiff's damages and recover no indemnity: see *Taylor*, at paras. 18-20.

50 Before the Pierringer Order in the Hearsey Action, the hospital and oral surgeons were defendants and had cross-claimed against each other. The hospital and the oral surgeons were each at risk to the Hearsey appellants, if found at fault to any degree, of having to pay 100% of any damages. But, each had the right to recover from the other for the latter's proportionate share of any fault. So if, for example, the hospital paid the plaintiff more than its proportionate share, the hospital's out of pocket expense, assuming the oral surgeons were creditworthy, would be reduced by obtaining indemnity from the oral surgeons for their proportionate share of fault, and vice versa.

51 In addition, before the Pierringer Order in the Hearsey Action the hospital and the oral surgeons had no proceeding pending to claim indemnity from the manufacturer or distributor for their proportionate share of any fault, and they had no practical means of collecting any indemnity even if they had claimed it, as each of the manufacturer and distributor was bankrupt. So if, for example, the hospital paid 100% of the damages of the Hearsey appellants, as it would be liable to do no matter the degree of fault attributed to it, it could recover nothing from either the manufacturer or the distributor.

52 This brings us to the Pierringer Order in the Hearsey Action. Named after *Pierringer v. Hoyer*, 124 N.W.2d 106, 21 Wis. 2d 182 (U.S. Wis. S.C. 1963), the purpose of a Pierringer Order is to facilitate a settlement between a plaintiff and a defendant who wishes to settle (a settling defendant), while maintaining a level playing field for the remaining (non-settling) defendant

against whom the plaintiff wishes to proceed to trial: see *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623 (S.C.C.), at paras. 6, 23-26. It does this by certain essential provisions:

- (1) The settling defendant settles with the plaintiff;
- (2) The plaintiff discontinues its claim [against] the settling defendant;
- (3) The plaintiff continues its action against the non-settling [defendant] but limits its claim to the non-settling defendant's several liability (a 'bar order');
- (4) The settling defendant agrees to co-operate with the plaintiff by making documents and witnesses available for the action against the non-settling defendant;
- (5) The settling defendant agrees not to seek contribution and indemnity from the non-settling defendant; and
- (6) The plaintiff agrees to indemnify the settling defendant against any claims over by the non-settling defendants.

Handley Estate v. DTE Industries Limited, 2018 ONCA 324, 421 D.L.R. (4th) 636, at para. 39, citing Paul M. Perell & John W. Morden, *The Law of Civil Procedure in Ontario*, 3d ed. (Toronto: LexisNexis Canada, 2017), at p. 762.

53 These essential provisions of a Pierringer Order are informed by the discussion of liability above. The non-settling defendant will have cross-claimed against a settling defendant because it wants to recover the settling defendant's share of fault from it as indemnity, should the non-settling defendant have to pay more than its proportionate share of the plaintiff's damages. The non-settling defendant's need to do so disappears under a Pierringer Order, because it requires the plaintiff to effectively put the non-settling defendant in the same economic position as if it paid the plaintiff in full and recovered any indemnity from the settling defendant. It does this by requiring the plaintiff to reduce its recovery from the non-settling defendant by the percentage of fault to be attributed to the settling defendant, and thus by the amount the non-settling defendant would have been able to recover from the settling defendant as indemnity: see *M. (J.) v. Bradley* (2004), 71 O.R. (3d) 171, 187 O.A.C. 201 (Ont. C.A.), at paras. 30-31.

54 To use an example, suppose defendants A and B were each creditworthy and cross-claimed against each other for indemnity. Suppose each is found liable at trial and fault was apportioned 50% to each. The plaintiff makes A pay 100% of the damages. But A recovers from B, on a cross-claim, for B's 50% proportionate liability as indemnity. At the end of the day, A's net payment is only 50%, commensurate with A's liability.

55 Now suppose the plaintiff settled with B before trial. In the Pierringer Order situation, the plaintiff reduces their recovery from A (who did not settle) by the amount it is determined that B is at fault. At trial, A and B are each found to be 50% at fault. The plaintiff reduces their claim against A by the amount of fault attributed to B. A's net payment is the same 50%.

The Pierringer Order in the Hearsey Action Did Not Authorize Reduction of Recovery Due to Fault of Persons Other Than the Oral Surgeons

56 The Pierringer Order in the Hearsey Action is similar to the example above in so far as the hospital and the oral surgeons were concerned. For ease of reference, that Pierringer Order is attached as 'Schedule A' to these reasons. The hospital's cross-claim against the oral surgeons in the Hearsey Action had been made so that the hospital could obtain indemnity from the oral surgeons if it was obliged to pay the plaintiff's full damages. To the extent fault was attributed to the oral surgeons, the hospital could recover indemnity from them and thus reduce its net out of pocket expenditure. The Pierringer Order dismissed the cross-claim of the hospital against the oral surgeons. It did not prejudice the hospital by doing so, as it required the Hearsey appellants to reduce their claim against the hospital by the amount of fault that would be apportioned at trial to the oral surgeons, and it provided procedures whereby that determination could be made at trial. If that was all the Pierringer Order in the Hearsey Action did, it would meet the objectives generally ascribed to a Pierringer Order discussed above.

57 However, the effect the hospital argues for goes much further. According to the hospital, the effect of the Pierringer Order was to also reduce the Hearsey appellants' recovery from the hospital by the amount of fault the trial judge might attribute to the manufacturer and the distributor. These were entities against whom the hospital had not claimed indemnity under the *Negligence Act*, and from whom the hospital had no practical ability to recover indemnity even if claimed. The Pierringer Order, if so interpreted, would do more than maintain a level playing field for the hospital compared to its pre-Order position. The effect of the interpretation the hospital seeks is to put the hospital in a *better* position than it was in before the Pierringer Order. Before the Pierringer Order, the hospital was at risk, if found at fault to any degree, to pay all of the Hearsey appellants' damages without the ability to obtain indemnity from the manufacturer and distributor. This risk was on the hospital, regardless of the degrees of fault of the concurrent tortfeasors. As interpreted by the hospital, the Pierringer Order would free the hospital of that risk. The hospital would be placed in as good a position as it would have been had it claimed indemnity from the manufacturer and distributor and had the manufacturer and distributor been creditworthy and able to pay indemnity, rather than being bankrupt. No reason why this should be the case was suggested.

58 The Pierringer Order's language, including that incorporated into the amended statement of claim, does not, taken as a whole, support this broader interpretation. Paragraph 5 of the Pierringer Order provides that the "Plaintiffs will only claim from the Defendant Hospital those damages, if any, arising from the actions or omissions of the Defendant Hospital", and refers to the "Defendant Hospital's several liability, or proportionate share of joint liability, as may be proven against it at trial". But that must be read in light of the context and the other provisions of the Pierringer Order, which demonstrate that this was only intended to ensure the Hearsey appellants' claim and recovery from the hospital did not include anything for the fault that may be attributed to the oral surgeons.

59 The Pierringer Order was made in the context of an action that included the oral surgeons and the hospital as defendants — no one else. It was made in the context of a settlement by the appellants with the oral surgeons against whom the hospital had cross-claimed. It dismissed the hospital's cross-claim against the oral surgeons. It expressly provided that the court at trial may apportion fault among "all *Defendants named in the Statement of Claim*" (emphasis added), which meant only the hospital and the oral surgeons. It did not refer to apportionment of fault to anyone else. And it provided procedures, including for the obtaining and use of evidence from and about the oral surgeons, clearly aimed at assisting the parties to present their cases on what fault should be apportioned to the oral surgeons. It provided no similar procedures regarding the fault of any other entities.

60 We were not referred to evidence that any of the appellants had made an agreement, as a result of settlements with the manufacturer or distributor, that claims the appellants might pursue against the hospital, would be reduced by the percentage fault that would be attributed to the manufacturer or distributor.

61 In his reasons, the trial judge referred to the manufacturer having gone bankrupt shortly after it ceased to make the implant in 1988. No reference is made to any settlement with the manufacturer or recovery from it, let alone to the terms on which that may have occurred.

62 The trial judge also referred to a settlement between the distributor on the one hand, and the appellants and many others who received the implant on the other. The record included a settlement agreement of class actions against the distributor. Accepting that the appellants were members of the class and may have benefitted from that settlement, my review of that agreement does not reveal any term whereby the appellants would reduce their claims against persons who were not parties to the class actions, such as the hospital, by the distributor's percentage fault. Rather, the settlement agreement provides:

Except as otherwise provided herein, nothing in this Settlement Agreement shall prejudice or in any way interfere with the rights of the Settlement Class Members to pursue all of their other rights and remedies against persons and/or entities other than the Defendant and Released Parties. Nevertheless, Settlement Class Members further agree that in the event the Settlement Class Member commences or continues litigation or pursues a claim or makes a claim against any person or entity arising from, arising out of, or connected directly or indirectly with the distribution and insertion of a Vitek Proplast TMJ implant, including all claims for non-pecuniary, punitive, aggravated, and consequential damages, then the Settlement Class Member expressly agrees not to include in respect of any such claim any right to recover from such person or entity

any such amounts as have been paid under the terms of this Settlement Agreement to the Settlement Class Member or Settlement Class Members.

63 This provision requires the appellants to reduce their claims against the hospital to take into account the amount they recovered from the distributor under the class action settlement. If applicable, this credit would occur in the damages phase of the trial. It does not require or justify, on the question of apportionment, reducing the appellants' recovery by the distributor's percentage fault, as the trial judge did.

64 In my view, taken as a whole against the evidentiary background, the Pierringer Order and the amended statement of claim in the Hearsey Action do not require the appellants to reduce their claims against the hospital by the percentage fault of the manufacturer and the distributor, and thus improve the position of the hospital.

The Trial Judge Erred in Relying on Taylor

65 The trial judge relied on this court's decision in *Taylor* as authority to apportion fault to non-parties. He stated that *Taylor* "...expressly determined that a court can apportion fault to a person who is not a party to an action." But the issue is not whether a court may do so, but under what circumstances a court should do so. The circumstances in *Taylor* were substantially different than those in the case at bar.

66 *Taylor* concerned an attempt, by a defendant to a class action, to add third parties from whom the defendant wished to claim contribution and indemnity on the basis that their fault had contributed to each class member's injury. In other words, due to the risk it could be made to pay 100 percent of the damages it wished to seek indemnity from the third parties for their proportion of fault. The plaintiff, however, made it clear by an amendment to the claim that the exposure of the defendant was limited to damages for which it could have no right of contribution, because all that was claimed were the damages that would be apportioned to the defendant given its relative degree of fault: see paras. 4 and 11. This was done specifically "to preclude the defendant's attempt to assert a third party claim" and with the intention that "[t]he possibility of third party claims will be obviated": paras 9 and 10. Thus in *Taylor* the plaintiff amended her statement of claim to specifically state that she was not suing the defendant for anything other than the defendant's proportionate share of fault, in circumstances that made it clear she was prepared to reduce the claim by the proportion of fault that would be attributed to the proposed third parties.

67 It was in that context that the court in *Taylor* held that fault could be apportioned at trial to the proposed third parties even though they were non-parties. This was essential to the court's holding that the third party claim was unnecessary. To protect the defendant, the reductions in the plaintiff's claim due to the fault of the proposed third parties would have to be calculated by determining their degree of fault. As the court in *Taylor* noted, considerations of encouraging settlements with non-parties or of simply allowing a plaintiff to streamline litigation by obviating third party claims, favoured an interpretation of the court's powers to apportion fault that is broad enough to permit apportionment to non-parties: see paras. 26 to 28.

68 The circumstances in *Taylor* were not present in the case at bar in so far as the manufacturer and distributor are concerned. As discussed in the section above, the settlement with the oral surgeons which gave rise to the Pierringer Order contemplated an apportionment of fault to, and a corresponding reduction of the claim for the fault of, the oral surgeons, not the manufacturer and distributor. The class action settlement with the distributor also does not contemplate such an apportionment and reduction. Nor did the appellants evince an intention to streamline the litigation by indicating they would reduce their claim for the fault of the distributor and manufacturer, as the plaintiff did in *Taylor*.

69 *Taylor* does not stand for a proposition that is so broad that it would entitle the court in any case to apportion fault to non-parties, and reduce the plaintiff's recovery by that apportioned share of fault. That would be inconsistent with what the Supreme Court of Canada said in *Athey* and with s. 1 of the *Negligence Act*: namely, the general rule is that a wrongdoer is liable for 100 percent of a plaintiff's injuries and wrongdoers are liable to contribute *between themselves* in accordance with their relative shares of fault. The approach in *Taylor* was context specific. And that context is not present here.

70 Accordingly, it was an error of law for the trial judge to apply *Taylor* as he did.

Conclusion on Apportionment

71 The appellants argued that if we agreed there was an error in the apportionment of fault to the manufacturer and distributor and the reduction of the appellants' recovery as a result, we should remit that matter back to the trial judge. The hospital argued that if we found such an error, fault should be reapportioned 20% to the hospital and 80% to the oral surgeons. In other words, the relative assessment of fault as between the hospital and oral surgeons found by the trial judge should be maintained. The trial judge found the oral surgeons four times more at fault than the hospital.

72 I agree with the result proposed by the hospital. As discussed above, the underlying theory of contribution and indemnity is that a wrongdoer should be able to recover indemnity from another when the first has paid the plaintiff more than its proportionate share, assessed by their relative degrees of fault. Both the hospital and the oral surgeons were at risk before the Pierringer Order that one or the other would have to pay all of the appellants' damages. They each had cross-claimed for indemnity from the other. And they were both in the same situation vis-à-vis the manufacturer and distributor — they had no claim or ability to recover indemnity from them regardless of their degree of fault.

73 The Pierringer Order was designed to protect the hospital from paying more than its proportionate share to the same degree as its prior cross-claim for indemnity against the oral surgeons. Given the findings of the trial judge, the hospital would be paying more than its proportionate share if it paid more of the total damages than its relative share of fault compared to the fault of the oral surgeons: namely, more than one fifth of the total fault attributed to the hospital and the oral surgeons combined. The judgment in the Hearsey Action should therefore be varied to reflect this.

(4) The Costs Cross-Appeal

74 I would not give effect to the hospital's cross-appeal on costs. The hospital argues that an amount for HST is not included in the costs awards which the trial judge made after dismissing the Endean, Karam, and Lind Actions. In my view, the trial judge did not limit himself to a mechanical calculation of costs dependent on the inclusion or lack of inclusion of any specific item. In his reasons on costs, he "stepped back" to determine whether the amounts he calculated were reasonable given the magnitude of the matter and other relevant considerations: see para. 72. He was satisfied the amounts he awarded were reasonable. There is no error in principle justifying appellate intervention.

Conclusion

75 Accordingly, I would dismiss the appeals in the Endean, Lind and Karam Actions. I would allow the appeal in the Hearsey Action and vary para. 1 of the judgment in that action by replacing 5% with 20%. I would dismiss the hospital's cross-appeal.

76 The Hearsey appellants should have their costs of the appeal and cross-appeal fixed at \$20,000 inclusive of HST and disbursements.

77 Success was divided between the hospital and the Endean, Karam and Lind appellants. I would not award any costs in the appeals or the cross-appeals in those actions.

Paul Rouleau J.A.:

I agree.

K. van Rensburg J.A.:

I agree.

Schedule A

Court File No. 96-0342A

ONTARIO SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	DAY, THE 2{nd} DAY
	)	
JUSTICE JOHN WILKINS	)	OF JUNE, 2013

BETWEEN:

JANET HEARSEY and LESLIE HEARSEY

Plaintiffs

-and-

DR, W.W. DOWHOS, ST. JOSEPH'S GENERAL HOSPITAL and THE ROYAL COLLEGE OF DENTAL SURGEONS OF ONTARIO

Defendants

-and-

ATTORNEY GENERAL OF CANADA

Third Party

ORDER

THIS MOTION made by the Defendant Dr. W. W. Dowhos (the "Moving Defendant") for an Order dismissing the Main Action against him, as well as the Crossclaims and Third Party Claims, was heard this day at the 361 University Avenue, Toronto, Ontario.

ON READING the Affidavits of Tim Farrell, a solicitor for the Moving Defendant, and of David Steeves, a solicitor for the Plaintiffs, and on being advised of the Consent of the Plaintiffs, Defendants and Third Party to the requested Order, and on being advised that the action was discontinued as against the Defendant the Royal College of Dental Surgeons of Ontario on or about October 16, 1996, and on being advised that Dr. W.W. Dowhos passed away on or about February 24, 2011, and that Carole Dowhos is the Estate Trustee for the Estate of Dr. W.W. Dowhos, and on hearing submissions of counsel for the Moving Defendant:

1. *THIS COURT ORDERS* that this proceeding continue with the Estate of Dr. W.W. Dowhos, deceased, by its Estate Trustee Carole Dowhos as a Defendant, and that the Title of Proceeding be amended accordingly in all documents issued, served or filed after the date of this Order.
2. *THIS COURT ORDERS* that the Main Action be dismissed as against the Moving Defendant, without costs.
3. *THIS COURT ORDERS* that the Moving Defendant's Crossclaim against St. Joseph's General Hospital (the "Defendant Hospital") and the Defendant Hospital's Crossclaim against the Moving Defendant are hereby dismissed without costs.
4. *THIS COURT ORDERS* that all claims for contribution and/or indemnity or any other relief over by the Defendant Hospital or by any other person, whether as yet asserted or still unasserted, as against the Moving Defendant, and/or Daniel Tomlak, and/or Eric Orpana in relation to the claims made in the Main Action, are hereby barred, prohibited and enjoined forever.

5. *THIS COURT ORDERS* that the Plaintiffs' claims are restricted such that the Plaintiffs will only claim from the Defendant Hospital those damages, if any, arising from the actions or omissions of the Defendant Hospital, and that, to effect this, the Statement of Claim shall be amended to include the following paragraphs:

1. The Plaintiffs limit their claims against the Defendant Hospital to the damages, costs and interest attributable only to the Defendant Hospital's several liability Or proportionate share of joint liability to the Plaintiffs, such that the Plaintiffs' recovery shall be limited to the damages, costs and interest attributable to the Defendant Hospital's several liability, or proportionate share of joint liability, as may be proven against it at trial.

2. That the Plaintiffs acknowledge that the court at any trial of this action shall have the full authority to adjudicate upon the apportionment of fault, if any, among all Defendants named in this Statement of Claim.

6. *THIS COURTS ORDERS* that the following procedures will be observed upon the continuation of the Action as between the Plaintiffs and the Defendant Hospital:

(a) For the purpose of a trial of this Action, despite the dismissal of the Crossclaims, the Defendant Hospital will be deemed to be adverse in interest to the Moving Defendant, Daniel Tomlak and/or Eric Orpana, and may cross-examine any of these three at trial despite calling them as witnesses;

(b) The Defendant Hospital shall be entitled to serve a Request to Admit upon the Moving Defendant prior to the trial of this Action and shall be entitled to file the Response (including any deemed admissions) at the Trial of this Action;

(c) The Moving Defendant, Daniel Tomlak and/or Eric Orpana, shall provide an undertaking to attend at the trial of this Action as a fact-witness if the Defendant Hospital summonses them or one of them or serves a Notice of Intention to Call thorn or one of them and the Defendant Hospital will compensate the witness in accordance with the applicable tariffs; and

(d) All Discovery evidence provided by the Moving Defendant including all Transcripts of the examinations of discovery conducted of the Moving Defendant in any file, action or proceeding which relates to the Vitek TMJ Implant litigation shall be available for use at the Trial in this Action.

(e) For the purposes of service of the Requests to Admit or Summonses on the Moving Defendant, Daniel Tomlak and/or Eric Orpana, service will be directed to their lawyers, Blaney McMurtry LLP, Toronto, ON, unless otherwise advised.

7. *THIS COURT FURTHER ORDERS* that all Third Party Claims be dismissed without costs.

[Handwritten signature]

ENTRE	BOOK
INSUIT	REGISTRAR
DATE	June 26/13
No. 984	PER POUR

Graphic 1

Appeal allowed in part; cross-appeal dismissed.

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

Applicant

Court File No. CV-20-00638930-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**BOOK OF AUTHORITIES OF THE
RESPONDING PARTY PETER ACETO
(Motion Returnable March 19, 2021)**

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