Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

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

AND IN THE MATTER OF A PLAN OF COMPROMISE
OR ARRANGEMENT OF **JTI-MACDONALD CORP.**

AND IN THE MATTER OF A PLAN OF COMPROMISE

OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED**
AND **IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE

OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

SUPPLEMENTAL JOINT BOOK OF AUTHORITIES OF THE MEDIATOR & IMPERIAL & RBH MONITORS

Motions for Meeting Orders and Claims Procedure Orders
(Returnable October 31, 2024)

October 30, 2024

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INDEX

Cases

1. *Air Canada, Re*, 2004 CarswellOnt 1843 (SC [Commercial List]).
2. *Cable Satisfaction International Inc. v. Richter & Associés inc.*, 2004 CarswellQue 810 (SC).
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12. *SFC Litigation Trust v. Chan*, 2019 ONCA 525.
13. *Sino-Forest Corp. (Re)*, 2012 ONSC 5011.
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IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

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

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

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

Farley J.

Heard: April 27, 2004
Judgment: April 27, 2004
Docket: 03-CL-4932

Counsel: Frederick W. Chenoweth for Moving Party, Thomas Rodney Wickerson
Monique Jilesen for Monitor, Ernst & Young Inc.
Ashley Taylor for Air Canada
Gregory R. Azeff for GECAS

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous

MOTION for leave to file late dispute notice in proceeding under *Companies' Creditors Arrangement Act*.

***Farley J.*:**

1 I have reviewed this request from the viewpoint of *Blue Range, Royal Oak* and *Eaton's Liquidation*. On the basis of the facts before me I am satisfied that leave ought to be granted to late file the dispute notice, provided that same is given to the Monitor by May 13, 2004 together with the supporting documentation.

2 I think it key to that leave that the Alberta counsel acknowledged that it was his error in not reading the rejection when it came in and then compounded the error when he hesitated for several weeks in doing anything as he thought that the Alberta WCB ruling would make the issue moot. More importantly the errors were acknowledged in a fairly short time period and this motion was brought (essentially all within a 2 month timeframe). The extension of time will not cause a hardship to any interested party or prejudice AC's reorganization at this time.

3 I would however, wish to emphasize that no one should assume that an extension will usually be granted. "Corrective" action must be taken forthwith upon the error being realized (or ought reasonably to have been appreciated). Lying in the weeds is not an option.

Motion granted.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Minco-Division Construction Inc. v. 9170-6929 Québec Inc. | 2007 QCCS 236, 2007 CarswellQue 420, 29 C.B.R. (5th) 165, EYB 2007-113273, J.E. 2007-724, 164 A.C.W.S. (3d) 439 | (Que. Bktcy., Jan 17, 2007)

See paras. 20, 34, 35.

2004 CarswellQue 810
Quebec Superior Court

Cable Satisfaction International Inc. v. Richter & Associés inc.

2004 CarswellQue 810, [2004] Q.J. No. 5461, 48 C.B.R. (4th) 205, J.E. 2004-907, REJB 2004-55437

In the Matter of the plan of arrangement and reorganization of: Cable Satisfaction International Inc., Debtor, v. Richter & Associés inc., Interim Receiver - Monitor - Petitioner

Chaput J.

Heard: March 17, 2004
Judgment: March 19, 2004
Docket: C.S. Montréal 500-11-020963-035

Counsel: Me Mortimer Freiheit, Me Guy Martel for Cable Satisfaction Inc.
Me Martin Desrosiers, Me Sandra Abitan, Me David Tardif-Latourelle for Richter & Associés inc.
Me Denis Ferland, Me Vincent Mercier for Catalys Capital Group
Mr. Robert Chadwick for Goodmans LLP
Me Louise Lalonde for Banking Syndicate

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by court
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.c Miscellaneous
Table of Authorities
Cases considered by *Chaput J.*:
Canadian Airlines Corp., Re (2000), 2000 ABQB 442, 2000 CarswellAlta 662, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta. Q.B.) — considered
Doman Industries Ltd., Re (2003), 2003 BCSC 375, 2003 CarswellBC 552, 41 C.B.R. (4th) 42 (B.C. S.C. [In Chambers]) — considered
Michaud c. Steinberg Inc. (1993), [1993] R.J.Q. 1684, 55 Q.A.C. 298, 1993 CarswellQue 229 (Que. C.A.) — considered
Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175, 1988 CarswellBC 558 (B.C. S.C.) — considered
Statutes considered:
Canada Business Corporations Act, R.S.C. 1985, c. C-44
s. 122 — referred to

s. 191 — considered

s. 191(7) — considered

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

Generally — considered

s. 4 — considered

s. 6 — pursuant to

s. 7 — considered

s. 18.2 [en. 1997, c. 12, s. 125] — referred to

Words and phrases considered

Arrangement

[. . .] As is provided in section 4 of the [Companies' Creditors Arrangement Act], the arrangement or compromise is a proposal. It is a plan of terms and conditions for the arrangement or compromise to be presented to the creditors for their consideration and eventual acceptance.

In the case of [*Michaud v. Steinberg Inc.* (June 16, 1993), Doc. C.A. Montréal 500-09-00668-939 (Que. C.A.), p. 18], Delisle, J. commented that the binding force of the arrangement or compromise arises from the law itself through the sanction of the Court, and not from the effect of mutually agreed upon the terms as in a contract.

« S'il est vrai qu'un arrangement est une offre qui, pour être soumise à l'autorité compétente pour homologation, nécessite son acceptation par les créanciers dans les proportions exigées par la L.A.C.C., il n'est pas exact, avec respect, de qualifier la situation juridique qui en résulte de « contrat liant les parties ». La conséquence de l'homologation d'un arrangement est de le rendre exécutoire par le seul effet de la loi, non de rendre obligatoires des stipulations découlant d'un contrat. »

MOTION by monitor for sanction of debtor company's plan of arrangement and reorganization.

***Chaput J.*:**

1 The Interim Receiver/Monitor (« Monitor ») petitions the Court to sanction a plan of arrangement and reorganization of Cable Satisfaction International Inc. (Csii). The petition is filed pursuant to section 6 of the *Companies' Creditors Arrangement Act* (C.C.A.A.) and section 191 of the *Canada Business Corporations Act* (C.B.C.A.).

Context

2 The Initial Order was made on July 4, 2003 at the request of Csii. That order was subsequently amended.

3 A first plan of arrangement was prepared, but never voted on by the creditors.

4 Following a letter of Commitment between The Catalyst Capital Group (Catalyst), who is a creditor of Csii to the extent of over US$52.9 million, and Cabovisão - Televisão por Cabo S.A., a subsidiary company of Csii in Portugal, Csii was to submit its plan of arrangement to its creditors by January 16, 2004.

5 That plan was filed but not submitted to the creditors.

6 On November 14, 2003, the Board of Csii terminated all of its employees.

7 On November 20, 2003, the Court appointed Petitioner as interim receiver to Csii and as Monitor replacing the Monitor initially appointed.

8 After the appointment of the interim receiver, the Court granted a motion to establish the Claims Process and the Information Circular with the proposed plan was completed and sent out to the creditors.

9 On February 17, 2004, the Court issued an order setting out the conditions for the procedure leading up to the meeting of creditors.

10 The meeting of creditors to vote on the proposed plan was held on March 16, 2004.

11 As is explained in the Information Circular :

> The Plan contemplates a series of steps leading to the overall capital reorganization of Csii including the following transactions to occur on the Effective Date.

12 And :

> Following the implementation of the Plan, the equity of Csii will be held as follows (assuming no exercise of Warrants and without any adjustments as a result of fractional or *de minimis* holdings):
>
> • 70% by the Investor Group and Participating Rightholders, as part of the New Investment;
>
> • 28% by Affected Creditors; and
>
> • 2% by Existing Shareholders.

13 Prior to the meeting of creditors, on March 12, the representative of the Noteholders who are creditors to the extent of US$ 155 million under 12 3/4 % notes due March 1, 2010, issued by Csii pursuant to a trust indenture, advised the attorneys that he would table on behalf of the Noteholders before the creditors an amendment to the Plan.

14 On the same day, the Monitor announced the proposed amendment by press release. Csii published a press release on March 15, advising that it had not approved the proposed amendment and did not know if the creditors would approve it.

15 The purpose of the amendment was to eliminate the 2% participation of the shareholders and increase the share of the Noteholders to 30%.

16 At the meeting, the creditors voted to accept the amendment and then voted to accept the Amended and Restated Plan (« the Amended Plan »).

17 The Monitor asks the Court to sanction the Amended Plan.

18 On behalf of Csii, its attorneys have filed a Contestation to the Monitor's motion to sanction the Amended Plan.

19 The Contestation raises three reasons why the Amended Plan should not be sanctioned by the Court:

Absence of Consent of Csii

20 Csii alleges that a plan of arrangement proposed under the C.C.A.A., just as a proposal in bankruptcy, must be viewed as a contract. If it is to be altered or modified, the consent of the debtor company must be obtained.

Unfairness of the Amended Plan

21 According to Csii, it would be unfair to the shareholders to sanction the Amended Plan which eliminates their participation in the reorganization of the company, since the proxies, in particular those of 97% of the Noteholders representing 87% in value, contained instructions to vote for the Plan as proposed.

Lack of Procedural Fairness

22 Csii takes the position that, given the proxies to vote in favour of the Plan, the representative of the Noteholders had no authority to propose amendments to the Plan.

Discussion

Sanction Requirements

23 As to the principles governing an application for sanction of a plan pursuant to the C.C.A.A., Delisle, J. of the Quebec Court of Appeal writes in the case of *Michaud c. Steinberg Inc.*: [1]

> OBJECTIF DE LA L.A.C.C.
>
> Dans l'affaire Multidev Immobilia Inc. c. Société Anonyme Just Invest, [1988] R.J.Q. 1928 (C.A.), monsieur le juge Parent a rappelé le but visé de l'adoption de la loi (p. 1930):
>
> > « Il y a lieu de rappeler ici que la loi sur les arrangements avec les créanciers des compagnies a été adoptée au cours de la dépression, pour permettre à des compagnies en difficultés financières, débitrices aux termes d'obligations ou autres titres de créance en circulation, de conclure des ententes avec leurs créanciers, pour régler leurs problèmes en dehors des mécanismes prévus par la Loi sur la faillite et la Loi sur les liquidations. C'est une loi d'"équité » qui favorise des arrangements entre une telle compagnies et tous ses créanciers. »
>
> Le premier but de la L.A.C.C. était donc d'offrir aux compagnies qui rencontraient ses conditions d'application une alternative à certaines autres lois aux effets plus radicaux, l'objectif final étant de permettre à ces compagnies de survivre à des difficultés financières, avec l'accord de ses créanciers.
>
> Au cours des années, ce caractère curatif de la L.A.C.C. a été confirmé par la jurisprudence, de sorte qu'aujourd'hui il y a reconnaissance unanime de la raison d'être de la loi :
>
> > « 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 . . . » Hongkong Bank v. Chef Ready Foods (1991) 4 C.B.R. (3d) 311 (C.A.C.B.) (p. 315)
> >
> > . . . 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: . . . » Nova Metal Prods v. Comiskey (Trustee of), [1991] 1 C.B.R. (3d) 101 (C.A.O.) (p. 122)
> >
> > « La loi veut permettre à une compagnie débitrice de soumettre à l'ensemble de ses créanciers un plan de réorganisation . . . » Banque Laurentienne du Canada c. Groupe Bovac Ltée (1991) R.L. 593 (C.A.) (p. 613)
>
> À cause précisément de l'objectif visé, la L.A.C.C. doit recevoir une interprétation libérale. La compagnie qui a recours à cette loi doit être en mesure d'atteindre sa fin.
>
> C'est dans cette optique que le tribunal, saisi d'une requête en homologation d'un arrangement, doit exercer son rôle.
>
> RÔLE DU TRIBUNAL SUR UNE REQUÊTE EN HOMOLOGATION D'ARRANGEMENT
>
> La jurisprudence est bien campée sur le sujet. Les principes suivants s'en dégagent:
>
> > a) le premier devoir du tribunal est de s'assurer que l'arrangement a été accepté par les créanciers conformément aux exigences de l'article 6 L.A.C.C.: il faut une majorité numérique représentant les trois quarts en valeur des créanciers

ou d'une catégorie de créanciers, selon le cas, présents et votant soit en personne, soit par fondé de pouvoirs à une assemblée dûment convoquée à cette fin: In re Dorman, Long & Co. In re South Durham Steel and Iron Co., [1934] 1 Ch. 635 (p. 655); Re Northland Properties Ltd., [1989] 73 C.B.R. (N.S.) 175 (p. 182];

b) le tribunal doit ensuite s'assurer du caractère raisonnable de l'arrangement; il faut que celui-ci soit bénéfique aux deux parties en présence; In re Alabama, New Orleans Texas and Pacific Junction Railway Co. [1891] 1 Ch. 213 (C.A.) (p. 243); In re English Scottish and Australian Chartered Bank, [1893] 3 Ch. 385 (C.A.) (p. 408); dans le premier de ces arrêts, Lord Bowen définit ce qu'il faut entendre par un arrangement raisonnable (p. 243):

« A reasonable compromise must be a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it . . . »

c) le tribunal n'a pas à substituer sa propre appréciation de l'arrangement à celle des créanciers: Re Langley's Ltd., [1938] O.R. 123 (C.A.O.) (p. 142); Carruth v. Imperial Chemical Industries Ltd., [1937] A.C. 707 (p. 770);

d) le tribunal doit cependant s'assurer, et c'est sûrement là la partie la plus importante de son rôle, qu'une minorité de créanciers n'est pas l'objet de coercition de la part de la majorité ou forcée d'accepter des conditions exorbitantes (« unconscionable »):

» . . .

In reviewing the arrangement, the Court is placed under an obligation to see that there is not within the apparent majority some undisclosed or unwarranted coercion of the minority who may not have voted or who may have been opposed . . . » Re Gold Texas Resources Ltd., Brisith Columbia Supreme Court, A883238, (jugement du 14 février 1989; la juge McLachlin)

» . . . The court's role is to ensure that the creditors who are bound unwillingly under the Act are not made victims of the majority and forced to accept terms that are unconscionable . . . » Re Keddy Motors Inns Ltd., [1992] 13 C.B.R. (3d) 245 (C.A.N.E.) (p. 258)

Il y a maintenant lieu de passer aux moyens invoqués par les appellants au soutien de leur appel. »

24 As summarized by Chief Justice McEachern of the B.C. Court of Appeal in *Northland Properties Ltd., Re*: [2]

« The authorities do not permit any doubt about the principles to be applied in a case such as this. They are set out over and over again in many decided cases and may be summarized as follows:

(1) There must be strict compliance with all statutory requirements (it was not suggested in this case that the statutory requirements had not been satisfied);

(2) All material filed and procedures carried out must be examined to determine if anything has been done which is not authorized by the C.C.A.A.;

(3) The plan must be fair and reasonable.

25 The same principles apply to an application in the case of a reorganization under Section 191 C.B.C.A. in *Doman Industries Ltd., Re*., [3] Tysoe, J. writes :

« It was common ground between counsel on this application that the test to be applied by the Court under s. 191 of the *CBCA* is similar to the test applied in deciding whether to sanction a reorganization plan under the *CCAA*; namely:

(1) there must be compliance with all statutory requirements;

(2) the debtor company must be acting in good faith;

(3) the capital restructuring must be fair and reasonable.

26 The statutory requirements under the C.C.A.A. include various matters such as: the status of the company as a « debtor company »; the amount of its indebtedness; compliance with Court orders, especially that dealing with the calling of the creditors meeting; the determination of the classes of creditors; the procedure for calling the meeting of creditors and the voting.

27 As appears from the Contestation filed, an issue is raised as to the legality of the proposal to amend the plan and the voting of the creditors on the Amended Plan.

28 Save for that issue, on the basis of the documents filed and the testimony of the Monitor, it appears that the statutory requirements have been met.

29 Also, it is to be noted that the Amended Plan does contain a provision for the payment of the Crown claims as required by section 18.2 C.C.A.A. In addition, the Monitor has informed the Court that no such claims have become payable since the Court issued the Initial Order.

Contestation

30 The intent of the Contestation is that the Court refuses to sanction the Amended Plan, since it takes away the advantage which the shareholders would receive under the Plan.

31 It was raised during the pleadings that Csii cannot appear before the Court to plead in favour of the shareholders.

32 It is doubtful that Csii has the required legal interest to attend before the Court to argue what should be done in the interest of the shareholders. No doubt, as provided in section 122 C.B.C.A., the directors and officers of a corporation must act in the best interest of the corporation. But, in the present case, it is not the directors or officers who are before the Court, but Csii through its attorneys.

33 However, at the outset of the hearing, no preliminary exception was taken to the filing of the Contestation by Csii and the Contestation was pleaded.

34 The Contestation raises that the consent of Csii should have been obtained to the proposed amendment to the Plan, as a plan under the C.C.A.A. is to be considered a contract.

35 That is not the case. As is provided in section 4 of the C.C.A.A., the arrangement or compromise is a proposal. It is a plan of terms and conditions for the arrangement or compromise to be presented to the creditors for their consideration and eventual acceptance.

36 In the case of *Michaud*, [4] Delisle, J. commented that the binding force of the arrangement or compromise arises from the law itself through the sanction of the Court, and not from the effect of mutually agreed upon the terms as in a contract.

> « S'il est vrai qu'un arrangement est une offre qui, pour être soumise à l'autorité compétente pour homologation, nécessite son acceptation par les créanciers dans les proportions exigées par la L.A.C.C., il n'est pas exact, avec respect, de qualifier la situation juridique qui en résulte de « contrat liant les parties ». La conséquence de l'homologation d'un arrangement est de le rendre exécutoire par le seul effet de la loi, non de rendre obligatoires des stipulations découlant d'un contrat. »

37 The proxy to be completed by the Noteholders for the vote at the creditors' meeting contains the following:

Section 2 - To be completed by Noteholder

> **THE NOTEHOLDER _____(insert name),** hereby revokes all proxies previously given and nominates, constitutes, and appoints Mr. Robert Chadwick of Goodmans LLP, counsel to the Noteholder committee, of failing him, such person as Mr. Robert Chadwick may designate, or instead _____(**insert name, if applicable**), as nominee of the Noteholder, with power of substitution, to attend on behalf of and act for the Noteholder at the Meeting of Affected Creditors to be held in connection with CSII's Plan and at any and all adjournments or postponements thereof, and to vote the Voting Claim of the Noteholder as follows:
>
> **A. (mark one only):**
>
> VOTE FOR approval of the Plan; or
>
> VOTE AGAINST approval of the Plan
>
> and
>
> **B. vote at the nominee's discretion and otherwise act thereat for and on behalf of the Noteholder in respect of any amendments or variations to the above matter and to any other matters that may come before the Meeting of Affected Creditors or any adjournment or postponement thereof.**

38 And the Information Circular did notify the creditors that the proxy holders could be called upon to vote on amendments to the proposed plan at the meeting of creditors.

> The forms of proxy accompanying this Circular are to be used in connection with the Meeting. Such forms of proxy confer discretionary authority upon the individuals named therein with respect to amendments or variations to matters identified in the Notice of Meeting and with respect to other matters which may properly come before the Meeting including amendments or variations to the Plan. Any material amendments to the Plan known prior to the Meeting will, to the extent practicable, be disclosed by press release and by notice to the service list; however, amendments to the Plan may be made at any time prior to the termination of the Meeting. Accordingly, Affected Creditors are urged to attend the Meeting in person.

39 The Monitor has testified 97% of the proxies tabulated were marked: « VOTE FOR approval of the plan ».

40 It is argued on behalf of Csii that the required majority of the proxies did indicate the intention of the creditors to vote for the plan that provided for a 2% distribution to the shareholders, and the Court should sanction the Plan as tabled at the meeting of creditors prior to the amendment.

41 The Court cannot accept that argument.

42 Nothing in the C.C.A.A. precludes creditors from proposing an amendment to the plan to be considered at the meeting of creditors. It clearly provides that a proposed plan may be modified before or at the meeting of creditors.

> 6. Where a majority in number representing two-thirds 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 and Insolvency Act* or in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

> 7. Where an alteration or a modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, the meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and those directions may be given after as well as before adjournment of any meeting or meetings, and the court may in its discretion direct that it is not necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

43 The notice that the Noteholders would propose the amendment was given to the Monitor and press released by him on March 12. The meeting of creditors was scheduled on March 15.

44 No doubt that is a short notice. But it was possible for any one of the creditors or any other interested party to request from the Monitor or by Court Order an adjournment of the meeting. Also, the adjournment could have been requested at the meeting at the time the amendment was proposed.

45 That is not the case. It appears from the results of the voting that the creditors did consider the proposed amendment and did vote for it.

46 To accept the position of Csii that the Court should sanction the Plan as proposed before the amendment would mean that it sanctions a plan on which the creditors have not voted. The plan submitted for sanction must necessarily be the one voted on by the creditors. The Court cannot force on the creditors a plan which they have not voted to accept.

47 The Monitor did testify that if either the Plan or the Amended Plan is not implemented, the only alternative available is the liquidation of Csii. In that case, the creditors will have a greater loss than under the Plan or the Amended Plan.

48 As regards the interests of the creditors, at this stage there appears to be no other viable option than to carry forward with the arrangement.

49 From the representations made, the Court understands that the shareholders are not investing nor participating in the arrangement or the reorganization.

50 The Amended Plan does take away the 2% participation which had been proposed for the shareholders. However, the creditors who will suffer an important shortfall have decided that since the shareholders bring nothing to the efforts being made to revitalize the company, they should get nothing.

51 In the present case, the reorganization proposed in the Plan is also sought under section 191 C.B.C.A. Sub-section (7) of that section reads as follows:

> (7) A shareholder is not entitled to dissent under section 190 if an amendment to the articles of incorporation is effected under this section.

52 On a reorganization, Martel comments as follows [5] :

> « Lorsqu'une société fédérale est insolvable et qu'elle fait une proposition à ses créanciers en vertu de la *Loi sur la faillite et l'insolvabilité* ou une transaction ou un arrangement avec ceux-ci sous l'autorité de la *Loi sur les arrangements avec les créanciers des compagnies*, elle peut à cette occasion apporter des modifications à ses statuts par voie de réorganisation en vertu de l'article 191 de la *Loi canadienne sur les sociétés par actions*. L'ordonnance rendue par le tribunal en vertu des deux premières de ces lois peut effectuer dans les statuts de la société toute modification prévue à l'article 173, incluant des modifications au capital-actions, sans qu'aucune résolution des actionnaires ne soit requise. De plus, le tribunal qui rend l'ordonnance peut autoriser, en en fixant les modalités, l'émission de titres de créance (obligations, débentures ou billets) convertibles ou non en actions de toute catégorie ou assorties de l'option d'acquérir de telles actions; il peut aussi ajouter d'autres administrateurs ou remplacer ceux qui sont en fonction.

> La réorganisation ordonnée par le tribunal s'effectue par le dépôt de clauses de réorganisation (formule 14) auprès du Directeur, et de la délivrance par celui-ci d'un certificat de modification.
>
> Non seulement les actionnaires ne sont-ils pas appelés à voter sur la réorganisation, mais en plus ils ne bénéficient pas du droit de dissidence. Le raisonnement derrière cette entorse à la protection statutaire des actionnaires est que, puisque la société est insolvable, leurs actions ne valent rien et il ne leur appartient pas de faire échec à une proposition ou un arrangement avec les créanciers qui sera à l'avantage de la société et, éventuellement, si la société parvient à survivre et à redémarrer grâce à cette démarche, au leur. »
>
> (*references omitted*)

53 And, in the case of an arrangement proposed under the C.C.A.A., the shareholders of the debtor company cannot expect any advantage from the arrangement. As the company is insolvent, the shareholders have no economic interest to protect. More so when, as in the present case, the shareholders are not contributing to any of the funding required by the Plan. Accordingly, they have no standing to claim a right under the proposed arrangement. As Paperny, J. wrote in *Canadian Airlines Corp., Re*: [6]

> [Paragraph 143] « Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of a liquidation of insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where the creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have « a true interest to be protected » because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: *Royal Oak Mines Ltd., supra*, par. 4, *Re Cadillac Fairview Inc.* (March 7, 1995), Doc. B28/95 (Ont. Gen Div. [Continental List]) and *T. Eaton Company, supra. »*
>
> (*emphasis added*)
>
> [Paragraph 170] « [. . .] « Where secured creditors have compromised their claims and unsecured creditors are accepting 13 cents on the dollar in a potential pool of unsecured claims totalling possibly in excess of $1 billion, it is not unfair that shareholders receive nothing. »
>
> (*emphasis added)*

54 In the end, the Amended Plan does not appear to be unfair and should be sanctioned.

55 (As regards the other conclusions sought in the Motion, there was no contestation.)

56 FOR THESE REASONS, THE COURT:

57 GRANTS the motion pf Petitioner to sanction the Second Amended and Restated Plan of Arrangement and Reorganization of Cable Satisfaction International Inc. (the « Motion »);

58 DECLARES that the time for service of the Motion is hereby abridged and that Cable Satisfaction International Inc., all creditors and shareholders have been properly notified;

59 DECLARES that capitalized terms used in the Motion and not otherwise defined herein shall have the meaning set out in the Second Amended and Restated Plan of Arrangement and Reorganization, Exhibit M-19 (the « Amended Plan »);

60 SANCTIONS the Amended Plan pursuant to Section 6 of the *Companies' Creditors Arrangement Act*;

61 DIRECTS and AUTHORIZES Richter & Associés Inc., acting for and on behalf of Cable Satisfaction International Inc., to complete all of the corporate and financial transactions contemplated under the Amended Plan, including, without limitation, (i) all acts required in section 3.1 of the Amended Plan, and (ii) the incorporation of a new wholly-owned subsidiary under the laws of the Netherlands;

62 DECLARES that the compromises and the reorganization of share capital effected by the Amended Plan (including section 6 thereof) are approved, binding and effective upon all Affected Creditors, shareholders of Cable Satisfaction International Inc. and other Persons affected by the Amended Plan;

63 APPROVES the form of articles of reorganization, Exhibit M-21, providing for the reorganization of Cable Satisfaction International Inc.'s share capital, including the appointment of the New Board as contemplated by Section 9.4 of the Amended Plan;

64 APPROVES the releases and discharges as at the Effective Date of Cable Satisfaction International Inc. and other Persons in accordance with the provisions of Section 9.1 and 9.3 of the Amended Plan;

65 DISCHARGES as at the Effective Date all charges against assets of Cable Satisfaction International Inc. by any Order;

66 DISCHARGES, as at the Effective date, the Monitor and the Interim Receiver from all duties (except, in the case of the Monitor, the adjudication of Claims which then remain unresolved and any other duties specified by the orders rendered herein) and RELEASES the Monitor and the Interim Receiver from any and all claims as at the Effective Date;

67 STAYS any and all steps or proceedings, including, without limitation, administrative orders, declarations or assessments commenced, taken or proceeded with against any of the Persons released pursuant to Section 9.1 and 9.3 of the Amended Plan and to the extent provided therein;

68 DECLARES the Shareholders Agreement terminated as at the Effective Date;

69 DECLARES the Trust Indenture terminated and Cable Satisfaction International Inc. released from its obligations thereunder upon the Effective Date;

70 DECLARES all issued and outstanding options (including any options issued pursuant to the Stock Option Plan), warrants (including warrants issued pursuant to the Existing Warrant Indenture) and rights to acquire shares of Cable Satisfaction International Inc. cancelled as at the Effective Date without payment of any consideration, and DECLARES the Stock Option Plan and Existing Warrant Indenture terminated as at the Effective Date;

71 CONFIRMS that all executory contracts to which Cable Satisfaction International Inc. is a party are in full force and effect notwithstanding the Proceedings, or the Amended Plan and its attendant compromises, and that no Person party to any such executory contract shall be entitled to terminate or repudiate its obligations under such contract by reason of the commencement of the Proceedings or the content of the Amended Plan, or the compromises effected under the Amended Plan (excluding, for greater certainly, the agreement referred to in paragraphs 67, 68 and 69 above and the Lease Agreement);

72 GIVES EFFECT from and after the Effective Date to the waivers, permanent injunction and other provisions contemplated by Section 9.2 of the Amended Plan;

73 DECLARES that all the transactions contemplated in the Amended Plan will be effective as of the Effective Date unless otherwise provided in the Amended Plan and are authorized and approved under the Amended Plan and by this Court, where appropriate, as part of the orders rendered herein, in all respects and for all purposes without any requirement of further action by the Affected Creditors or the shareholders or directors of Cable Satisfaction International Inc.;

74 DECLARES that following the Effective Date, all Charges in respect of the Claims of the Affected Creditors will be released and all instruments or other documents related thereto, if any, will be terminated and cancelled. If any affected Creditors

refuses to provide a discharge in respect of registered Charges to Cable Satisfaction International Inc. on terms acceptable to Cable Satisfaction International Inc., Cable Satisfaction International Inc. will seek an Order from the Court (or any court of competent jurisdiction in the jurisdiction where such Charges are registered) for the discharge of the Charges of such Affected Creditor from title to the affected property;

75 DECLARES that on the Effective Date, each Affected Creditor whose Claim is affected by the Amended Plan shall be deemed to have consented and agreed to all of the provisions of the Amended Plan in their entirety. In particular, each Affected Creditor whose Claim is affected by the Amended Plan shall be deemed:

a) to have executed and delivered to Cable Satisfaction International Inc. all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out the Amended Plan in its entirety;

b) to have waived any non-compliance by Cable Satisfaction International Inc. with any provision, express or implied, in any agreement or other arrangement, written or oral, referred to in Section 9.2 of the Amended Plan existing between such Affected Creditor and Cable Satisfaction Inc. that has occurred on or prior to the Effective Date, and where provided for in the orders rendered herein, after the Effective Date as provided herein; and

c) to have agreed that, if there is any conflict between the provisions, express or implied, of any agreement or other arrangement, written or oral, existing between such Affected Creditor and Cable Satisfaction International Inc. at the Effective Date (other than those entered into by Cable Satisfaction International Inc. on, or with effect from, the Effective Date) and the provisions of the Amended Plan, the provisions of the Amended Plan take precedence and priority and the provisions of such agreement or other arrangement shall be deemed to be amended accordingly;

76 DECLARES, to the extent provided in the Amended Plan that the terms and conditions of the Amended Plan and procedures for the exchange of Common Shares and Rights are fair to those to whom securities will be issued;

77 ORDERS that:

a) the Amended Initial Order remains in full force and effect and that the Stay Termination Date (as defined in paragraph 22 of the Initial Order) is hereby extended until the earlier of the Effective Date and April 30, 2004; and

b) the appointment of Richter & Associés Inc. as Interim Receiver under the Interim Receiver Order remains in full force and effect until the earlier of the Effective Date and April 30, 2004;

78 DECLARES that the orders rendered herein shall supersede and/or complete any previous Order;

79 DECLARES the orders rendered herein executory notwithstanding any appeal or application seeking leave therefrom;

80 WITHOUT COSTS.

Motion allowed.

Footnotes

1 [1993 CarswellQue 229 (Que. C.A.)], 500-09-000668-939, June 16, 1993 (C.C.A.), p. 3 to 7.

2 (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), p. 3 and 4.

3 (2003), 41 C.B.R. (4th) 42 (B.C. S.C. [In Chambers]), 45.

4 Above, note 1, p. 18.

5 La compagnie au Québec, Éditions Wilson & Lafleur Martel Ltée, 2004, p. 19-87 - 19-88.

6 (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.).

End of Document

Court of Queen's Bench of Alberta

See para. 56

Citation: Canada North Group Inc (*Companies' Creditors Arrangement Act*), 2017 ABQB 550

Date: 20170911
Docket: 1703 12327
Registry: Edmonton

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

AND

In the Matter of a Plan of Arrangement of
Canada North Group Inc, Canada North Camps Inc, Campcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd

Applicants

Reasons for Judgment
of the
Honourable Madam Justice J.E. Topolniski

Introduction

[1] This case is about whether Court ordered "super-priority" security interests granted in a *Companies' Creditor Arrangement Act* [1](*CCAA*) proceeding can take priority over statutory deemed trusts in favour of Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue (CRA) for unremitted source deductions.

[2] Acknowledging that its success on this motion would cause a chill on commercial restructuring, CRA relies on the comeback provision in an initial *CCAA* Order made July 5, 2017 (Initial Order) to vary "super-priority" charges made in favour of an interim financier, the directors of the debtor companies, and the Monitor and its counsel (Priority Charges), which

[1] RSC 1985, c C-36 as amended, ss 11.2, 11.4, 11.51 11.52.

subordinate its deemed trust claims arising under the *Income Tax Act (ITA)*[2], *Canada Pension Plan Act*[3] *(CPP Act)*, and *Employment Insurance Act*[4] *(EI Act*) (collectively, the Fiscal Statutes)[5].

[3] CRA's view is that the deemed trusts give it a proprietary, rather than a secured interest in the Debtors' assets that cannot be subordinated. Alternatively, if it is a secured creditor, its first place position under the Fiscal Statutes cannot be undermined by the Priority Charges. Canada North Group Inc, Canada North Camps Inc, Camcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd and 1919209 Alberta Inc (the Debtors), the Monitor, and the interim financer, Business Development Bank of Canada (BDC), strenuously oppose the motion.

[4] In addition to the priority issue, there are a number of interconnected, subsidiary issues including: Whether the subject is proper for variance, the onus on a comeback motion, technical service versus actual notice, and delay prejudice.

[5] For the reasons that follow, CRA's interest arising under the Fiscal Statutes is properly subordinated by the Priority Charges. Concerning the subsidiary issues, I have (obviously given the foregoing) found that the question is appropriate for a comeback hearing. I have also found that CRA bears the onus and that, even if CRA had prevailed, it would have been inappropriate to disturb the Priority Charges for the period between the Initial Order and this hearing on August 11, 2017, because of the delay prejudice.

The Factual Landscape

[6] No surprise given the nature of the proceedings, matters have unfolded quickly.

[7] The Debtor's restructuring plan began with s 50.4(1) *Bankruptcy and Insolvency Act* (*BIA*)[6] notice of intention to make a proposal to creditors that very quickly changed to a plea for *CCAA* relief.

[8] The originating *CCAA* materials were served on CRA via courier at its Edmonton office (CRA Office) on June 28. The service package included:

a. The originating application returnable July 5, 2017 seeking a stay of proceedings and basket of other relief, including the Priority Charges;

b. A draft form of initial order that set out the sought after charges: Interim financier charge of $1,000,000, administrative charge of $1,000,000, and the director's indemnity charge of $50,000,000; and

c. An affidavit of a director of the Debtors attesting to a $1,140,000 debt to CRA for source deductions and GST (the evidence does not breakdown what is owed for source deductions, which is the only remittance in issue).

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[2] RSC, 1985, c 1 (5th Supp) 6.
[3] RSC 1985, c C-8.
[4] SC 1996, c 23.
[5] Para 44 of the Initial Order provides that the Priority Charges constitute a charge on all of the debtors' property which, subject to s 34(11) of the *CCAA*, rank in priority to all other security interests, including trusts, liens, and encumbrances, statutory or otherwise.
[6] RSC 1985, c B-3.

[9] On July 5, the Debtors' motion and a cross-motion to appoint a receiver of three of the debtor companies by the Debtor's primary lender, Canadian Western Bank (CWB), proceeded. CRA did not appear (more will be said about this later). The Court refused CWB's receivership application and granted the Initial Order, which included typical service provisions and a comeback clause (Comeback Provision). The Priority Charges track the draft form of Order with one change - a (consensual) $500,000 reduction to the administrative charge.

[10] On July 6, the Debtors served CRA with the Initial Order by mailing it to the CRA Office, a permissible form of service under Alberta's *Rules of Court*. Also on this day, the CRA employee responsible for *CCAA* filings in western Canada (CRA Representative) received the Initial Order. The curious routing was via a Department of Justice Canada (DOJ) lawyer who was given it by a party that noted CRA's manifest absence at the initial hearing.

[11] On July 12, the Monitor published notice of the proceedings in one local and one national newspaper and created a proceeding-specific website.

[12] By July 13, the Debtor's service package had wended its way from the CRA Office to the CRA Representative's hands.

[13] Next, on July 20, when BDC had advanced $900,000 of the Priority $1,000,000 facility, the Debtors served a motion to extend the stay of proceedings (made in the Initial Order) returnable July 27 (Extension Motion). Again, service was on the CRA Offices.

[14] Then, on July 21, CWB served another motion to appoint a receiver also returnable on July 27. CWB served CRA by sending the documents to a DOJ lawyer.

[15] On July 25, the Debtors served CRA with an application to increase interim financing returnable July 27 on the ground that they had a new contract to supply camps for firefighters battling the wildfires then ravaging British Columbia (Enhanced Financing Motion).

[16] Late on the afternoon of July 26, CRA's counsel emailed an unfiled version of this motion and a draft form of the order to be sought to the Monitor's and Debtors' counsel, who passed the information to BDC's counsel.

[17] On July 27, all three motions proceeded. CRA appeared, taking no position. In the result, the stay of proceedings was extended until September 26, and the interim financing was increased to $2,500,000 (written reasons were later filed: 2017 ABQB 508). After the Court delivered its oral reasons for decision, CRA's counsel rose to advise that his client would be filing this motion, noting the risk to BDC for "additional advances subject to the Crown's charges." In response, BDC's counsel indicated that his client had earlier learned of CRA's intentions and was still prepared to advance under the facility.

The Legal Landscape

The *CCAA* and Judicial Decision Making

[18] The *CCAA*'s purpose is to allow financially distressed businesses with more than $5,000,000 debt to keep operating and, where possible, avoid the social and economic costs of liquidation.

[19] The *CCAA* process "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."[7]

[20] When enacting the *CCAA*, Parliament understood that liquidation of insolvent businesses is harmful to creditors and employees and the optimal outcome is their survival.[8] This notion would not have been lost on Parliament when the *CCAA* was substantially amended in 2009 (2009 amendments). Indeed, in a post-2009 amendment case, ***Sun Indalex Finance, LLC v United Steelworkers,***[9] Cromwell J, concurring in result and writing for McLachlin CJ and Rothstein J, spoke of the *CCAA's* purpose saying:

> [It] is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent.[10]

[21] The Court's function during the *CCAA* stay period is to supervise and move the process to the point where the creditors approve a compromise or it becomes evident that the attempt is doomed to fail.[11] Typically, this requires balancing multiple interests.

[22] *CCAA* s 11 cloaks the Court with broad discretionary power to make any order it considers appropriate in the circumstances, subject to the restrictions set out in the *Act*. However, as the Supreme Court of Canada observed in ***Century Services***, there are limits on the exercise of inherent judicial authority in a *CCAA* restructuring.[12]

[23] The Supreme Court also provides this overarching direction for exercising *CCAA* judicial authority in ***Century Services***:

> The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants

[7] ***Century Services Inc v Canada (Attorney General***), 2010 SCC 60 at para 77, [2010] 3 SCR 379.
[8] ***Century Services*** at paras 15, 17.
[9] ***Sun Indalex Finance, LLC v United Steelworkers,*** 2013 SCC 6 at para 205, [2013] 1 SCR 271.
[10] ***Indalex*** at para 105.
[11] ***Hong Kong Bank of Canada v Chef Ready Foods Ltd*** (1990), [1991] 2 WWR 136 at 140, 51 BCLR (2d) 84 (BCCA).
[12] ***Century Services*** at paras 64-66.

achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit[13].

[24] In interpreting and applying the *CCAA*, the Court is to employ a hierarchical approach, and consider and, if necessary, resolve the underlying policies at play.[14]

A Brief History of Deemed Trust Litigation

[25] While there are other priority cases involving disputes between CRA and insolvent entities, this discussion necessarily begins with ***Royal Bank of Canada v Sparrow Electric Corp***.[15]

[26] The contest in ***Sparrow Electric*** was between CRA's deemed trust claim for unremitted source deductions under the *ITA* and security interests under the *Bank Act*[16] and the Alberta *Personal Property Security Act.*[17] CRA lost the priority battle since the security interests were fixed charges attaching to the secured property when the debtor acquired it. Consequently, CRA's deemed trust had no property to attach to when it later arose. In response to ***Sparrow Electric,*** Parliament amended the *ITA* by expanding s 227 (4) and adding s 227(4.1) (detailed below).

[27] The next noteworthy case is ***First Vancouver Finance v MNR***,[18] which concerned a priority dispute between CRA's deemed tax trusts and the interest of a third party purchaser of assets bought in an insolvency proceeding sale. The interpretation of *ITA* s 227(4.1) was at the fore.

[28] The Supreme Court found in favour of the third party purchaser. Writing for the majority, Iacobucci J noted:

a. In principle, the deemed trust is similar to a floating charge over all the debtor's assets in favour of the Crown (at para 40);

b. The deemed trust operates "in a continuous manner, attaching to any property which comes into the hands of the debtor as long as the debtor continues to be in default, and extending back in time to the moment of the initial deduction" (at para 33);

c. Property subject to the deemed trust can be alienated by the debtor, after which the deemed trust applies to the proceeds (at para 42); and

d. The deemed trust is not a "true trust," nor is it governed by common law requirements under ordinary principles of trust law, but the effect of s227(4.1) is to revitalize the trust whose subject matter has lost all identity (citing Gonthier J in ***Sparrow Electric***) (at para 27-28).

[29] The Supreme Court concluded that Parliament intended s 227(4) and (4.1):

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[13] ***Century Services*** at para 70.
[14] ***Century Services*** at paras 65 and 70.
[15] ***Royal Bank of Canada v Sparrow Electric Corp,*** [1997] 1 SCR 411.
[16] SC 1991, c 46.
[17] SA 1988, c P-4.05.
[18] ***First Vancouver Finance v MNR,*** 2002 SCC 49, [2002] 2 SCR 720.

> ... to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect. (at para 28).

[30] ***First Vancouver*** was considered in the 2007 decision, ***Temple City Housing Inc (Companies' Creditors Arrangement Act)***,[19] and again in June 2017 in ***Re Rosedale Farms Limited, Hassett Holdings Inc, Resurgame Resources***.[20]

[31] In ***Temple City***, CRA opposed a Priority charge in favour of an interim financier (then termed a debtor in possession, or DIP, financier) on the basis that it had a proprietary interest in the debtor's assets under its (tax) deemed trusts. Unlike this case, it was decided before the 2009 amendments.

[32] Like others before her with no statutory authority to grant the super priority charges, Romaine J assessed the merits and relied on the Court's inherent jurisdiction to grant the charge.

[33] The Alberta Court of Appeal denied leave to appeal, finding the issue unimportant to the practice because amendments allowing such charges were on the horizon and future cases would engage statutory interpretation (the Court of Appeal's forecast of looming amendments was sidelined by Parliamentary inaction, and the amendments were eventually proclaimed in force on September 18, 2009). The Court also found the issue unimportant to the case itself for two distinct reasons. First, the proceeding had taken on a momentum that would make it virtually impossible to "unscramble the egg." Second, an appeal would hinder the restructuring as the DIP lender would not advance without being in a priority position.

[34] Next is the seminal decision in ***Century Services***, which considered the deemed trust for GST arising under the *Excise Tax Act* (ETA).[21] Despite the different deemed trust at issue, ***Century Services*** is important for many reasons including, general interpretation of the *CCAA*, policy considerations, the Court's function, and the parameters for exercising inherent jurisdiction.

[35] ***Rosedale Farms*** concerned deemed tax trusts and a super-priority interim financing charge in a *BIA* proposal scenario. The reasons disagree quite strongly with the logic of ***Temple City***. The Court also found that because CRA did not have the requisite notice, it could not be bound by the interim financing Order.

[36] I will return to the conflicting views expressed in ***Temple City*** and ***Rosedale Farms*** in the context of the priority analysis.

The Statutory Provisions

[37] The relevant statutory provisions are set out below. All emphasis is mine.

[38] *CCAA* s 2(1) defines the term, "secured creditor" as including:

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[19] ***Temple City Housing Inc (Companies' Creditors Arrangement Act),*** 2007 ABQB 786, 42 CBR (5th) 274, leave to appeal denied ***Canada v Temple City Housing Inc***, 2008 ABCA 1, 43 CBR (5th) 35.

[20] ***Re Rosedale Farms Limited, Hassett Holdings Inc, Resurgame Resources,*** 2017 NSSC 160.

[21] RSC 1985, c E-15.

> **a holder of ... a trust** in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada... .

[39] *ITA* s 224(1.3) defines "secured creditor" as "a person who has a security interest in the property of another person." It defines "security interest" as:

> **any interest in**, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, **created by or arising out of a** debenture, mortgage, hypothec, lien, pledge, charge, **deemed or actual trust,** assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for.

[40] The *EI Act* and *CPP Act* cross-reference these definitions.

[41] The relevant portions of *CCAA* ss 11.2, 11.51, and 11.52 read:

> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) **The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.**
>
> 11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> (2) **The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.**
>
> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) **The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.**

[42] *CCAA* s 37, previously s 18.2, reads:

> 37 (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act (each of which is in this subsection referred to as a "federal provision")… .

[43] *ITA* ss 227(4) and (4.1) read:

> **(4)** Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> (4.1) **Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada,** any enactment of a province or any other law, **where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid** to Her Majesty in the manner and at the time provided under this Act, **property of the person and property held by any secured creditor** (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust **is deemed**
>
> > **(a) to be held**, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, **in trust for Her Majesty whether or not the property is subject to such a security interest**, and
> >
> > **(b)** to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

> **and is property beneficially owned by Her Majesty**
> notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[44] *EI Act* s 86(2.1) and *CPP Act* s 23(3) are identical to *ITA* s 227(4.1).

[45] With that legal backdrop, I turn now to address whether I can and, if so should, entertain CRA's motion, or whether it is properly the subject of an appeal to the Court of Appeal.

Jurisdiction to Entertain CRA's Motion

[46] The language of the Comeback Provision is typical in initial *CCAA* Orders made in this province and elsewhere. It reads:

> 58 Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

[47] The answer to whether I have jurisdiction to entertain CRA's motion or whether it is properly a subject of appeal to the Court of Appeal rests on the answers to: for whom and when is the Comeback Provision is available.

Who can rely on the Comeback Provision?

[48] The Comeback Provision is available to any interested party. It is only logical that an interested party that was not given notice of a *CCAA* initial hearing can rely on the comeback clause.[22] Similarly, and depending upon the circumstances, an interested party given notice may also access the comeback clause.

[49] CRA is an interested party that received notice of the motion for the Initial Order. While the Initial Order deemed that service to be good and sufficient, CRA's actual knowledge came the day after it occurred.

When can the Comeback Provision be used?

[50] Recourse through the comeback clause is available when circumstances change. As explained in ***Re Pacific National Lease Holding Corp***:

> [I]n supervising a proceeding under the C.C.A.A. **orders are made, and orders are varied as changing circumstances require**. Orders depend upon a careful and delicate balancing of a variety of interests and of problems.[23] [emphasis added]

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[22] ***Re Muscletech Research & Development*** (2006), 19 CBR (5th) 54 (ONSC) at para 5; ***Re Comstock Canada Ltd***, 2013 ONSC 4756, 4 CBR (6th) 47 at para 49; ***Re Fairview Industries Ltd*** (1991), 109 NSR (2d) 12, 11 CBR (3d) 43 (SCTD); ***Re CanaSea PetroGas Group Holdings Ltd*** (2014), 18 CBR (6th) 283 at paras 13-14.

[23] ***Re Pacific National Lease Holding Corp*** (1992), 15 CBR (3d) 265, 72 BCLR (2d) 368 (CA) at para 30.

[51] Likewise, in ***Re Royal Oak Mines Inc,*** Blair J (as he then was) observed that the comeback clause is a means of sorting out issues as they arise during the course of the restructuring.[24]

[52] Logically, non-disclosure of material information in an *ex parte* initial application also supports recourse via the comeback clause.[25]

[53] An analogous form of statutory recourse is found in *BIA* s 187(5). A sparingly used tool, variance under this provision is a practical means of determining if an order should continue in the face of changed circumstances or fresh evidence.[26]

[54] Equally, under r 9.15(1) of the Alberta *Rules of Court* the Court can set aside, vary, or discharge an entered judgment or order (interlocutory or final) if it was made without notice to an affected person, or to correct an accident or mistake if the person did not have adequate notice of the trial. In a similar vein, r 9.15(4) allows the Court to set aside, vary, or discharge an interlocutory order by agreement of the parties, or because of fresh evidence, or other grounds that the Court considers just.

[55] Likely because many, if not most, *CCAA* authorities deal with variance of *ex parte* initial orders, little is written about recourse by appeal versus comeback. One example is the rather unusual case of ***Re Algoma Steel Inc***,[27] where creditors filed a simultaneous comeback motion and appeal of the initial *ex parte* order. The appeal was heard first. The Court of Appeal found that the appeal was premature (because the order was a "lights on" order) and said that variance should have been pursued.

[56] Comeback motions must be made *post haste* because of delay prejudice and the mounting prejudice caused by the momentum of proceeding itself - which Rowbothom JA described as the virtual impossibility of unscrambling the egg in ***Temple City***.[28]

[57] Next, I will discuss service and timing concerns.

Service

[58] It is trite that the point of service is that a party must get notice of the proceeding and that a party serving documents on a proper address for service must be able to do so with confidence.[29]

[59] As previously noted, CRA was served on June 28 at the CRA Office by courier delivery.

[60] Rule 11.14(1)(b) provides that service is effected on statutory entities and other entities by "being sent by recorded mail, addressed to the entity, to the entity's principal place of

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[24] ***Re Royal Oak Mines Inc*** (1999), 6 CBR (4th) 314 (ONSCJ GD) at para 28.
[25] ***Re CanaSea PetroGas Group Holdings Ltd***.
[26] ***Elias v Hutchison*** (1980), 12 Alta LR (2d) 241 (at para 6), 35 CBR (NS) 30 (QB), aff'd (1981), 121 DLR (3d) 95, 37 CBR (NS) 149 (ABCA); ***Christiansen v Paramount Developments Corp***, 1998 ABQB 1005 (at para 24), 8 CBR (4th) 220 ; ***Fitch v Official Receiver*** (1995), [1996] 1 WLR 242 (UK CA); ***Re Lyall*** (1991), 8 CBR (3d) 82 (BCSC).
[27] ***Re Algoma Steel Inc***, [2001] OJ No 1994 (Ont Sup Ct J), leave to appeal refused, 147 OAC 291, 25 CBR (4th) 194 (CA).
[28] At para 14.
[29] ***Re Concrete Equities Inc***, 2012 ABCA 266 at paras 19, 24.

business or activity in Alberta." Recorded mail includes mail by courier and the date of effective service is "on the date acknowledgement of receipt is signed": r 11.14(2)(b).

[61] Rule 3.9 requires that an originating application and supporting affidavits be served at least 10 days before the return date. To comply, the Debtors had to serve by June 25, but because this date fell on a weekend, technically compliant service mandated delivery of the service package on June 23.

[62] CRA points to the Office of the Superintendent of Bankruptcy's (OSB) website in defence of the position that service was lacking. In part, it reads:

> To make sure insolvency documents are processed quickly and effectively, you should send them to the appropriate area of the CRA.

The webpage also identifies "key processing areas for insolvency documents", which in this case is the office where the CRA Representative is located in Surrey, British Columbia.

[63] The OSB website does not assist CRA. While companies seeking relief under the *CCAA* may retain insolvency professionals in advance of their filing, imposing an expectation that debtors heed the OSB's 'unofficial advice' is simply asking too much. More importantly, to require compliance is contrary to the Alberta *Rules of Court*.

[64] Properly, CRA does not cast blame on the Debtors for the fact that its own challenges routing mail caused the delay in getting the service package into the right hands. What CRA does say is that despite this, it should have the opportunity to address its significant challenge to the Priority Charges because if the service package was delivered to the regional office responsible for *CCAA* matters by June 25, it was "very likely that CRA would have been represented at the July 5th application."

[65] The Debtors effected service, albeit short notice service, on CRA, which the Court deemed to be good and sufficient. Short notice in insolvency proceedings is not a new concept and CRA is not new to insolvency proceedings. Indeed, it is a seasoned and sophisticated player in the *CCAA* arena with access to the might of the federal government's resources.

[66] These observations aside, the *CCAA* is not all about technicalities and technical compliance. It is about ensuring maintenance of the *status quo* in the sorting-out period, balancing interests, and, in that vein, hearing from all affected voices whenever it is practicable to do so.

[67] In the result, despite the glaring failure of CRA's mail management system and although CRA was effectively and technically served on June 28, the purpose of service was not fulfilled until July 6 when CRA became aware of the Initial Order. On this basis, I am satisfied that I have jurisdiction to hear the variance motion. In finding as I do, I am mindful that CRA is asking whether the Priority Charges ought to have been granted in the first instance, which could well be the subject of appeal. However, ***Algoma Steel*** supports the notion that variance may be the preferred route where a party did not have actual notice of an order made early in the proceeding.

Timing

[68] While comeback relief may be appropriate, it "cannot prejudicially affect the position of the parties who have relied *bona fide* on the previous order in question."[30]

[69] Armed with knowledge of the Initial Order the day after it was made and well-knowing that the beneficiaries of the Priority Charges would rely upon them, CRA waited twenty days to informally announce its intentions. Then, CRA chose to attend and take no position at the Extension and Enhanced Financing Motions. It also chose to defer advising the Court of this intended motion until after the Court delivered its decision on those motions.

[70] CRA's dawdling put BDC, the Monitor, and perhaps the directors at risk of significant prejudice, and it is unfair for it to now ask that the priority be reversed before it gave meaningful notice to all affected parties.

[71] The options for fixing the appropriate date of meaningful notice are the date of informal notice, the hearing date, and the release of these Reasons. In my view, the most appropriate date is the hearing of this motion because experience shows that not all informally announced motions actually proceed.

[72] Accordingly, irrespective of whether CRA prevails at the end of the day, all of the Priority Charges should be unaffected until August 11, 2017.

[73] I turn next to who bears the onus.

The Onus

[74] The authorities disagree on who bears the onus where the party seeking to vary under a comeback clause was served. Indeed, Blair J (as he then was) observed that there may be no formal onus, but there "may well be a practical one if the relief sought goes against the established momentum of the proceeding."[31]

[75] In ***Re General Chemical Canada Ltd***,[32] Farley J stated that "[I]n any comeback situation, the onus rests solely and squarely with the [initial] applicant to demonstrate why the original or initial order should stand."

[76] In contrast, in ***Re Target Canada Co***, Morowetz J directed a comeback hearing that was to be a "true" comeback hearing in which the applying party did "not have to overcome any onus of demonstrating that the order should be set aside or varied."[33] There, the initial order went beyond a usual "first day" order. While service was not addressed, it is evident that many, if not most, of the stakeholders were not represented at the hearing.

[77] Considering the practicalities of *CCAA* matters, my view is that barring unforeseen circumstances, the onus on a variation application should be this:

- When the initial application is made *without notice* or with insufficient notice, the initial applicant bears the onus of satisfying the court that the terms of the initial order are appropriate.

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[30] ***Muscletech***, at para 5.
[31] ***Royal Oak***, at para 28.
[32] ***Re General Chemical Canada Ltd*** (2005), 7 CBR (5th) 102 (ONSC) at para 2.
[33] ***Re Target Canada Co,*** 2015 ONSC 303, 22 CBR (6th) 323 at para 82.

- When the initial application is made *with notice*, the onus is on the party seeking the variation to show why it is appropriate and that the relief sought does not prejudice others who relied on the order in good faith.

[78] I now turn to the substantive priority issue.

Who has priority?

[79] It is beyond debate that *ITA* s227 (4) and the mirrored provisions in *EI Act* (s 86(2) and *CPP Act* (s 23(3)) create deemed trusts, and that *CCAA* s 37(2) explicitly preserves their operation. The debate is simply about whether CRA's interest arising from the deemed trusts can be subordinated by the Priority Charges.

[80] Two principal questions arise:

i. What is the nature of CRA's interest?

ii. Does CRA's statutorily secured status elevate it above a Priority Charge?

What is the nature of CRA's interest?

[81] CRA relies on the extension of trust provisions in the Fiscal Statutes to support the notion that it holds a proprietary rather than secured interest in the Debtors' property. Key to its position is the effect of the concluding phrase in s 227(4.1):

> Notwithstanding any other provision of this Act... property held by any secured creditor... is deemed...and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests. [emphasis added]

[82] CRA asserts that these words take it beyond a mere secured creditor because they do not just **deem** the Crown to be the owner of the interest, but rather, says that it **is** the owner.

[83] This is the same position CRA advocated in ***Temple City***, where Romaine J distilled these features of tax deemed trusts from ***First Vancouver***:

- The "deemed trust" is not in "truth a real one as the subject matter of the trust cannot be identified from the date of creation of the trust;" and
- In principle, the deemed trust is similar to a floating charge over all the assets of the tax debtor in that the tax debtor is free to alienate its property, and when it does, the trust releases the disposed-of property and attaches to the proceeds of sale. To find otherwise would freeze the tax debtor's assets and prevent it from carrying on business, which was clearly not a result intended by Parliament.

[84] Justice Romaine determined that despite the concluding words of s 227(4.1) these features were inconsistent with a property interest, noting that the definition of a "security interest" in the *ITA* included a "deemed or actual trust", which supports the interest being capable of having the same treatment as a security interest under the *CCAA*.[34]

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[34] ***Temple City,*** at para 13.

[85] Moir J in ***Rosedale Farms*** disagreed finding instead that:

- The analogy of the deemed trust to a floating charge in ***First Vancouver*** was not about creating security, but rather, sales made in the ordinary course of business. Iacobucci J's statement that the question of priority of secured creditors did not arise is noted.[35]
- The "notwithstanding" language of *ITA* s 227(4.1) expressly overrides the *BIA* and all other enactments thereby giving priority to the deemed trust.[36]
- Reliance on the *ITA* definition of "secured interest" is misguided.[37]

[86] Moir J correctly notes Justice Iacobucci's observation that the creation of secured creditor priority did not arise in ***First Vancouver***. However, as I read ***Temple City***, the analysis did not rest on the floating charge analogy. Rather, like the *ITA* definition of "secured creditor," it was but one of several features supporting the result. That said the fact that a floating charge permits alienation of secured property resonates in all *CCAA* restructurings.

[87] ***Rosedale Farms*** is distinguishable in that it concerned a *BIA* scenario. Nevertheless, even if it were otherwise, like Romaine J, I accept that the definitions of secured creditor and security interest in the *CCAA* and Fiscal Statutes support finding that the interests arising from the deemed trusts are security interests, not property interests. In particular, I note that s 224(1.3) defines a security interest as "any interest in property that secures payment ... and includes a ... deemed or actual trust ... ."

[88] Indeed, it would seem inconsistent to interpret the interest they create in a way contrary to their enabling statutes.

[89] For these reasons, I conclude that CRA's interest is a security interest, not a proprietary interest. The impact and interplay of the "notwithstanding" language in *ITA* s 227(4.1), the discussion of which follows, does not change my conclusion.

Does CRA's statutorily secured status elevate it above the Priority Charges?

[90] It may appear that *CCAA* ss 11.2, 11.51, or 11.52 conflict with the deemed trust sections in the Fiscal Statutes, and that a strict "black letter" reading of only ss 227(4) and (4.1) may support CRA's interpretation. However, one must not read these provisions in a vacuum. The Fiscal Statutes, the *BIA*, and the *CCAA* are part of complex legislative schemes that operate concurrently and must "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[38] Each references the other, expressly or impliedly, and it would be an error to focus on only one section in one piece of the entire scheme.

[91] *ITA* s 227(4.1) opens with these words:

> **Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law**, where at

[35] ***Rosedale Farms***, at para 39.
[36] *Ibid,* para 35.
[37] *Ibid,* para 29.
[38] ***Rizzo & Rizzo Shoes Ltd. (Re),*** [1998] 1 SCR 27 at para 21.

> any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty notwithstanding any security interest in such property … . [emphasis added] (Notwithstanding Provision)

[92] CRA points to the *obiter dicta* of Fish J (in his separate concurring reasons) in ***Century Services*** (at para 104) finding that Parliament intended deemed trusts to prevail in insolvency proceedings as a complete answer. The other members of the Court did not adopt his reasoning. For that reason, I cannot find his *obiter dicta* to be "the answer."

[93] While the *CCAA* preserves the operation of the Fiscal Statutes deemed trusts, it also authorizes the reorganization of priorities through Court ordered priming.

[94] CRA urges that the Fiscal Statutes and the *CCAA* can be 'stitched together' to read:

> Notwithstanding [sections 11, 11.2, 11.51, and 11.52 of the *Companies' Creditors Arrangements Act*,] property of [the Applicants] equal in value to the [unremitted source deductions] … is beneficially owned by Her Majesty notwithstanding any security interest in such property [including security interests granted pursuant to ss. 11.2, 11.51, or 11.52 of the *CCAA*] and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[95] The problem with "stitching" in this way is that incorporating these sections into the Notwithstanding Provision implies that they are somehow in conflict with it. The Supreme Court of Canada has taken a restrictive view of what constitutes a conflict between statutory provisions of the same legislature.

[96] In ***Thibodeau v Air Canada***,[39] the Court addressed whether there was a conflict between the *Official Languages Act* and the *Convention for the Unification of Certain Rules for International Carriage by Air*, concluding that there is a conflict between two provisions of the same legislature "**only** when the existence of the conflict, in the restrictive sense of the word, **cannot be avoided by interpretation**"[40] [emphasis added]. Nothing in these *CCAA* sections directly conflict with s 227(4.1) and thus, one must attempt to interpret these provisions without conflict.

[97] Further, in ***ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)***,[41] the Supreme Court of Canada, dealing with another complex legislative scheme, said:

> The provisions at issue are found in statutes which are themselves components of a larger statutory scheme **which cannot be ignored**:
>
> > As the product of a rational and logical legislature, the statute is considered to form a system. **Every component contributes to the meaning as a whole**, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" ... .

[39] ***Thibodeau v Air Canada***, 2014 SCC 67, [2014] 3 SCR 340.
[40] ***Thibodeau*** at para 92.
[41] ***ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)***, 2006 SCC 4, [2006] 1 SCR 140.

> (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p 308)
>
> As in any statutory interpretation exercise ... courts need to examine **the context that colours the words and the legislative scheme**. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute **while preserving the harmony, coherence and consistency of the legislative sch**eme (***Bell ExpressVu***, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": ***Bristol-Myers Squibb Co***., at para. 102.[42] [emphasis added]

[98] Deschamps J observed in ***Century Services***, at para. 15:

> ... the purpose of the *CCAA* ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

[99] She also quoted with approval the reasons of Doherty JA in ***Elan Corp v Comiskey***[43] (Doherty JA was dissenting):

> 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.

[100] In a survey of *CCAA* cases, Dr. Janis Sarra found that 75% of the restructurings required the aid of interim lenders.[44]

[101] In ***Indalex***, the Supreme Court of Canada observed the phenomenon, citing Sarra, and said:

> … case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries.[45]

[102] The interim financiers' charge provides both an incentive and guarantee to the lender that funds advanced in the course of the restructuring will be recovered. Without this charge such financing would simply end, and with that, so too would end the hope of positive *CCAA* outcomes. Here, I digress to note the increasing prevalence of interim financiers having no prior relationship to the debtor. It does not take a stretch of imagination to forecast that this practice will diminish if not end altogether without the comfort of super-priority charges.

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[43] ***Elan Corp v Comiskey*** (1990), 41 OAC 282 (ONCA) at para 57.
[44] Janis P Sarra, *Rescue!: Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 199.
[45] ***Indalex*** at para 59.

[103] Similarly, the charge in favour of directors is important. The charge is intended to keep the captains aboard the sinking ship. Without the benefit of this charge, directors will be inclined to abandon the ship, and it would be remarkably difficult, if not impossible, to recruit replacements.

[104] Likewise, the priority charge for administrative fees is critical to a successful restructuring. Indeed, it is the only protection the Monitor has to ensure that its bills are paid. While the debtor's counsel has the option of resigning if its accounts go unpaid, the Monitor does not have that luxury. As a Court officer, the Monitor's job is to see the proceeding through to completion or failure and would need Court approval to be relieved of that duty. Finally, insolvency practitioners well know that they typically do not have to look to the administrative charge for their initial work – where it has the most significance is at the end.

[105] Further, the 2009 amendments codifying and elaborating on priority charges that had previously been granted under the Court's residual, inherent jurisdiction, shows Parliament's intention that secured creditors' interests could be eroded if the Court was satisfied of the need.

[106] Had Parliament wanted to limit the Court's ability to give priority to these charges, it could have drafted s 11.52(2) (and the mirror provisions) to expressly provide:

> ... priority over the claim of any secured creditor **except the claim of Her Majesty over deemed trusts under s. 227(4) and (4.1) of the Income Tax Act**.

[107] CRA's interpretation recognizes the obvious, underlying policy reason favouring the collection of unremitted source deductions, which is described as being "at the heart" of income tax collection in Canada": ***First Vancouver*** at para 22. However, it fails to reconcile that objective with the Canadian insolvency restructuring regime and Parliament's continued commitment (as evidenced by the 2009 amendments) to facilitating complex corporate *CCAA* restructurings, even if erosion of security is required.

[108] The *CCAA*'s aim is to facilitate business survival and avoid the multiple traumas occasioned by business failure. Interim financiers are an integral part of the restructuring process. Without them, most *CCAA* restructurings could not get off the ground. Likewise, directors and insolvency professionals are essential to the process, and they too need the comfort of primed charges to fully engage in the process. Surely, Parliament knew all of these things when it passed the 2009 amendments authorizing primed charges.

[109] CRA's position, which it acknowledges will cause a chill on complex restructurings, undermines the *CCAA*'s purpose for the sake of tax collection. It disregards the rather obvious, that successful corporate restructurings result in continued jobs to fuel and fund its source deduction tax base. Notably, its interpretation fails to reconcile these purposes.

[110] The Fiscal Statutes and the *CCAA* should, if possible, be interpreted harmoniously to ensure that Parliament's intention in the entire scheme is fulfilled.

[111] It is logical to infer that Parliament intended to create a co-existing statutory scheme that accomplished the goals of both the Fiscal Statues and the *CCAA*. In my view, it is possible to construe these legislative provisions in a manner that preserves the harmony, coherence, and consistency of the entire legislative scheme.

[112] I conclude that it is the Court's order that sets the priority of the charges at issue. The relevant *CCAA* sections allow the Court, where appropriate, to grant priority **only** to those

charges necessary for restructuring. The purpose of the deemed trusts in the Fiscal Statutes is still met as deemed trusts maintain their priority status over **all other** security interests, but those ordered under ss 11.2, 11.51, and 11.52.

[113] A harmonious interpretation respecting both sets of statutory goals is one that preserves the deemed priority status over all security interests, subject to a Court order under *CCAA* ss 11.2, 11.51, and 11.52 granting a "super priority' to those charges.

[114] For these reasons, I find that the *CCAA* gives the Court the ability to rank the Priority Charges ahead of CRA's security interest arising out of the deemed trusts.

Heard on the 11th day of August, 2017.
Dated at the City of Edmonton, Alberta this 11th day of September, 2017.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

Darren R Bieganek, QC
Duncan Craig LLP
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Department of Justice Canada
for Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue

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Stephanie A Wanke
DLA Piper (Canada) LLP
for the Applicants, Canada North Group Inc, Canada North Camps Inc, Campcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd

In the Court of Appeal of Alberta

Citation: Canada v. Canada North Group Inc., 2019 ABCA 314

Date: 20190829
Docket: 1703-0237-AC
Registry: Edmonton

Between:

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

Her Majesty the Queen in Right of Canada

Appellant
(Applicant)

- and -

**Canada North Group Inc., Canada North Camps Inc.,
Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd.,
1371047 Alberta Ltd. and 1919209 Alberta Ltd.**

Respondents
(Respondents)

- and -

Ernst & Young Inc. in its capacity as Monitor

Respondent
(Respondent)

- and -

Business Development Bank of Canada

Respondent
(Respondent)

- and -

Insolvency Institute of Canada

Intervenor

- and -

Canadian Association of Insolvency and Restructuring Professionals

Intervenor

The Court:

The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Frederica Schutz

Reasons for Judgment Reserved of The Honourable Madam Justice Rowbotham
Concurred in by The Honourable Madam Justice Schutz

Dissenting Reasons for Judgment Reserved of The Honourable Mr. Justice Wakeling

Appeal from the Order by
The Honourable Madam Justice J.E. Topolniski
Dated the 11th day of September, 2017
Filed the 5th day of October, 2017
(2017 ABQB 550, Docket: 1703 12327)

Reasons for Judgment Reserved of
The Honourable Madam Justice Patricia Rowbotham

Introduction

[1] The issue on this appeal is one of statutory interpretation, and whether the chambers judge correctly interpreted s. 227(4.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (*ITA*) and ss. 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*).

[2] Leave to appeal was granted on a single issue: whether the chambers judge erred in law in determining that the "super-priority" charges made in favour of the interim financier, the directors of the debtor companies, and the Monitor and its counsel under the *CCAA* (the "Priority Charges" or "Priming Charges") have priority over statutory deemed trusts in favour of the Crown for unremitted source deductions as created by the *ITA*, the *Canada Pension Plan*, RSC 1985, c C-8 (*CPP*) and the *Employment Insurance Act*, SC 1996, c 23 (*EIA*) (collectively, the "Fiscal Statutes"): *Canada v Canada North Group Inc*, 2017 ABCA 363 at para 5.

[3] This appeal pits two of Parliament's objectives against each other: avoiding the social and economic costs of a debtor liquidating its assets (*Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 15; *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at para 205); and the collection of source deductions, which lie "at the heart" of income tax collection (*First Vancouver Finance v MRN*, 2002 SCC 49 at para 22). What charges have priority: court-ordered Priority Charges in favour of those who participate in *CCAA* restructuring proceedings or unremitted source deductions in favour of the Crown?

[4] The chambers judge held that the *CCAA* gives the court the ability to rank court-ordered Priority Charges ahead of the Crown's interest arising out of statutory deemed trusts.

[5] The Crown, as represented by the Minister of National Revenue (CRA), appeals, claiming that Parliament's intention to give paramount priority to the Crown's claims for unremitted source deductions over claims of those involved in *CCAA* proceedings is clear from the language of the *CCAA* and the Fiscal Statutes.

[6] The respondent interim lender (Business Development Bank of Canada) and the respondent court-appointed Monitor (Ernst & Young Inc.) argue that the chambers judge's interpretation is correct as it gives effect to the policy objectives of both the Fiscal Statutes and the *CCAA*. The intervenors (the Canadian Association of Insolvency and Restructuring Professionals and the Insolvency Institute of Canada) also argue that the appeal should be dismissed.

[7] All parties acknowledge the chilling effect on commercial restructuring that will result if the Crown's position prevails.

[8] For the reasons that follow I dismiss the appeal.

Background Facts

Initial Order

[9] On July 5, 2017, the Court of Queen's Bench issued an order granting the Debtors[1] protection under the *CCAA* (the "Initial Order"). The Initial Order provided for a total of $1,650,000 in Priming Charges in the following priority:

- Administration Charge of $500,000 in favour of the court-appointed Monitor;
- Interim Lender's Charge of $1,000,000 in favour of the interim financier; and
- Directors' Charge of $150,000.

[10] The Interim Lender's Charge was later increased to $3,500,000 and the Administration Charge to $950,000.

[11] The court's authority to order these Priming Charges is found in the *CCAA*. Parliament has afforded the court the discretion to order Priming Charges in an amount that the court considers appropriate: ss. 11.52(1), 11.51(1) and 11.2(1) of the *CCAA*. Sections 11.52(2), 11.2(2) and 11.51(2) of the *CCAA* (the "Priming Provisions") each provide as follows:

> The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[12] Consistent with the discretionary authority of the court, paragraph 44 of the Initial Order provides that the Priming Charges have priority over the claims of secured creditors:

> Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge … shall constitute a charge on the Property and subject always to section 34(11) of the *CCAA* such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise … in favour of any Person.

[13] Paragraph 46(d) of the Initial Order provides that the Priming Charges "shall not otherwise be limited or impaired in any way by…(d) the provisions of any federal or provincial statutes".

[1] Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., and 1919209 Alberta Ltd.

Crown's Application to Vary the Initial Order

[14] On July 31, 2017, the Crown applied to vary the Priming Charges in the Initial Order on the grounds that paragraphs 44 and 46(d) of the Initial Order failed to recognize the Crown's legislative proprietary interest in unremitted source deductions (i.e., employees' income tax, employees' CPP contributions and employees' EI premiums). At the time of the Initial Order, two of the Debtor corporations had failed to remit to the Crown a total of $685,542.93 in source deductions.

[15] The Crown argued that s. 227(4.1) of the *ITA*, s. 23(4) of the *CPP* and s. 86(2.1) of the *EIA* provide that the Crown's claims for unremitted source deductions have priority over the claims of all other creditors of a debtor, notwithstanding any other federal statute, including the *CCAA*.

[16] Sections 227(4) and (4.1) of the *ITA* provide:

> 227(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> (4.1) **Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law,** where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests. [Emphasis added]

[17] In *First Vancouver* at para 3, Iacobucci J explained the effect of these provisions:

> Section 153(1) of the *ITA* requires employers to deduct and withhold amounts from their employees' wages ("source deductions") and remit these amounts to the Receiver General by a specified due date. By virtue of s. 227(4), when source deductions are made, they are deemed to be held separate and apart from the property of the employer in trust for Her Majesty. If the source deductions are not remitted to the Receiver General by the due date, the deemed trust in s. 227(4.1) of the *ITA* becomes operative and attaches to property of the employer to the extent of the amount of the unremitted source deductions. As well, the trust is deemed to have existed from the moment the source deductions were made.

[18] Sections 23(4) of the *CPP* and s. 86(2.1) of the *EIA* are identical to s. 227(4.1) of the *ITA*.

[19] The chambers judge dismissed the Crown's application. She rejected the Crown's argument that the trust provisions in the Fiscal Statutes create a proprietary rather than secured interest. She preferred the analysis of Romaine J in *Temple City Housing Inc (Companies' Creditors Arrangement Act)*, 2007 ABQB 786, leave to appeal to CA refused, 2008 ABCA 1 over that of Moir J in *Rosedale Farms Limited, Hassett Holdings Inc, Resurgam Resources (Re)*, 2017 NSSC 160. The chambers judge held that the definition of a "security interest" in s. 224(1.3) of the *ITA* includes a "deemed or actual trust". The *ITA* is the enabling statute of the Crown's deemed trusts. It would be inconsistent to characterize the deemed trusts in a way contrary to their enabling statutes.

[20] She then held that the Crown's statutorily deemed trusts could be subordinated by court-ordered Priming Charges. In her view, the Crown's position implied that the Fiscal Statutes and the *CCAA* are in conflict. While it appeared that Parliament had drafted provisions that purport to grant super-priority to court-ordered Priming Charges under the *CCAA* while at the same time granting super-priority to the Crown's deemed trusts under the Fiscal Statutes, she held that this apparent conflict could be avoided by interpreting the statutes harmoniously. The chambers judge stated at para 96, citing *Thibodeau v Air Canada*, 2014 SCC 67 [footnotes omitted]:

> [T]here is a conflict between two provisions of the same legislature "**only** when the existence of the conflict, in the restrictive sense of the word, **cannot be avoided by interpretation**" (emphasis added). Nothing in these *CCAA* sections directly conflict with s. 227(4.1) [of the *ITA*] and thus, one must attempt to interpret these provisions without conflict.

[21] Applying the principle of statutory interpretation that legislation should be construed in a manner that preserves the harmony, coherence, and consistency of the entire legislative scheme, she held that the Crown's statutory deemed trusts have priority over all security interests, except those ordered under the Priming Provisions of the *CCAA*. She concluded that ss. 11.2, 11.51 and 11.52 of the *CCAA* gave the court the ability to grant priority to charges necessary for restructuring ahead of the Crown's security interest arising out of the deemed trusts.

Leave to Appeal

[22] As there are sufficient assets in the estate to satisfy both the Priming Charges and the Crown's claim, the issues on appeal are moot. Nevertheless, leave to appeal was granted given the importance of the issue: *Canada v Canada North Group Inc*.

Analysis

[23] The main issue on appeal is whether the Crown's deemed trusts under the Fiscal Statutes can be subordinated to the Priming Charges by a court order under ss. 11.2, 11.51 and 11.52 of the *CCAA*? The Crown asked the court first to determine whether its deemed trust is a proprietary interest or a security interest.

[24] These are questions of law, reviewable for correctness: *Housen v Nikolaisen*, 2002 SCC 33 at para 8.

[25] Before turning to these questions, I review the applicable principles of statutory interpretation.

The Correct Approach to Statutory Interpretation

[26] The guiding rule of statutory interpretation is this:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 36 OR (3d) 418)

[27] A governing principle of statutory interpretation is the presumption of coherence:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed

> to work together dynamically, each contributing something toward accomplishing the intended goal.
>
> (R Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (LexisNexis Canada, 2014) at para 11.2)

[28] Courts presume that legislation passed by Parliament does not contain contradictions or inconsistencies, and that each provision is capable of operating without coming into conflict with any other: *Thibodeau* at para 93 citing R Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (2008) at 325. As the majority explained in *Lévis (City) v Fraternité des policiers de Lévis Inc*, 2007 SCC 14 at para 47:

> The starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable.

[29] If a conflict is unavoidable, meaning it cannot be resolved by adopting an interpretation that would remove the inconsistency, the court is faced with the question of which provision should prevail having regard to the legislature's intent: *Lévis* at para 58.

1. Is the Crown's deemed trust a proprietary interest or a security interest?

[30] Do the statutory deemed trust provisions of the Fiscal Statutes create a security interest over the debtor's property, rendering the Crown a "secured creditor" for the purposes of the Priming Provisions in the *CCAA*, or does the Crown have a proprietary interest in the debtor's property that is subject to the deemed trust, thereby removing assets from the debtor's estate?

[31] The chambers judge held that the former interpretation was correct. The Crown argues for the latter interpretation.

[32] I conclude that the chambers judge correctly interpreted the nature of the Crown's interest. The Crown's interest under the deemed statutory trust provisions of the Fiscal Statutes is akin to that of a secured creditor, but ranking ahead of all other secured creditors. The Crown does not hold a proprietary interest. Section 227(4.1) of the *ITA* does not elevate the Crown's claim to a proprietary interest. This is consistent with prior case law and the definitions of "secured creditor" and "security interest" in the Fiscal Statutes and the *CCAA*.

Prior Case Law

[33] The Crown advances the same argument that was rejected by Romaine J in *Temple City*. The Crown's argument is also inconsistent with the Supreme Court of Canada's characterization of the Crown's deemed trust under the *ITA* as a "floating charge over all of the assets of the tax debtor in the amount of the default": *First Vancouver* at para 40.

[34] Deemed trusts are not true trusts: *Royal Bank of Canada v Sparrow Electric Corp*, [1997] 1 SCR 411 at para 31, 143 DLR (4th) 385; *First Vancouver* at para 37. They do not attach to particular assets: *First Vancouver* at para 40. While the trust is focussed on the tax debtor's property, it attaches to the proceeds from realization of the estate of the tax debtor: *First Vancouver* at para 41. It follows that their character will change over time: *First Vancouver* at para 41.

[35] As noted by Iacobucci J, this interpretation gives effect to legislative intent. Parliament did not intend for the statutory deemed trusts to attach to particular assets thus freezing the debtor's assets and preventing the debtor from carrying on business: *First Vancouver* at para 41. I agree with the chambers judge that "the fact that a floating charge permits alienation of secured property resonates in all *CCAA* restructurings": at para 86.

[36] It follows that I do not adopt the conclusion of Moir J in *Rosedale Farms* who found the deemed trust to have priority over the security for debtor in possession financing.

Definitions

[37] Further, the Crown's interest falls squarely within the definition of "secured interest" in both the *ITA* and the *CCAA*.

ITA

[38] Section 224(1.3) of the *ITA* defines "secured creditor" as "a person who has a security interest in the property of another person." Where a "security interest" includes "any interest in … property that secures payment ... and includes an interest ... created by or arising out of a ... deemed or actual trust ..." The *EIA* and the *CPP* cross-reference the *ITA* definitions.

[39] The Crown concedes that s. 224(1.3) of the *ITA* provides that deemed or actual trusts are security interests, but argues that this definition does not apply when the Crown is asserting its deemed trust claim. I reject this argument for the same reason as the chambers judge: it is illogical to interpret the statutory deemed trust interests in a way contrary to their enabling statutes.

CCAA

[40] The Crown's main argument relates to the definition of "secured creditor" in section 2(1) of the *CCAA*. The Crown proposes a reading of the section which it says supports a finding that the Crown is not a secured creditor. The definition reads as follows:

> **secured creditor** means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge,

> lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.

[41] The Crown argues that under the *CCAA* there are two "classes" of secured creditors: (i) holders of direct security, and (ii) holders of secured bonds. This interpretation requires that the definition be read as follows [indentation and emphasis added]:

> **secured creditor** means
>
> > a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company,
> >
> > **or a holder of any bond of a debtor company secured by**
> >
> > > a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or **a trust in respect of, all or any property of the debtor company,**
> >
> > whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. [Emphasis added]

[42] According to the Crown's interpretation, the reference to "a trust" is nested within the reference to bonds; the reference to "trust" is only in relation to an instrument securing *a bond* of a debtor company. If Parliament intended for "secured creditor" to include holders of trusts, the Crown argues there would be a third reference to "a holder of a trust" drafted in parallel to the first two classes. The Crown also points to the phrase "a trustee under any trust deed or other instrument *securing any of those bonds*" as evidence that this is the intended meaning.

[43] Neither the chambers judge nor Romaine J in *Temple Housing* specifically addressed this argument. Although the Crown's analysis is initially attractive, it ignores two things: (1) the Crown's interest could be characterized as a "charge" so is covered by the opening words of the definition; and (2) if we read the statutes harmoniously, as we must, Parliament has defined "security interest" in the *Income Tax Act* as including a deemed trust.

2. Can the deemed trust be subordinated to the Priming Provisions under the CCAA?

[44] The Crown argues that the language of the Fiscal Statutes is clear: Parliament intended that the Crown's interest in unremitted source deductions cannot be subordinated to any other secured interest, including court-ordered Priming Charges. It relies on the opening words of s. 227(4.1) of the *ITA*: "Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law ..." The Crown submits, and my colleague finds, that these words lead to one conclusion: the deemed trust supersedes all.

[45] I disagree with this conclusion for a number of reasons. First, while a conflict may appear to exist at the level of the "black letter" wording of the Priming Provisions of the *CCAA* and the Fiscal Statutes, the presumption of statutory coherence requires that the provisions be read to work together to achieve the intended goal. The *CCAA* and the Fiscal Statutes are part of a larger statutory scheme that must be considered as a whole: *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 49. In my view, the chambers judge's harmonious interpretation is correct.

[46] The crux of the chambers judge's reasoning is that the Crown failed to reconcile the objective of tax collection with Parliament's commitment to facilitate *CCAA* restructurings. The Crown's position ignores that *CCAA* restructurings facilitate the survival of companies, the production of goods and services, and ultimately jobs, all of which serve as fuel for the fiscal base.

[47] In *Century Services*, the Supreme Court provided an extensive history of the *CCAA*, its function amidst the body of insolvency legislation, and the principles that have been recognized by the jurisprudence. The Supreme Court explained the remedial purpose of the *CCAA* at para 18:

> Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

[48] This remedial purpose has been recognized time and again in the jurisprudence: *Century Services* at para 59. Not only does the Crown's position undermine the objective of the *CCAA*, it will also result in fewer restructurings which will necessarily result in reduced tax revenue.

Undermining the remedial objective of the *CCAA* for the sake of tax collection disregards the obvious benefit for the government of successful corporate restructurings. In other words, the Crown is biting off the hand that feeds it. Indeed, in this case, the Priming Charges allowed the debtor to continue to operate its business and raise sufficient funds to satisfy both the Priming Charges and the Crown's claim. When the statutes are read harmoniously, as the chambers judge did, the objectives of both the Fiscal Statutes and the *CCAA* can be achieved.

[49] Second, the harmonious interpretation avoids absurd consequences. The presumption that the legislature does not intend absurd consequences was explained in *Rizzo* at para 27:

> It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté [P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)], an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile ([R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994)], at p. 88).

[50] If the Crown's position prevailed, absurd consequences could follow. Interim financing of *CCAA* restructurings would simply end. Interim financing is necessary to achieve the purposes of the *CCAA*, with approximately 75% of restructurings requiring the aid of interim lenders: Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 199; *Indalex* at para 59. The chambers judge rightly recognized the important role played by the court-appointed monitors who cannot resign without leave of the court, and the directors of the debtor company who steer the sinking ship.

[51] The chamber's judge's interpretation is also consistent with *Edmonton (City) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109 at para 17, leave to appeal to SCC requested where this court recognized the modern commercial reality that professional services and interim lending in *CCAA* proceedings are provided in reliance on super priorities. Moreover, since the value of unremitted source deductions is often unknown at the outset of *CCAA* proceedings, the Crown's position would inject an unacceptable level of uncertainty into the insolvency process. As noted in the Report of the Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: 2003) at p 6:

> [C]anadian insolvency laws must be drafted in a manner that ensures a high level of predictability for all stakeholders, domestic and international. Everyone should have a clear understanding of how the insolvency process operates and the options that are available; consistency should enable the likely outcomes to be predicted

> with a relatively high degree of accuracy. Predictability will enable stakeholders to make the best possible choices given their particular circumstances: debtors to decide between bankruptcy and a consumer proposal or commercial reorganization, suppliers and creditors to assess the likely outcome of debtor default as a contributing factor in their decision about whether to supply and extend credit and at what cost, domestic and foreign investors about whether to make an investment, and judges to determine the most appropriate orders to be made and actions to be taken in particular circumstances, among others.

[52] The consequences of a proposed interpretation are properly considered as part of the interpretive exercises. Courts are not engaged in academic exercises; the application of legislation to facts affects the well-being of society and the legislature is presumed to act to protect the public interest: Sullivan at para 10.4. The Crown's interpretation is incompatible with the intended goal of the *CCAA*.

[53] Third, s. 6(3) of the *CCAA* prohibits the court from sanctioning a compromise or arrangement unless the plan of compromise or arrangement provides for payment in full to the Crown, within six months of the sanction of the plan, of all amounts that could be subject to a demand under the Fiscal Statutes. If the Crown's statutory deemed trusts had absolute priority, s. 6(3) would be unnecessary because the Crown would always be paid first. The legislature avoids tautology: every provision serves a purpose.

[54] Fourth, this interpretation is supported by the court's authority to displace the Crown's claim in order to facilitate a restructuring. Section 11.09(1) of the *CCAA* grants courts the power to stay the Crown's garnishment right under s. 224(1.2) of the *ITA*, just as the court can stay the enforcement mechanisms of other secured creditors. This power is illustrative of Parliament's intent to authorize courts to exercise control over the Crown's interests while monitoring restructuring proceedings. An implication of the Crown's position is that a court ordered stay would not apply to the Crown's claim.

[55] Fifth, even if there was a conflict, the implied exception rule (*generalia specialibus non derogant*) supports the chambers judge's interpretation. This principle is described by R Sullivan at para 11.58:

> When two provisions are in conflict and one of them deals specifically with the matter in question while the other has a more general application, the conflict may be resolved by applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first.

[56] See also *Schnarr v Blue Mountain Resorts Limited*, 2018 ONCA 313 at paras 41-42, 52, 61-64, leave to appeal to SCC refused, [2018] SCCA No 187.

[57] The *CCAA* applies in special circumstances while the Fiscal Statutes are of general application. At the level of the provisions, the Priming Provisions in the *CCAA* are narrow, precise, limited to only those charges necessary for restructuring, and subject to ongoing judicial oversight. The court is typically balancing multiple interests as it moves the *CCAA* process forward. In contrast, the *ITA* deals generally with income tax collection, giving the Minister a mechanism to recover employee tax deductions that employers fail to remit to the Minister.

[58] The intended effect of s. 227(1.4) of the *ITA* is not diminished by giving effect to the *CCAA*. The Crown's interest remains specially protected as against all other secured creditors save those charges that are necessary to implement restructurings. This interpretation recognizes that the *CCAA* carves out a discretion for the court to achieve the intended legislated purpose of the *CCAA*.

[59] For these reasons, I dismiss the appeal and uphold the chambers judge's ruling that ss. 11.2, 11.51 and 11.52 of the *CCAA* give the court the ability to grant priority to charges necessary for restructuring ahead of the Crown's security interest arising out of the statutory deemed trusts under the Fiscal Statutes.

Costs

[60] The respondents argue that since the appeal was brought by the Crown as a test case on a moot point, it is just and equitable for the Crown to pay the respondents' costs on a full indemnity basis. The respondent Monitor notes that the costs of the appeal will only serve to reduce the amounts available for distribution to creditors in the subject *CCAA* proceedings. The intervenors do not seek costs.

[61] I am not persuaded that the respondents are entitled to enhanced costs. Although moot, the issue is significant to insolvency law. The default Rule (Rule 14.88) applies. The respondents are entitled to party and party costs. There will be no costs payable to the intervenors.

Appeal heard on October 4, 2018

Reasons filed at Edmonton, Alberta
this 29th day of August, 2019

Rowbotham J.A.

I concur:

Schutz J.A.

Dissenting Reasons for Judgment Reserved of The Honourable Mr. Justice Wakeling

I. Introduction

[62] This is an important statutory interpretation case involving priorities created under s. 227 (4.1) of the *Income Tax Act*[2] and under ss. 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act.*[3]

[63] The Crown, relying on s. 227(4.1) of the *Income Tax Act*, claims that it is the beneficial owner of an amount equal to the unremitted employment income tax withholdings[4] made by Canada North Group Inc. and the other applicants seeking relief under the *Companies' Creditors Arrangement Act*. It asserts that its claim to these funds is superior to that of the Business Development Bank Canada, the insolvency professionals and the directors of the Canada North companies. The respondents rely on the provisions of the *Companies' Creditors Arrangement Act.*

[64] The Insolvency Institute of Canada predicts that validation of the Crown's position will "result in fewer restructurings [under the *Companies' Creditors Arrangement Act*], negating the primary purpose of … [the *Act*] and, arguably, the tax collection purposes of the … [*Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act*]. "[5]

[2] R.S.C. 1985 (5th Supp.), c. 1.

[3] R.S.C. 1985, c. C-36.

[4] *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, s. 227(4).

[5] Factum, ¶ 15. See also ¶ 1 ("The net result of the Crown's position, if successful, will be more liquidations and *less* recoverable tax revenue") (emphasis in original) & ¶ 4 ("Priority Charges provide the basis for the participation of insolvency professionals, interim lenders and others in ... [*Companies' Creditors Arrangement Act*] proceedings and, without certainty that such parties will be compensated or repaid, the restructuring practice will suffer from a shortage of experience and capital"). See also Hanlon, Tickle & Csiszar, "Conflicting Case Law, Competing Statutes and the Confounding Priority Battle of the Interim Financing Charge and the Crown's Deemed Trust for Source Deductions", in Annual Review of Insolvency Law 2018, at 939 (J. Sarra et al eds. 2019) ("Until the Alberta Court of Appeal renders its decision, the lower court's ruling that the priority of the ... [*Income Tax Act*] deemed trust may be subordinated to a court-ordered interim financing lender charge is encouraging to interim lenders").

II. Questions Presented

[65] Section 227(4.1) of the *Income Tax Act*[6] states that

> [n]otwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* ..., any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed ... to be held by a person in trust for Her Majesty is not paid to Her Majesty ... is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General *in priority to all such security interests*.

[66] Section 227(4) of the *Income Tax Act* states that a person who makes source deductions holds the amount deducted in trust for Her Majesty.

[67] The Crown relies on s. 227(4.1) and argues that its meaning is obvious.

[68] The respondents rely generally on s. 11 and more specifically on ss. 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act*.[7]

[69] Section 11 declares that "[d]espite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*[8]... the court… may, subject to the restrictions set out in this *Act*… make any order that it considers appropriate in the circumstances". This is a broad but not unlimited grant of authority.

[70] It is broad in the sense that it excludes limitations of a court's authority under s. 11 that may be incorporated in the *Bankruptcy and Insolvency Act*[9] or the *Winding-up and Restructuring Act*.[10]

[71] It is limited in the sense that it does not exclude provisions in the *Income Tax Act* and other federal and provincial enactments or the other provisions of *Companies' Creditors Arrangement Act.*

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[6] R.S.C. 1985 (5th Supp.), c. 1 (emphasis added).

[7] R.S.C. 1985, c. C-36.

[8] R. Wood, Bankruptcy and Insolvency Law 16 (2d ed. 2015) ("The *Winding-up and Restructuring Act* ... is the only insolvency regime that can be used in connection with the insolvency of banks, insurance companies, trust companies, and loan companies. Proceeding under [it]... are characterized by a higher degree of court involvement; the court appoints a liquidator and supervises the liquidation of the debtor's assets").

[9] R.S.C. 1985, c. B-3.

[10] R.S.C. 1985, c. W-11.

[72] Sections 11.2(1), 11.51(1) and 11.52(1) of the *Companies' Creditors Arrangement Act* bestow on a court the power to create a "security or charge" on the property of the company seeking to restructure or reorganize in favour of a number of specified persons who assist a company to restructure or reorganize under the *Companies' Creditors Arrangement Act.* The first set consists of interim lenders who agree to provide financial assistance to applicants seeking relief under the *Companies' Creditors Arrangement Act*. The second set captures the insolvency professionals and the fees and expenses they incur. The third set identifies directors of the applicant companies who assist with restructuring or reorganization.

[73] Those who participate in insolvency proceedings call these "priming charges".

[74] Sections 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act* are identical and provide that a court may order that these priming charges "rank in priority over the claim of any secured creditor of the company".

[75] The initial order issued July 5, 2017 granted priming charges in favour of the Business Development Bank Canada, the interim lender, and the insolvency professionals and directors of the Canada North companies who assisted the applicants with their attempt to restructure or reorganize under the *Companies' Creditors Arrangement Act.*

[76] Who has the best claim to the deemed trust funds created by s. 227(4) of the *Income Tax Act*?

[77] Is it the Crown on account of the deemed trust under s. 227(4) and the priority created by s. 227(4.1) of the *Income Tax Act*?

[78] Or is it the interim lender, the insolvency professionals and the directors by reason of the priming charges priority authorized by ss. 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act*?

[79] If the consequence of giving s. 227(4.1) of the *Income Tax Act* its ordinary meaning might discourage insolvency professionals, interim lenders and directors of a relief-seeking corporation from participating in a restructuring or reorganization project under the *Companies' Creditors Arrangement Act*, does that justify a court ignoring the ordinary meaning of the statutory text?

III. Brief Answers

[80] The text of s. 227(4.1) of the *Income Tax Act*[11] bears only one plausible meaning.

[81] The Crown has a claim to the s. 227(4) deemed trust funds that supersedes any claim by those holding priming charges under ss. 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act*.[12]

[82] Nothing in the *Companies' Creditors Arrangement Act* is inconsistent with this determination.

[83] The fact that this interpretation of s. 227(4.1) of the *Income Tax Act* might reduce the efficacy of the *Companies' Creditors Arrangement Act* is a result of a policy choice made by Parliament. It is not the judiciary's role to rewrite the legislation under the guise of statutory interpretation. If Parliament concludes that its 1997 decision to accord first priority to the Crown[13] was unwise and must be reversed, it will have to act.

IV. Statement of Facts

A. Initial Order Under the *Companies' Creditors Arrangement Act*

[84] On July 5, 2017, the return date of an originating application filed on June 28, 2017[14] by Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., D.J. Catering Ltd., 816956 Alberta Ltd. and 1371047 Alberta Ltd.[15] under s. 9 of the *Companies' Creditors Arrangement Act*,[16] the Court of Queen's Bench of Alberta issued a "*Companies' Creditors Arrangement Act* Initial Order,"[17] parts of which are as follows:

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[11] R.S.C. 1985 (5th Supp.), c. 1.

[12] R.S.C. 1985, c. C-36.

[13] *Income Tax Amendments Act, 1997,* S.C. 1997, c. 19, s. 226.

[14] *Re Canada North Group Inc.*, 2017 ABQB 550, ¶ 2.

[15] An order pronounced July 27, 2017 added 1919209 Alberta Ltd. as an applicant.

[16] R.S.C. 1985, c. C-36.

[17] *Re Canada North Group Inc.*, 2017 ABQB 550, ¶ 9.

APPLICATION

2. The Applicants are companies to which the … [*Companies' Creditors Arrangement Act*] applies.[18]

…

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

13. Until and including August 3, 2017,[19] or such later date as this Court may order …, no proceeding or enforcement process in any court … shall be commenced or continued against or in respect of the Applicants … or the Monitor … or affecting the Business or the Property, arising out of or in connection with any right, remedy or claim of any person against the Applicants in connection with any indebtedness, indemnity, liability or obligation of any kind whatsoever of the Applicants under contract, statute or otherwise … except with leave of this Court, and any and all such Proceedings currently underway against or in respect of the Stay Parties or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

…

DIRECTORS' AND OFFICERS' INDEMINIFICATION AND CHARGE

21. The directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the 'Directors' Charge') on the Property, which charge shall not exceed an aggregate amount of $150,000, as *security*[20] for the indemnity provided in paragraph 21 of this Order. The Directors' Charge shall have the priority set out in paragraphs 44 and 46 herein.

…

[18] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 3(1) ("This Act applies in respect of a debtor company or affiliated debtor companies if the total of the claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed").

[19] Id. s. 11.02(1) ("A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days").

[20] Emphasis added.

APPOINTMENT OF MONITOR

30. The Monitor, counsel to the Monitor, the … [Chief Restructuring Officer] and its counsel, if any, and the Applicants' counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the 'Administration Charge') on the Property, which charge shall not exceed an aggregate amount of $500,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 44 and 46 hereof.

INTERIM FINANCING

…

34. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the 'Interim Lender's Charge') on the Property to *secure*[21] all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The Interim Lenders' Charge shall have the priority set out in paragraphs 44 and 46 hereof.

…

VALIDITY AND PRIORITY OF CHARGES

42. The priorities of the Directors' Charge, the Administration Charge and the Interim Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $500,000);

Second – Interim Lender's Charge (to the maximum amount of $1,000,000); and

Third – Directors' Charge (to the maximum amount of $150,000).

…

44. Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge … shall constitute a charge on the Property and subject always to section 34(11) of the … [*Companies' Creditors Arrangement Act*] such Charges shall rank

[21] Emphasis added.

in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise … in favour of any Person.

…

46. The Directors' Charge, Administration Charge … and the Interim Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargee entitled to the benefits of the Charges … shall not otherwise be limited or impaired in any way by:

…

(b) any application(s) for bankruptcy order(s) issued pursuant to … [the *Bankruptcy and Insolvency Act*], or any bankruptcy order made pursuant to such applications;

…

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement … which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

…

(iii) the payments made by the Applicants pursuant to this order, including the Letter of Offer … and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

…

General

…

56. Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven … days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

[85] As a result of the initial order the total priming charges were $1,650,000 – directors' charge of $150,000, administration charge of $500,000 and the interim lender's charge of $1,000,000.[22]

[86] On July 20, 2017 the Business Development Bank Canada advanced $900,000 to the applicants.[23]

B. The Crown's Variation Application

[87] While the applicants served the Crown on June 28, 2017, the service package failed to make its way to the appropriate Canada Revenue Agency official until July 13, 2017.[24] As a result, the Crown did not appear at the July 5, 2017 hearing.[25]

[88] As of July 5, 2017 Canada North Group Inc. and Campcorp Structures Ltd. owed the Canada Revenue Agency $685,542.93 for employee source deductions held in trust and not remitted to the Crown.[26]

[89] On July 31, 2017 the Crown applied for an order varying paragraphs 44 and 46(d) of the initial order on the ground that

> [s]ubsections 227(4.1) of the *Income Tax Act*, 23(4) of the *Canada Pension Plan* and 86(2.1) of the *Employment Insurance Act* all provide that the Minister's claims for unremitted employee source deductions have priority over the claims of all other creditors of a debtor, notwithstanding any other federal statute, including the *Companies' Creditors Arrangement Act*.
>
> …
>
> Paragraphs 44 and 46(d) of the Initial Order are without force and effect vis-à-vis the Minister, as those paragraphs fail to recognize the Minister's legislative proprietary interest as described in the cited provisions.

[90] The Crown sought the following variations of the initial order:

> 1. Paragraph 44 of the Initial Order in these [*Companies' Creditors Arrangement Act*] proceedings granted by the Honourable K.G. Nielsen on July 5, 2017 is

[22] Subsequent orders increased the administration charge to $950,000 and the interim lender's charge to $3,500,000 and extended the stay-of-proceedings end date beyond August 3, 2017. 2017 ABQB 508, ¶ 15.

[23] *Re Canada North Group Inc.*, 2017 ABQB 550, ¶ 13.

[24] Id. ¶¶ 10 & 12.

[25] Id. ¶ 9.

[26] Factum of the Appellant ¶¶ 10 & 38.

amended by adding the following phrase before the opening words of paragraph 44:

> Subject to subsections 23(3) and (4) of the *Canada Pension Plan*, subsections 86(2) and (2.1) of *Employment Insurance Act*, and subsections 227(4) and (4.1) of the *Income Tax Act*,

2. The reference in paragraph 46(d) of the Initial Order to the provisions of any federal statute does not apply to the provisions cited in paragraph 1 of this Order.

3. This Order is deemed effective *ab initio* to July 5, 2017 as if the cited amendments were made as part of the Initial Order.

C. The Court of Queen's Bench Dismissed the Crown's Variation Application

[91] The chambers judge acknowledged that any funds held by Canada North Group Inc. and the other applicants covered by s. 227(4) of the *Income Tax Act*,[27] s. 23(3) of the *Canada Pension Plan*[28] and s. 86(2) of the *Employment Insurance Act*[29] were the subject of a deemed trust.[30]

[92] The critical issue, according to the chambers judge, was "whether CRA's interest arising from the deemed trusts can be subordinated [to the priming charges.]"[31]

[93] She concluded that "it is the Court's order [under the *Companies' Creditors Arrangement Act*] that sets the priority of the charges at issue."[32]

[94] This interpretation, in her opinion, was the one most consistent with the general purpose of the *Companies' Creditors Arrangement Act* – to preserve the entrepreneurial heartbeat of a stricken enterprise so that it could return to financial health in the future.[33] She noted that corporate patients who leave the operating room as functioning entities continue to employ taxpayers[34] and contribute to the Crown treasury.

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[27] R.S.C. 1985 (5th Supp.), c. 1.

[28] R.S.C. 1985, c. C-8.

[29] S.C. 1996, c. 23.

[30] 2017 ABQB 550, ¶ 79.

[31] Id.

[32] Id. ¶ 112.

[33] Id. ¶¶ 108 & 113.

[34] Id. ¶ 109.

[95] She foresaw a gloomy future for the *Companies' Creditors Arrangement Act* as the emergency physician if a court exercising its authority under the *Act* could not attach a super priority to the priming charges:[35]

> The interim financiers' charge provides both an incentive and guarantee to the lender that funds advanced in the course of the restructuring will be recovered. Without this charge such financing would simply end, and with that, so too would end the hope of positive *CCAA* outcomes. Here, I digress to note the increasing prevalence of interim financiers having no prior relationship to the debtor. It does not take a stretch of imagination to forecast that this practice will diminish if not end altogether without the comfort of super-priority charges.
>
> Similarly, the charge in favour of directors is important. The charge is intended to keep the captains aboard the sinking ship. Without the benefit of this charge, directors will be inclined to abandon the ship, and it would be remarkably difficult, if not impossible, to recruit replacements.
>
> Likewise, the priority charge for administrative fees is critical to a successful restructuring. Indeed, it is the only protection the Monitor has to ensure that its bills are paid. While the debtor's counsel has the option of resigning if its accounts go unpaid, the Monitor does not have that luxury. As a Court officer, the Monitor's job is to see the proceeding through to completion or failure and would need Court approval to be relieved of that duty. Finally, insolvency practitioners well know that they typically do not have to look to the administrative charge for their initial work – where it has the most significance is at the end.

D. The Crown Secured Leave to Appeal

[96] The Crown applied for leave to appeal[36] this question:[37] "Did the case management judge err in law in determining that the 'super-priority' charges made in favour of the interim financier, the directors of the debtor companies, and the Monitor and its counsel have priority over the claim of the Minister of National Revenue for unremitted source deductions?"

---

[35] Id. ¶¶ 102-04.

[36] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 13 ("Except in Yukon, any person dissatisfied with an order or decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs").

[37] 2017 ABCA 363, ¶ 5.

[97] The chambers judge granted leave to appeal even though there were sufficient assets in the debtors' estates to satisfy both the Crown's claim and the priming charges. He was satisfied that the "applicant has identified a substantive issue justifying a further appeal".[38]

V. Applicable Statutory Provisions

A. *Income Tax Act*

[98] The key parts of s. 227 of the *Income Tax Act*[39] are set out below:

> 227(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> (4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

[38] Id.

[39] R.S.C. 1985 (5th Supp.), c.1.

> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[99] "Secured creditor" and "security interest," important terms in s. 227(4) and (4.1) of the *Income Tax Act*, are defined in s. 224(1.3) of the *Income Tax Act*:

> 224(1.3) In subsection 224(1.2),
>
> *secured creditor* means a person who has a security interest in the property of another person or who acts for or on behalf of that person with respect to the security interest and includes a trustee appointed under a trust deed relating to a security interest, a receiver or receiver-manager appointed by a secured creditor or by a court on the application of a secured creditor, a sequestrator or any other person performing a similar function; …
>
> *security interest* means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for … .

B. *Canada Pension Plan*

[100] Sections 23(3) and (4) of the *Canada Pension Plan*[40] are in this form:

> 23(3) Where an employer has deducted an amount from the remuneration of an employee as or on account of any contribution required to be made by the employee but has not remitted the amount to the Receiver General, the employer is deemed, notwithstanding any security interest (as defined in subsection 224(1.3) of the *Income Tax Act*) in the amount so deducted, to hold the amount separate and apart from the property of the employer and from property held by any secured creditor (as defined in subsection 224(1.3) of the *Income Tax Act*) of that employer that but for the security interest would be property of the employer, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> 23(4) Notwithstanding the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province

[40] R.S.C. 1985, c. C-8.

> or any other law, where at any time an amount deemed by subsection (3) to be held by an employer in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the employer and property held by any secured creditor (as defined in subsection 224(1.3) of the *Income Tax Act*) of that employer that but for a security interest (as defined in subsection 224(1.3) of the *Income Tax Act*) would be property of the employer, equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted by the employer, separate and apart from the property of the employer, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (b) to form no part of the estate or property of the employer from the time the amount was so deducted, whether or not the property has in fact been kept separate and apart from the estate or property of the employer and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property or in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

C. *Employment Insurance Act*

[101] Sections 86(2) and 86(2.1) of the *Employment Insurance Act*[41] are identical to ss. 23(3) and 23(4) of the *Canada Pension Plan*.

D. *Companies' Creditors Arrangement Act*

[102] The important provisions of the *Companies' Creditors Arrangement Act*[42] are set out below:

> *2(1) In this Act,*
>
> …
>
> ***secured creditor*** means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge,

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[41] S.C. 1996, c. 23.

[42] R.S.C. 1985, c. C-36.

lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds … .

…

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

…

11.2(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

…

11.51(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

…

11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of

> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> …
>
> 37(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* … .

VI. Analysis

A. A Court Cannot Give Statutory Text a Meaning It Cannot Support

[103] A court tasked with applying statutory text to a fact pattern must read the statute and related statutes in their entirety.[43]

[104] This review produces two significant benefits.

[105] First, it may disclose the purpose or purposes[44] that the enactment pursues.[45] This is frequently helpful.[46] Sometimes it is not.[47]

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[43] *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 41 (the Court approved this statement: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament") *& Purba v. Ryan*, 2006 ABCA 229, ¶ 13; 397 A.R. 251, 254 ("one must consider the combined effect of all relevant legislation as a whole and in its appropriate context").

[44] Most enactments incorporate more than one purpose. This is certainly the case for the *Criminal Code*. R.S.C. 1985, c. C-46. At the most abstract level the *Criminal Code* provides an exhaustive statement of crimes. Section 9 of the

[106] Second, reading the statutory text[48] discloses its potential plausible meanings.[49]

Criminal Code states that "[n]otwithstanding anything in this Act or any other Act, no person shall be convicted ... of an offence at common law". This promotes certainty. A law that clearly defines criminal conduct allows persons who have free will to factor in the lawfulness of possible courses of conduct when deciding how to act. See also *Canadian Charter of Rights and Freedoms*, s. 11(g) ("Any person charged with an offence has the right ... not be found guilty on account of an act or omission unless, at the time of the act or omission, it constitutes an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations". *Canada Act 1982*, c. 11, sch. B (U.K.). The *Criminal Code* is a comprehensive enactment that contains discrete parts each of which pursues distinct objectives. For example, Part XXIII deals with sentencing. Section 718 declares that "[t]he fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives: (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct; (b) to deter the offender and other persons from committing offences; (c) to separate offenders from society, where necessary; (d) to assist in rehabilitating offenders; (e) to provide reparations for harm done to victims or to the community; and (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community". Part XXI/Mental Disorder also promotes a distinct purpose. In *Winko v. British Columbia*, [1999] 2 S.C.R. 625, 658 Justice McLachlin opined that "the purpose of Part XX.1 is to replace the common law regime for the treatment of those who offend while mentally ill with a new approach emphasizing individualized assessment and the provision of opportunities for appropriate treatment. … Throughout the process the offender is to be treated with dignity and accorded the maximum liberty compatible with Part XX.1's goals of public protection and fairness to the NCR accused". All this means that one must be mindful that many purposes may be at play and that they may advance completely difference interests in a way that may be complementary or discordant.

[45] *Frank v. Canada*, 2019 1 SCC 1, ¶ 130 ("the best way of discerning a legislature's purpose will usually be to look to the legislation itself"); *Alberta v. Cardinal*, 2013 ABQB 407, ¶52; 565 A.R. 271, 286 ("The best source of the goal the legislature pursues is the text itself. A part of the legislation devoted to a statement of the legislative purpose is usually an indisputable marker of the true intention of the legislature") & H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1200 (tentative ed. Harvard University 1958) ("In interpreting a statute a court should ... [d]ecide what purpose ought to be attributed to the statute").

[46] E.g., *Election Amendment Act, 1998*, S.A. 1998, c. 34 ("Whereas the Legislative Assembly of Alberta believes that, with a few exceptions, denying the right to vote to those whose disrespect for the law has caused them to be imprisoned at the time of an election preserved the integrity of those principles and their recognition among Albertans").

[47] Knowledge of an enactment's purpose may be of minimal assistance. This is usually so if it is stated abstractly. *McMorran v. McMorran*, 2014 ABCA 387, ¶ 70; 378 D.L.R. 4th 103, 143 per Wakeling, J.A. ("For example, the determination that a labour relations statute exists to promote collective bargaining by government employees does not assist much in determining whether a worker is employed by government or is an independent contractor"); *Alberta v. Cardinal*, 2013 ABQB 407, ¶ 54; 565 A.R. 271, 287 ("On occasion, the legislative purpose is stated in terms too abstract to be helpful. A legislative purpose which is precise is of more assistance to the court than one that is not") & *Alberta Union of Provincial Employees v. Alberta Research Council*, [1992] C.L.L.R. 14390 at 14392 (Alta. P.S.E.R.B.) ("an abstract statement of purpose will as a rule be less helpful … than one that is specific").

[48] *Spencer v. Australia*, [2010] HCA 28, ¶ 50; 241 C.L.R. 118, 138 per Hayne, Crennan, Kiefel & Bell, JJ. ("Consideration of the operation and application ... [of the summary judgment rule] must begin from consideration of its text").

[107] Words have an ordinary meaning or meanings.[50] Legislators are presumed to know the ordinary meanings of words and to have intended readers of the text to give a statute an interpretation consistent with those ordinary meanings.[51] "Words must not be given meanings they cannot possibly bear."[52]

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[49] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 109 ("[a court] must identify the potential permissible meanings [of the text]"). A permissible meaning is one that a reasonable reader could have given the text when it was produced. *Unifor, Local 707A v. SMS Equipment Inc.*, 2017 ABCA 81, ¶ 81; 47 Alta. L.R. 6th 28, 56 per Wakeling, J.A. An implausible meaning is not a permissible meaning. *Lenz v. Sculptoreanu*, 2016 ABCA 111, ¶ 4; 399 D.L.R. 4th 1, 6 ("A contrary meaning would give the text an implausible meaning. A court may never do this") & *Valard Construction Ltd. v. Bird Construction Co*., 2016 ABCA 249, ¶ 184; 57 C.L.R. 4th 171, 236 per Wakeling, J.A. in dissent ("The text of the bond does not support the interpretation the trial judge gave it"), rev'd 2018 SCC 8; [2018] 1 S.C.R. 224.

[50] Dictionaries record the ordinary meanings those who use the language correctly understand their use to represent. See *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 113; [2017] 7 W.W.R. 343, 375 ("Reference to authoritative dictionaries is helpful. Those sources record a range of potential meanings from which the court must select the most suitable for the context") & H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1220 (tentative ed. Harvard University1958) ("A dictionary... never says what meaning a word must bear in a particular context. ...An unabridged dictionary is simply an historical record, not necessarily all-inclusive, of the meanings which words in fact have borne, in the judgment of the editors, in the writings of reputable authors. ... A good dictionary always gives examples of the use of the word in context in each of the meanings ascribed to it") (emphasis in original).

[51] *The Queen v. D.A.I.*, 2012 SCC 5, ¶ 26; [2012] 1 S.C.R. 149, 166 ("The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision"); *Thomson v. Canada*, [1992] 1 S.C.R. 385, 399-400 (unless an enactment indicates a contrary intention a word should be given its ordinary or usual meaning); *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 109; [2017] 7 W.W.R. 343, 375 ("To do so one must identify the potential permissible meanings of these terms, taking into account their ordinary meanings"); *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917) ("Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them"); R. Sullivan, Sullivan on the Construction of Statutes 28 (6th ed. 2014) ("It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature") & A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 69 (2012) ("Words are to be understood in their ordinary, everyday meanings – unless the context indicates that they bear a technical sense").

[52] *Zuk v. Alberta Dental Ass'n*, 2018 ABCA 270, ¶ 159; 426 D.L.R. 4th 496, 539. See also *First Vancouver Finance v. Canada*, 2002 SCC 49, ¶ 43; [2002] 2 S.C.R. 720, 739 ("Although it would be open to Parliament to extend the trust to property alienated by the tax debtor, such an interpretation is simply not supported by the language of the ... [*Income Tax Act*]"); *Bourne v. Norwich Crematorium Ltd.*, [1967] 2 All E.R. 576, 578 (Ch.) ("[a court] must not ... distort ... [the *Income Tax Act, 1952*] and give it a meaning which in the context ... it can [not] possibly bear"); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 31 (2012) ("A fundamental rule of textual interpretation is that neither a word nor a sentence may be given a meaning that it cannot bear") & H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1200 (tentative ed. Harvard University 1958) ("In interpreting a statute a court should... [i]nterpret the words of the statute... so as to carry out the purpose [of the statute] as best it can, making sure, however, that it does not give the words... a meaning they will not bear").

[108] If text may bear only one plausible or permissible meaning, the inquiry is over.[53] A court must conclude that the text has this restricted meaning.[54]

[109] The next example shows how this works.

[110] Suppose that a municipality receives complaints that some residents are disrupting the peace and quiet of their neighbourhoods by mowing their lawns when school children are in bed. It amends its noise bylaw and prohibits the operation of a lawn mower in residential areas between the hours of 9 pm and 8 am. An overzealous bylaw enforcement officer charges a resident who is operating his old-fashioned reel push mower at 10 pm. The accused's mower made no or very little sound. Any noise it made would not disturb anyone. The resident has violated the noise bylaw. An old-fashioned reel push mower is a lawn mower. He operated it during prohibited hours. Any person asked whether this machine is a lawn mower would say yes. Webster's Third New

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[53] *The Queen v. Rodgers*, 2006 SCC 15, ¶ 20; [2006] 1 S.C.R. 554, 573 ("The clear language of s. 487.055(1) [of the *Criminal Code*] indicates that Parliament intended to authorize *ex parte* applications under this section. There is no room to interpret the provision as presumptively requiring that applications be brought on notice"); *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, ¶ 10; [2005] 2 S.C.R. 601, 610 ("When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process"); *The Queen v. McIntosh*, [1995] 1 S.C.R. 686, 704 ("where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be"); *Canada v. Mossop*, [1993] 1 S.C.R. 554, 581 ("when Parliamentary intent is clear, courts ... are not empowered to do anything else but to apply the law") *Unifor, Local 707A v. SMS Equipment Inc.*, 2017 ABCA 81, ¶ 82; 47 Alta. L.R. 6th 28, 56 per Wakeling, J.A. ("If this endeavor produces only one ... [plausible] meaning the interpretation process comes to an end"); *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A.C. 107, 121-22 (H.L. 1912) per Lord Atkinson ("If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results ... . [Y]our Lordships' House sitting judicially is not concerned with the question whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievous"); *Sussex Peerage Case*, 8 Eng. Rep. 1034, 1057 (H.L. Committee for Privileges 1844) per Tindal C.J. ("If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense"); *Hamilton v. Rathbone*, 175 U.S. 414, 419 (1899) ("where a statute is ... susceptible upon its face of two constructions, the court may look into... the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it"); *Temple v. City of Petersburg*, 182 Va. 418, 423; 29 S.E. 2d 357, 358 (Sup. Ct. 1944) ("If the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it regardless of what courts think of its wisdom or policy") & de Sloovère, "Contextual Interpretation of Statutes", 5 Fordham L. Rev. 219, 219 (1936) ("Very often the obvious meaning is the correct one, but until one can say that it is the only sensible meaning, the statute has not been fully interpreted. At this point in the process the context must be studied so as to be sure there is no other equally justifiable meaning that the text will bear by fair use of language").

[54] *Royal Bank of Canada v. The Queen*, [1997] 1 S.C.R. 411, 484 ("the consequences of my colleague's approach might be more dire than even Professor Wood supposes. ... I agree that if Parliament mandated this outcome, the courts must perforce accept it. However, judges should not rush to embrace such a weighty consequence unless the statutory language requiring them to do so is unequivocal").

International Dictionary of the English Language Unabridged's[55] definition of "lawn mower" supports this assertion: "a hand-operated or power-operated machine for cutting grass or a lawn." The dictionary features a picture of a reel push mower to show what a lawn mower is. The conclusion that a reel push mower is a lawn mower ends the inquiry and eliminates the need to consider why the municipality amended its noise bylaw. In any event, giving the bylaw text its ordinary meaning did not thwart the attainment of the noise bylaw's purpose. It just meant that some lawn mowers that do not disrupt the peace and quiet of a neighbourhood may not be operated at night.

[111] If the text discloses more than one plausible or permissible meaning, the court must select the one that best promotes the purpose that accounts for the statute or the contested part of the statute.[56]

[112] Fidelity to statutory text is a fundamental feature of statutory interpretation.[57] Courts that ignore the text act as unauthorized legislators.[58] They disregard the primacy of parliament and the paramountcy of the rule of law in our legal system.[59]

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[55] Webster's Third New International Dictionary of the English Language Unabridged 1280 (2002).

[56] *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 ("An enactment … shall be given the fair, large and liberal construction and interpretation that best assures the attainment of its objects"); *Celgene Corp. v. Canada*, 2011 SCC 1, ¶ 21; [2011] 1 S.C.R. 3, 13 ("The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute"); *McBratney v. McBratney*, 59 S.C.R. 550, 561 (1919)("where you have rival constructions of which the language of the statute is capable you must resort to the object ... of the statute ... [and adopt] the construction which best gives effect to the governing intention"); *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 109; [2017] 7 W.W.R. 343, 375-76 ("If there is more than one potential meaning, the court must select the option that best advances the purpose that accounts for the text"); *McMorran v. McMorran*, 2014 ABCA 387, ¶ 69; 378 D.L.R. 4th 103, 142 per Wakeling, J.A. ("[a] failure to be mindful of the purpose may cause a court to select from several permissible meanings one that does not best promote the attainment of the text's object"); *Rainy Sky SA v. Kookmin Bank*, [2011] UKSC 50, ¶ 21; [2011] 1 W.L.R. 2900, 2908 ("If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other"); *The Queen v. Judge of The City of London Court*, [1892] 1 Q.B. 273, 290 (C.A. 1891) per Lord Esher, M.R. ("If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. ... [I]f the words...admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation"); *National Tax Credit Partners, L.P. v. Havlik*, 20 F. 3d 705, 707 (7th Cir. 1994) per Easterbrook, J. ("Knowing the purpose behind a rule may help a court decode an ambiguous text, ... but first there must be some ambiguity"); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 63 (2012) ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored") & H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1156 (tentative ed. Harvard University 1958)("Every statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible").

[57] *Quebec v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, ¶ 29; [2009] 3 S.C.R. 286, 304 ("Canadian tax authorities are bound by the choice of legislative policy now expressed in the ... [*Bankruptcy and Insolvency Act*]. ... The appellants' arguments conflict with both the words of the statutory provisions in question and their underlying legislative intent and cannot be accepted").

[113] Courts must be wary of the harm attributable to improper and undue emphasis of the purpose of the statute and the consequential perversion of the statutory text.[60] Purpose can never trump text.[61]

[114] Here is an example of the misuse of purpose.

[115] Suppose that a railway safety act declares that a railway must equip freight and passenger cars with automatic couplers. Automatic couplers relieve workers of the need to manually connect and disconnect rolling stock.[62] Manual connection is a very dangerous task and causes workers many serious injuries. A dispute arises as to whether a locomotive is a freight or passenger car. The railway unions argue that it is. They claim that a contrary interpretation would largely frustrate the

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[58] *Purba v. Ryan*, 2006 ABCA 229, ¶ 56; 397 A.R. 251, 262 ("The legislation fixes the boundary between large cases (with a right to a civil jury) and small cases (with no right) at $75,000. How can a court say that the legislators were wrong, and the boundary should be lower? … It is improper, because it is amendment, not interpretation"); *Williams v. Canada*, 2017 FCA 252, ¶ 50; 417 D.L.R. 4th 173, 189 ("judges – like everyone else – are bound by legislation. They must take it as it is. They must not insert into it the meaning they want. They must discern and apply its authentic meaning, nothing else"); *Temple v. City of Petersburg*, 182 Va. 418, 424; 29 S.E. 2d 347, 359 (Sup. Ct. 1944) ("Just why the Legislature in its wisdom saw fit to prohibit the establishment of cemeteries in cities and towns and did not see fit to prohibit enlargements or additions, is no concern of ours. Certain it is that language could not be plainer than that it employed to express the legislative will. From it we can see with certainty that while a cemetery may not be established in a city or town, it may be added to or enlarged") & *Saville v. Virginia Railway & Power Co.*, 114 Va. 444, 452-53; 76 S.E. 954, 957 (Sup. Ct. 1913) ("We hear a great deal about the spirit of the law, but the duty of this court is not to make the law, but to construe it ... . It is our duty to take the words which the legislature has seen fit to employ and give them their usual and ordinary signification, and thus having ascertained the legislative intent, to give effect to it, unless it transcends the legislative power as limited by the Constitution").

[59] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 404 (1937) per Sutherland, J. in dissent ("The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase 'supreme law of the land' stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections").

[60] Frankfurter, "Some Reflections on the Reading of Statutes", 47 Colum. L. Rev. 527, 543 (1947) ("Violence must not be done to the words chosen by the legislature").

[61] *Williams Lake Indian Band v. Canada*, 2018 SCC 4, ¶ 202 per Brown, J. ("The Tribunal is no more constitutionally empowered than this Court to aim for a result consistent with its own policy preferences by holding fast to the bits of statutory text that it likes while ignoring the bits that it does not"); *The Queen v. Zundel*, [1992] 2 S.C.R. 731, 771 (the Court held that a statute cannot be given a meaning it cannot bear in order to promote equality and multiculturalism); *Covert v. Nova Scotia*, [1980] 2 S.C.R. 774, 807 per Dickson, J. ("Although a court is entitled ... to look to the purpose of the Act ... it must still respect the actual words which express the legislative intention"); *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 85; 91 C.P.C. 7th 73, 106 per Wakeling, J.A. ("Overzealous pursuit of an undeniable legislative purpose must not cause one to overlook the limited scope of the words the legislators used") & *Alberta v. McGeady*, 2014 ABQB 104, ¶ 23; [2014] 7 W.W.R. 559, 571 ("No statutory decision maker can ignore substantive statutory provisions because it believes [they produce] ... unfair results").

[62] See *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 14-15 (1904) (the Court refused to interpret "car" in railway safety legislation narrowly – "any car ... not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars" – and exclude locomotives in order to promote the safety of railway employees responsible for coupling and uncoupling activities).

ameliorative effects of the legislation because locomotives frequently participate in the coupling and uncoupling process. The railways oppose this interpretation. Automatic couplers are expensive. A court contemplates holding that a locomotive is a freight or passenger car. It is attracted to this interpretation because it will enhance workplace safety. But the court ultimately rejects this option, convinced a court cannot do this. A locomotive cannot possibly be characterized as a freight or passenger car.[63] This is not a permissible reading of the statute – a legislative compromise of the positions advanced by the railway unions and the railways. If the law is to be changed the legislature must do it. It can amend the railway safety act to state that a railway must equip locomotives and freight and passenger cars with automatic couplers.

B. The Absurdity Doctrine Has a Very Limited Function in the Interpretation of Legal Texts

[116] In rare cases the generally accepted interpretation principles do not work.

[117] This is not because these principles are in any way deficient. It is because there is good reason to believe that there is something wrong with the text.

[118] The problem with the text may be attributable to an error on the part of the statutory printer.[64] Suppose the drafter of court rules had submitted text to the printer that stated a document may be served outside the jurisdiction "in accordance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters". The legislative printer erroneously substituted "Havana" for "Hague". There is no Havana Convention on this subject. Litigators and judges know that the governing norm is the Hague Convention. Neither the drafter nor the legislators detected this error and approved the court rules with this mistake.

[119] Sometimes the source of the error is the drafter.[65] Suppose that Parliament is convened on an emergency basis to order striking air traffic controllers back to work and declare that unresolved wage issues must be resolved by arbitration. The drafter submits a text to the printer providing that

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[63] Webster's Third New International Dictionary of the English Language Unabridged 908 (2002) ("freight car ... a railroad car for the transportation of freight") & 1650 ("a passenger car ... railroad car (as a coach, parlor car, dining car, or sleeping car) for carrying passengers").

[64] E.g., *An Act Respecting the Solemnization of Marriage*, R.S.M. 1970, c. M50, s. 8(2)(b) ("Where a marriage is to be solemnized under the authority of publication of banns, the intention to marry shall be proclaimed openly, at least once ... during divine service ... (b) where the parties are in the habit of attending whorship [read worship] at different churches ... in each of those churches").

[65] E.g., 3 Geo. 4, c. 39, s. 2 (U.K.) ("or unless judgment shall have been signed or [read 'and'] execution issued [read 'levied'] on such warrant of attorney") & *Green v. Wood*, 115 Eng. Rep. 455, 458 (Q.B. 1845) per Lord Denman, C.J. ("We have here words which, as they stand, are useless ... . But, to give an effectual meaning, we must alter, not only 'or' into 'and', but 'issued' into 'levied'. It is extremely probable that this would express what the Legislature meant. But we cannot supply it") & per Williams, J. ("It is much safer to say that the words really have no meaning"). See R. Sullivan, Sullivan on the Construction of Statutes 318 (6th ed. 2014) ("Absurd results can sometimes be avoided by correcting a clear drafting mistake").

the "arbitration award is binding on the employees and the bargaining agent". The printer returns a bill as instructed. In the rush no one detected that no mention is made of "the employer". The provision should have stated that the "arbitration award is binding on the employer, employees and the bargaining agent". This is a major problem. It gives the employer an opportunity to argue that an unfavourable arbitration award is not binding on it.

[120] The doctrine of absurdity allows a court to make minor corrections of the flawed text.[66] No reasonable person would contend that the text the legislators approved was what they thought it was.

[121] This proposition allows a court either to disregard the suspect text or modify the text slightly to correct what every reasonable person would recognizes as an obvious textual error. Justice Scalia and Professor Garner assert that "[a] provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve".[67]

[122] Most of the time correcting the error is the desirable course.

[123] The absurdity doctrine authorizes judicial rewriting of text only in these limited circumstances.

[124] A court has no authority to ignore or revise clear and unambiguous text that bears only one meaning just because the court considers the substantive norm embodied in the text to be unwise or dangerous.[68]

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[66] A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 234 (2012) ("If an easy correction is not possible, the absurdity stands").

[67] Id.

[68] *The Queen v. Conway*, 2010 SCC 22, ¶ 97; [2010] 1 S.C.R. 765, 810 ("barring a constitutional challenge to the legislation, no judicial fiat can overrule Parliament's clear expression of intent"); *Royal Bank of Canada v. The Queen*, [1997] 1 S.C.R. 411, 484 ("the consequences of my colleague's approach might be more dire than even Professor Woods supposes. ... I agree that if Parliament mandated this outcome, the courts must perforce accept it"); *The Queen v. McIntosh*, [1995] 1 S.C.R. 686, 704 ("where, by use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be"); *Zeitel v. Ellscheid*, [1994] 2 S.C.R. 142, 152 ("Recognition of the proper roles of the legislature and the judiciary requires that the courts give effect to the plain meaning of the words of a duly enacted statute. It is beyond the power of a court to interfere in a carefully crafted legislative scheme merely because it does not approve of the result produced by a statute in a particular case"); *Bedwell v. McGill*, 2008 BCCA 526, ¶ 31; 305 D.L.R. 4th 751, 765 ("I know of no judicial authority that would support our disregarding the clear terms of an enactment on the basis of absurdity"); *The Queen v. Huggins*, 2010 ONCA 746, ¶ 17 ("the clear wording of a statute must be given effect even if it may lead to an absurdity"); *Beattie v. National Frontier Insurance Co.*, 68 O.R. 3d 60, 67 (C.A. 2003) ("if the words of an Act are clear, they must be followed even though they lead to a manifest absurdity"); *Vacher & Sons Ltd. v. London Society of Composers*, [1913] A.C. 107, 121 (H.L. 1912) per Lord Atkinson ("If the language of a

[125] Suppose a legislature triples the minimum hourly wage rate when it amends employment standard legislation. Employers – large and small – are up in arms. They loudly proclaim that they will not employ workers if they have to pay triple the previous minimum and that it will drive them out of business. Informed commentators agree that a minimum wage of this magnitude will be a job and business-killing initiative. A court charged with the responsibility of hearing complaints filed by employees against noncompliant employers must enforce the minimum hourly wage.

[126] Needless to say, a court acts illegitimately if it substitutes its views for that of the legislators on the merits of a provision the text of which supports only one plausible meaning and gives the text a meaning it cannot support.[69] It is the role of legislature – not the courts – to evaluate the merits of an enactment and to amend imprudent enactments.[70]

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statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results"); *City of Victoria v. Bishop of Vancouver Island*, [1921] 2 A.C. 384, 388 (P.C.) (B.C.) (the Privy Council cited with approval Lord Esher's speech in *The Queen v. Judge of the City of London Court*); *Cooke v. Charles A. Vogeler Co.*, [1901] A.C. 102, 107 (H.L. 1900) per Earl of Halsbury, L.C. ("a court of law has nothing to do with the reasonableness of unreasonableness of a provision"); *Warburton v. Loveland*, 6 Eng. Rep. 806, 809 (1832) per Tindal, C.J. ("Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences"); *Abley v. Dale*, 138 Eng. Rep. 519, 525 (Common Pleas 1851) per Jervis, C.J. ("If the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice"); *The Queen v. Judge of the City of London Court*, [1892] 1 Q.B. 273, 290 & 301-02 (C.A. 1891) per Lord Esher, M.R. ("If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity") & per Lopes, L.J. ("if the words of an Act are unambiguous and clear, you must obey those words, however absurd the result may appear ... . If any other rule were followed, the result would be that the Court would be legislating instead of the properly constituted authority of the country, namely, the legislature"); *The Queen v. Skeen*, 8 Cox. Cr. C. 143, 158 (Cr. App. 1859) per Lord Campbell, C.J. ("Where by the use of clear and unequivocal language, capable of only one construction, anything is enacted by the legislature, we must enforce it, although in our opinion, it may be absurd or mischievous"); *Electrical, Electronic, Telecommunication and Plumbing Union v. Times Newspapers Ltd.*, [1980] 1 Q.B. 585, 599 (1979) ("It is my task to construe the words and if I find them to be absolutely clear, then even though the results produced may be one which strikes me as being absurd, I must give effect to them") & *Temple v. City of Petersburg*, 182 Va. 418, 423; 29 S.E. 2d 357, 358 (Sup. Ct. 1914) ("If the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it regardless of what courts think of its wisdom or policy").

[69] A court may properly decline to accord text that supports two plausible interpretations, only one of which is absurd, an absurd interpretation. *The Queen v. Judge of the City of London Court*, [1892] 1 Q.B. 273, 290 (C.A. 1891) per Lord Esher, M.R. ("if the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation"); *Holmes v. Bradfield Rural District*, [1949] 2 K.B. 1, 7 ("the mere fact that the results of applying a statute may be unjust or even absurd does not entitle this court to refuse to put it into operation. … but if there are two reasonable interpretations … of the words in an Act, the courts [will] adopt that which is just, reasonable and sensible rather than one which [is] … none of those things"); *Auckland City Corp. v. Dawson*, [1929] N.Z.L.R. 614, 619 (Sup. Ct.) ("Where the meaning of the words of a section is not clear, and such unreasonable consequences result from a particular interpretation of the section, the Court should not adopt such interpretation if the language is susceptible of a more reasonable construction"); R. Sullivan, Sullivan on the Construction of Statutes 313 (6th ed. 2014) ("If the text is judged to be ambiguous, everyone agrees that avoiding

C. The Plain Meaning of Section 227(4.1) of the *Income Tax Act* Accords Priority to the Crown Over the Holders of Priming Charges Created by the *Companies' Creditors Arrangement Act*

[127] There is only one plausible meaning for s. 227(4.1) of the *Income Tax Act*.[71]

[128] It makes two statements unequivocally. First, the Crown is the beneficial owner of amounts a corporation seeking relief under the *Companies' Creditors Arrangement Act*[72] withheld from the employment income of its employees and failed to remit to the Crown. Second, these amounts must be paid to the Crown notwithstanding the security interests of any other secured creditors including those who are the holders of a priming charge.[73]

[129] I will now focus on the text of s. 227(4.1) of the *Income Tax Act.*

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absurdity is a good reason to prefer one interpretation over another") & Manning, "The Absurdity Doctrine", 116 Harv. L. Rev. 2387, 2463 (2005) ("if a given phrase has several relevant social connotations, then an interpreter may use purpose or policy considerations to choose among them").

[70] *The Queen v. McIntosh*, [1995] 1 S.C.R. 686, 706 ("Parliament ... has the right to legislate illogically (assuming that this does not raise constitutional concerns). And if Parliament is not satisfied with the judicial application of its illogical enactments, then Parliament may amend them accordingly"); *Chung Fook v. White*, 264 U.S. 443, 446 (1924) per Sutherland, J. ("The words of the statute being clear, if it unjustly discriminates against the native-born citizen or is cruel and inhuman in its results ... the remedy lies with Congress and not with the courts. Their duty is simply to enforce the law as it is written, unless clearly unconstitutional"); *Stock v. Frank Jones (Tipton) Ltd.*, [1978] 1 W.L.R. 231, 234 (H.L.) per Viscount Dilhorne ("it is not open to the court to remedy the defect. That must be left to the Legislature"); *Hill v. East and West India Dock Co.*, 9 A.C. 448, 465 (H.L. 1884) per Lord Bramwell ("it is infinitely better, although an absurdity or an injustice or other objectionable result may be evolved as the consequence of your construction, to adhere to the words of an Act of Parliament and leave the legislature to set it right than to alter these words according to one's notion of an absurdity") & *Pocock v. Pickering*, 118 Eng. Rep. 298, 301 (Q.B. 1852) per Coleridge, J. ("In constructing an Act of Parliament, our first business, I conceive, is to examine the words themselves which are used; and, if in these there be no ambiguity, it is seldom desirable to go further ... .; and ... when ... you have arrived at the meaning, I think nothing is more dangerous than to flinch from that conclusion because we think the enactment is less wise or efficacious than it might have been made, or even wholly fail of its object. Perhaps the most efficacious mode of procuring good laws, certainly the only one allowable to a Court of Justice, is to act fully up to the spirit and language of bad ones, and to let their inconvenience be fully felt, by giving them their full effect").

[71] R.S.C. 1985 (5th Supp.), c. 1.

[72] R.S.C. 1985, c. C-36.

[73] *Century Services Inc. v. Canada*, 2010 SCC 60, ¶¶ 29 & 45; [2010] 3 S.C.R. 379, 400 & 406 ("The Crown retained priority for source deductions of income tax, Employment Insurance ... and Canada Pension Plan ... premiums, but ranks as an ordinary unsecured creditor for most other claims ... [T]here is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the ... [*Companies' Creditors Arrangement Act*] or the ... [*Bankruptcy and Insolvency Act*]. Unlike source deductions [under the *Income Tax Act*, *Canada Pension Plan* and *Employment Insurance Act*] which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST").

[130] For ease of reference s. 227(4.1) of the *Income Tax Act* is set out below:

> 227(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[131] Section 227(4.1) may be broken down into two parts.

[132] The first part, a dependent phrase – identified by single underlining – declares that the norm embedded in the main clause of this subsection is not abridged by any other provision to the contrary in other parts of the *Income Tax Act*, provisions of the *Bankruptcy and Insolvency Act*[74] with the exception of ss. 81.1 and 81.2[75], any other enactment of Canada or any province or any other law – anything set out in the dependent phrase.

[133] "Notwithstanding"[76] routinely appears in statutes[77] and contracts in a dependent phrase to identify specific provisions of a statute or contract that do not apply to the norm set out in the main

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[74] R.S.C. 1985, c. B-3.

[75] These sections are not applicable here.

[76] Black's Law Dictionary 1231 (10th ed. 2014 B. Garner ed.) ("1. Despite; in spite of < notwithstanding the conditions listed above, the landlord can terminate the lease if the tenant defaults >"); Webster's Third New International Dictionary of the English Language Unabridged 1545 (2002) ("without prevention or obstruction from

clause as "a fail-safe way of ensuring that the clause it introduces will absolutely, positively prevail".[78]

[134] The dependent clause in s. 227(4.1) establishes a remarkably comprehensive defensive bulwark.[79] No other statute or law that abridges the norm created by the main clause of s. 227(4.1) has any force. This is what drafters refer to as "blanket paramountcy".[80]

[135] Because there is no comparable blanket paramountcy provision in ss. 11, 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act* there is no need to look beyond the four corners of s. 227(4.1) to determine the scope of the unassailable priority it creates.[81]

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or by: in spite of <~ its wide distribution, it is an animal seldom encountered") & B. Garner, Garner's Modern English Usage 635 (4th ed. 2016) ("notwithstanding is a formal word used in the sense 'despite', 'in spite of', or 'although'").

[77] E.g., *Canada v. Rainville (Bankrupt Trustee)*, [1980] 1 S.C.R. 35, 44 (1979) ("Paragraph (j) [of s. 107(1) of the *Bankruptcy Act*] ends with the following words ... '*notwithstanding any statutory preference to the contrary*'. The purpose of this part of the provision is obvious. Parliament intended to put all debts to a government on a "equal footing: it therefore cannot have intended to allow provincial statutes to confer any higher priority"); *Tennant v. Union Bank of Canada*, [1894] A.C. 31, 45 (P.C. 1893) (Ont.) ("sect. 91 [of the *British North America Act*] expressly declares that, 'notwithstanding anything in this Act', the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority"); *Engineered Buildings Ltd. v. City of Calgary*, 57 D.L.R. 2d 322, 325 (Alta. Sup. Ct. App. Div. 1966) ("the words 'notwithstanding anything in this Act' in s.s. (9) mean that where the facts come within that subsection no other part of the Act applies, and this includes s.s. (10) which is another party of the Act") & *Green v. Commonwealth*, 28 Va. App. 567, 569-70; 507 S.E. 2d 627, 628-29 (Ct. App. 1998) (Virginia punished carjacking with a mandatory three-year prison term and denied the sentencer the option of suspending the sentence of juveniles, an option generally available for juveniles, by the use of the prepositional phrase "notwithstanding any other provision of law").

[78] A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 127 (2012). See P. Salembier, Legal and Legislative Drafting 382-83 (2d ed. 2018) ("if Rule A is stated to be *notwithstanding* Rule B, then where Rules A and B conflict, Rule A is to be given paramountcy and hence will govern. In such a case, Rule A is introduced with *Notwithstanding Rule B*") (emphasis in original).

[79] See *Re Rosedale Farms Ltd.*, 2017 NSSC 160, ¶ 35 ("the opening words of s. 227(4.1) ... expressly override s. 50.6 of the *Bankruptcy and Insolvency Act*, the authority for ordering ... [debtor in possession] financing and security for priority. To hold that the court can grant priority to ... [debtor in possession financing] security over the s. 227(4.1) deemed trust is to ignore these words"). *Cf. Century Services Inc. v. Canada*, 2010 SCC 60, ¶ 34; [2010] 3 S.C.R. 379, 402 ("The amended text of s. 227(4.1) of the ... [*Income Tax Act*] and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the ... [*Bankruptcy and Insolvency Act*]. The ... [*Excise Tax Act*] deemed trust at issue in this case is similarly worded, but it excepts the ... [*Bankruptcy and Insolvency Act*] in its entirety").

[80] P. Salembier, Legal and Legislative Drafting 385 (2d ed. 2018).

[81] See P. Salembier, Legal and Legislative Drafting 387 (2d ed. 2018) ("When readers (or the courts) are confronted with two conflicting statutory provisions, each of which states that it is to operate *Notwithstanding any other Act of Parliament*, which one governs?").

[136] The second part is the main clause. It can be subdivided. One part – identified by no underlining – declares the norm: the Crown has the best claim to an amount representing the funds the employer-applicant withheld from the employment income of its employees but failed to remit to the Crown and is entitled to be paid an amount equal to the withheld funds. The holders of the priming charges have no claim to these funds that is superior to the Crown's claim. This is because the holders of the priming charges have a security interest under s. 224(1.3) of the *Income Tax Act*[82] and the last clause of s. 227(4.1) states that "the proceeds of such property shall be paid to the Receiver General in priority to all such security interests."

[137] The other segment of the second part – identified by double underlining – explains why the Crown has this superior claim. The funds held by the corporate trustee and not properly remitted to the Crown "form no part of the estate or property" of the corporation that withheld them and failed to properly remit them to the Crown.[83] They are beneficially owned by the Crown.

[138] Nothing in the *Companies' Creditors Arrangement Act* suggests a contrary conclusion.

[139] As mentioned, there is no counterpart to the first part of s. 227(4.1) of the *Income Tax Act* – the formidable defensive bulwark – in ss. 11, 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act.*

[140] Indeed, s. 37(2) of the *Companies' Creditors Arrangement Act* expressly recognizes the primacy of the rule fashioned by s. 227(4.1) of the *Income Tax Act* and the comparable provisions in the *Canada Pension Plan*[84] and the *Employment Insurance Act*.[85]

[141] Section 37 of the *Companies' Creditors Arrangement Act* reads as follows:

> 37(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust

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[82] A priming charge is an interest in property that secures payment of an obligation. R.S.C. 1985 (5th Supp.), c.1, s. 224 (1.3) ("*security interest* means any interest in … property that secures payment or performance of an obligation and includes an interest … created by or arising out of a … charge … of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for").

[83] This is so even though the statutory trust applies to unidentifiable property and not specific assets that can be separated from the debtor's estate. See *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 37(2) & *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, 449 ("Thus while s. 227(5) [a deemed trust provision] can be seen as a provision enacted to solve the conceptual dilemma precipitated by an intermingling of unremitted payroll deductions with a tax debtor's general assets, it is a legal vehicle not without its own conceptual limitations").

[84] R.S.C. 1985, c. C-8.

[85] S.C. 1996, c. 23.

> for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* … .

[142] Section 11 of the *Companies' Creditors Arrangement Act*,[86] the provision that authorizes the court to "make any order that it considers appropriate in the circumstances," does not function without regard to s. 227(4.1) of the *Income Tax Act* and the comparable provisions in the *Canada Pension Plan*[87] and the *Employment Insurance Act*.[88] It only trumps provisions in the *Bankruptcy and Insolvency Act* and the *Winding-up and Restructuring Act*.[89]

[143] The sections of the *Companies' Creditors Arrangement Act* that authorize a court to create priming charges – ss. 11.2(1), 11.51(1) and 11.52(1) – declare that the order attach to "all or part of the company's property". Section 227(4.1) of the *Income Tax Act* unequivocally declares that unremitted employee income tax withholdings "form no part of the estate or property of the person from the time the amount was so deducted or withheld".

[144] In addition, none of the provisions that authorize a court to make a priming charge state that a priming charge overrides the interest created by s. 227(4.1) of the *Income Tax Act*. As well, subsections 11.2(2), 11.51(2) and 11.52(2) state that a court may make a priming charge with a priority superior to other secured creditors. The Crown is not a secured creditor under the *Companies' Creditors Arrangement Act*. A "secured creditor", as defined in s. 2(1) of the *Companies' Creditors Arrangement Act*, includes "a holder of any bond of a debtor company secured by ... a trust in respect of, all or any property of the debtor company". The Crown is not the holder of a bond of Canada North Group Inc. or any of the other applicants seeking relief under the *Companies' Creditors Arrangement Act*. It does not include a beneficiary of any trust, such as the Crown. The plain and ordinary meaning of the text defining "secured creditor" compels this conclusion.[90] The structure of this s. 2(1) definition makes it easy to misread. The Crown is the

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[86] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 11 ("Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances").

[87] R.S.C. 1985, c. C-8.

[88] S.C. 1996, c. 23.

[89] R.S.C. 1985, c. W-11.

[90] *Contra*, *Kerr Interior Systems Ltd. v. Kenroc Building Materials Co.*, 2009 ABCA 240, ¶ 7; 457 A.R. 274, 279 (per incuriam) & *Re Temple City Housing Inc.*, 2007 ABQB 786, ¶¶ 13 & 14; 42 C.B.R. 5th 274, 278-79.

beneficial owner of an amount equal to the withheld but unremitted employee income tax source deductions.[91]

[145] The fact that s. 6(3) of the *Companies' Creditors Arrangement Act* prohibits a court from sanctioning a compromise or arrangement unless it results in the payment to the Crown of its entire claim protected by s. 227(4) of the *Income Tax Act* provides additional support for the view that the *Companies' Creditors Arrangement Act* complements s. 227(4.1) of the *Income Tax Act* – the Crown is the holder of the super priority.[92]

D. There Is a Perfect Correlation Between the Purpose of the *Income Tax Amendments Act, 1997* and the Plain and Ordinary Meaning of Section 227(4.1) of the *Income Tax Act*

[146] I acknowledge the importance of the priming charges to the ability of companies to restructure.[93] Lenders will not advance funds and restructuring professionals will not accept assignments if they reasonably fear that their loan is in jeopardy or their fees will be unpaid.

[147] If the respondents and intervenors are correct and the efficacy of restructuring and reorganization under the *Companies' Creditors Arrangement Act* will be jeopardized by according the text of s. 227(4.1) of the *Income Tax Act* its plain and ordinary meaning, they will no doubt bring these concerns to the attention of Parliament. It is up to Parliament to assess the validity of these fears and decide whether the unassailable priority the *Income Tax Amendments Act, 1997* introduced was improvident and that its merits must be revisited.[94] Courts cannot ignore the plain

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[91] See also *Re Rosedale Farms Ltd.*, 2017 NSSC 160, ¶ 34 ("The correct contextual interpretation is that the inclusion of the [*Income Tax Act*] definition is to give the deemed trust for unremitted withholdings priority over all security interests including other federal and provincial statutory deemed trusts").

[92] See also *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 6(4) (the Court may not sanction a compromise or arrangement if post initial order the company fails to remit employment income withholding on post initial order employment income) & 11.09(2)(a) & (b) (if a company defaults on its post initial order withholding and remittance obligations, the Crown may take collection measures in spite of the stay of proceedings).

[93] *City of Edmonton v. Alvarez & Marsal Canada Inc.*, 2019 ABCA 109, ¶ 17 ("without security for their fees and disbursements ... [receivers] would be understandably concerned about taking on receiverships").

[94] *Century Services Inc. v. Canada*, 2010 SCC 60, ¶¶ 15 & 18; [2010] 3 S.C.R. 379, 394 & 395 ("the purpose of the ... [*Companies' Creditors Arrangement Act*] ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. ... Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs"). See also *Quebec v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, ¶12; [2009] 3 S.C.R. 286, 296 ("In 1992 ... Parliament ... made extensive changes to the ... [*Bankruptcy and Insolvency Act*] ... . Some of these changes related to the Crown's priority in bankruptcy situations. The federal government seemed at the time to want to respond to criticisms that the system establishing the priority of the Crown's claims often left nothing for a bankrupt's ordinary creditors").

and ordinary meaning of legislative text just because litigants present a compelling case that the consequences of the interpretation are problematic.[95]

[148] While it is unnecessary to examine the objective Parliament pursued when it enacted the *Income Tax Amendment Acts, 1997*[96] and introduced the current text of ss. 227(4) and (4.1) of the *Income Tax Act*, a study of the legislative history[97] reveals a perfect correlation between the stated purpose and the plain and ordinary meaning the text supports.

[149] The starting point of the legislative history is the February 27, 1997 decision of the Supreme Court of Canada in *Royal Bank of Canada v. Sparrow Electric Corp*.[98] At issue was whether the Crown's ownership claim to $625,990.86 of unremitted income tax withholdings from Sparrow Electric's employees under s. 227(4) of the *Income Tax Act* superseded the Royal Bank's claim to the sale proceeds of Sparrow Electric's inventory asserted under both a general security agreement and an inventory assignment under s. 427 of the *Bank Act*.[99] The issue arose because the proceeds of an inventory sale conducted by the receiver appointed by court order at the instigation of the Royal Bank were not sufficient to discharge the debtor's obligation to both the Crown and the Royal Bank.[100]

[150] The Court concluded that the Royal Bank was entitled to the inventory sale proceeds on account of its general security agreement that "gave it a fixed and specific charge against the debtor's inventory ... ."[101]

[151] But the Court also told Parliament how to proceed if it wished a contrary result:[102]

> Finally, I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done

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[95] See *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A.C. 107, 121-22 per Lord Atkinson (H.L. 1912) ("your Lordships' House sitting judicially is not concerned with the question whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievous") & *Canada v. Callidus Capital Corp.*, 2018 SCC 47, ¶ 1 (the Court adopted Justice Pelletier's reasons) & 2017 FCA 162, ¶ 64; 414 D.L.R. 4th 132, 160 per Pelletier, J.A. ("Had Parliament meant to make the subsection (3) trust a function of the continued existence of unremitted amounts, it could have said so easily enough").

[96] S.C. 1998, c. 19, s. 226.

[97] See *Williams v. Canada*, 2017 FCA 252, ¶ 51; 417 D.L.R. 4th 173, 189 per Stratas, J.A. ("in certain circumstances and with appropriate caution – [a court may consider] extraneous, contemporaneous materials (e.g., regulatory impact or official explanatory statements), legislative debates, and legislative history").

[98] [1997] 1 S.C.R. 411.

[99] Id. 424.

[100] Id. 427.

[101] Id. 485.

[102] Id.

> is afforded by s. 224(1.2) [of the *Income Tax Act*], which vests certain moneys in the Crown 'notwithstanding any security interest in those moneys' and provides that they 'shall be paid to the Receiver General in priority to any such security interest'. All that is needed to effect the desired result is clear language of that kind. In the absence of such clear language, judicial innovation is undesirable, both because the issue is policy charged and because a legislative mandate is apt to be clearer than a rule whose precise bounds will become fixed only as a result of expensive and lengthy litigation.

[152] On April 7, 1997 the Finance Minister announced the government's intention to propose amendments to the *Income Tax Act*, the *Canada Pension Plan*, the *Employment Insurance Act* and the *Excise Tax Act*[103] that would reverse the effect of *Royal Bank of Canada v. Sparrow Electric*.[104]

[153] An accompanying press release explained why these amendments were desirable:[105]

> [I]t is important to assert the absolute priority of the Crown's claim as unremitted source deductions are part of the gross wages of employees and are held in trust for remittance to the Receiver General. Further, source deductions are automatically credited to these employees on account of taxes paid for the year and they are paid over to those provinces that are parties to the Federal/Provincial Tax Collection Agreements, on account of the employee's provincial taxes payable. … Thus, the amendment will ensure that tax revenue losses are minimized and that delinquent taxpayers and their secured creditors do not benefit from failures to remit source deductions and GST at the expense of the Crown.

[154] Parliament passed the *Income Tax Amendments Act, 1997*.[106] It came into force on June 18, 1998. Provisions that introduced the current s. 227(4) and (4.1) were given retroactive effect as of June 15, 1994.[107]

[155] The Supreme Court of Canada commented on the new ss. 227(4) and (4.1) of the *Income Tax Act* in a 2002 opinion, *First Vancouver Finance v. Canada*:[108]

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[103] R.S.C. 1985, c. E-15.

[104] Department of Finance, "Unremitted Source Deductions and Unpaid GST" (Ottawa, April 7, 1997, 1997-030).

[105] Id.

[106] S.C. 1998, c. 19.

[107] S.C. 1998, c. 19, s. 226(4).

[108] 2002 SCC 49, ¶¶ 28 & 29; [2002] 2 S.C.R. 720, 732-33. *First Vancouver Finance v. Canada*, as the Supreme Court expressly acknowledged, does not apply to "the question of the priority of secured creditors". Id at ¶ 39; [2002] 2

> It is apparent from these changes that the intent of Parliament when drafting ss. 227(4) and 227(4.1) was to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect. This is clear from the use of the words 'notwithstanding any security interest' in both ss. 227(4) and 227(4.1). In other words, Parliament has reacted to the interpretation of the deemed trust provisions in *Sparrow Electric*, and has amended the provisions to grant priority to the deemed trust in situations where the Minister and secured creditors of a tax debtor both claim an interest in the tax debtor's property.
>
> … It is evident from these changes that Parliament has made a concerted effort to broaden and strengthen the deemed trust in order to facilitate the collection efforts of the Minister.

E. The Absurdity Doctrine Does Not Assist the Holders of the Priming Charges

[156] The absurdity doctrine does not apply.

[157] There is no basis to assert that s. 227(4.1) of the *Income Tax Act* contains flawed text. It obviously does not.

[158] Section 227(4.1) of the *Income Tax Act* bears only one plausible meaning. The Crown is the beneficial owner of an amount equal to the unremitted employment income tax withholdings made by the employer and is entitled to these funds in priority to those who are beneficiaries of the priming charges.

[159] A court cannot ignore the plain meaning of statutory text just because it concludes the consequences are mischievous.[109]

[160] Justice Rowbotham concludes that the interpretation I advance will undermine the general objective of the *Companies' Creditors Arrangement Act* – "[r]eorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs"[110] and thwart the restructuring process. She may be correct. She may not be.

[161] But this is irrelevant.

S.C.R. at 737. First Vancouver Finance was not a secured creditor of Great West Transport Ltd. It was a third party purchaser of book debts. Id.

[109] *Supra* note 68.

[110] *Century Services Inc. v. Canada*, 2010 SCC 60, ¶ 18; 2010 3 S.C.R. 379, 395.

[162] If Parliament shares her concerns, it can amend the governing legislation.[111]

[163] I am not aware of any case in the common law world in which a court has declared that it is entitled to rewrite statutory text that bears only one plausible meaning and is indisputably in accord with the declared objective of the legislature.[112]

VII. Conclusion

[164] I would allow the appeal and amend the initial order as requested by the Crown.

[165] I acknowledge the high quality of counsel's facta and oral arguments.

Appeal heard on October 4, 2018

Reasons filed at Edmonton, Alberta
this 29th day of August, 2019

Wakeling J.A.

[111] *Supra* note 70.

[112] See O. Jones, Bennion on Statutory Interpretation 433 (6th ed. 2013) ("If the court thinks that what it considers to be absurd was really and truly contemplated by Parliament, and was deliberately intended, then the court must defer to that").

Appearances:

G.F. Bódy/C. Davidson
for the Appellant

S. Norris/S.A. Wanke (no appearance)
for the Respondents Canada North Group Inc., Canada North Camps Inc., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd.

Respondents Campcorp Structures Ltd. and DJ Catering Ltd., unrepresented (no appearance)

D.R. Bieganek, Q.C.
for the Respondent and Ernst & Young Inc. in its capacity as Monitor

M.I.A. Buttery, Q.C./J.L. Oliver/J. Enns
for the Respondent Business Development Bank of Canada

K.J. Bourassa
for the Intervenor Insolvency Institute of Canada

R.S. Van de Mosselaer
for the Intervenor Canadian Association of Insolvency and Restructuring Professionals

Ontario Supreme Court
Canadian Red Cross/Société de la Croix-Rouge, Re
Date: 2002-06-28

See para. 13

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

In the Matter of a Plan of Arrangement of the Canadian Red Cross Society/La Société Canadienne de la Croix-Rouge

Ontario Superior Court of Justice Blair R.S.J.

Heard: May 28, 2002

Judgment: June 28, 2002

Docket: 98-CL-002970

Risa Kirshblum, for Trustee under Plan

Harvey T. Strosberg, Q.C., for Claimants J.A.M. and D.L.M.

Dawna J. Ring, Q.C., for Various HIV Claimants, previously Court Appointed Representative for Persons Secondarily Infected with HIV

Danielle Joel, for Yang and Kerekes Families

Kenneth Arenson, for Four Families of Claimants

***Blair R.S.J.*:**

Background

1 The Amended Plan of Compromise and Arrangement of the Canadian Red Cross Society [the "Society"], dated July 31, 2000, was approved by its creditors and sanctioned by the Court. The principal thrust of the Plan is to make available from the assets of the Society a Fund of money to meet the claims of various groups of persons who contracted HIV from certain blood products supplied by the Society. By its terms, the Honourable Peter Cory is appointed the Trustee under the Plan.

2 On this motion, the Trustee moves for directions as to the governing law respecting issues relating to the eligibility of persons to claim under the HIV Fund. Earlier, I ruled that this

was a question for the Court to determine, rather than the Referee who is named under the Plan to assess the claims.

3 The Honourable Robert Montgomery is the Referee now designated under the Plan. His responsibility is to determine whether and to what extent individuals infected with HIV from blood products at various times can apply to the HIV Fund for compensation. The process for doing so is set out in Section 5.10 of the Plan, which gives the Referee the power to decide whether limitation periods have expired, to determine whether claimants have already released the Red Cross, and to assess damages.

4 The Referee's award as to damages is final, and is to be satisfied solely out of the HIV Fund.

5 The underlying problem giving rise to this motion for directions is that in making those determinations, the Referee will have to know what governing law applies to such matters as:

a) the limitation period applicable to each claimant; and,

b) whether certain claimants fall into the category of family members who would otherwise be eligible to claim for their relative's infection pursuant to family law legislation in the various Provinces.

6 The results for individual claimants may differ, depending upon the applicable choice of law and the jurisdiction in which their claims may have been asserted in the first place against the Red Cross prior to the *Companies' Creditors Arrangement Act,*[1] ("CCAA") Order of July 20, 1998. While time limitations are not dissimilar across the country of those HIV Claimants still alive, they vary for the estates for those who have died. In a number of Provinces, the discoverability rule applies to estate claims (*see Burt v. LeLacheur* (2000), 189 D.L.R. (4th) 193 (N.S. C.A.), leave to appeal to SCC refused (2001), 271 N.R. 199 (note) (S.C.C.)), whereas in Ontario, the Court of Appeal had ruled that it does not (see *Waschkowski v. Hopkinson Estate* (2000), 47 O.R. (3d) 370 (Ont. C.A.)).[2] At the same time, Ontario law is more favourable than that of other Provinces in terms of the scope of categories of family law members who are entitled to make *Family Law Act* types of claims against the HIV Fund.

[1] R.S.C. 1985, c. C-36.
[2] Mr. Arenson has indicated that he will be challenging the application of the *Waschkowski* ruling to the circumstances of these Claims, in a proceeding to be dealt with later.

7 The opening provisions of Section 5.10 of the Plan and paragraph (a) thereof stipulate that:

> The fund established under paragraph 5.05(c) shall be available to satisfy HIV Claims in accordance with the terms hereof. As a condition of Plan Implementation the Plaintiffs in the Listed HIV Claims shall execute a release fully and finally releasing the Society and all Plan Participants from their respective HIV Claims, in exchange for their entitlement hereunder. The release shall include an undertaking not to pursue any other party unless on a several basis. HIV Claimants may apply to the Referee within 4 months following the Plan Implementation Date for a determination of damages with respect to their respective HIV Claim. Any references held hereunder shall be conducted on the following terms:
>
> > (a) The Referee shall decide whether limitation periods had expired prior to July 20, 1998 and no award or payment under this Plan shall he made to an HIV Claimant where the Referee decides that the limitation period in respect of such Claim had expired prior to July 20, 1998.

8 Section 8.09 of the Plan is the general provision dealing with the law governing the Plan. It provides that:

> This Plan shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. Any questions as to the interpretation or application of this Plan and all proceedings taken in connection with this Plan and its provisions shall be subject to the exclusive jurisdiction of the Court.

9 As the affidavit tiled in support of the Trustee's motion for directions notes:

> Some may therefore argue that the law of Ontario should apply in all respects to all claims regardless of factors such as the place of residence of the claimant or the place where the claimant received the blood transfusion which resulted in the HIV infection with respect to which the claimant is seeking recovery from the Fund. Others may argue that the issues outlined above do not, for the purposes of "choice of law", fall within the purview of s. 8.09 of the Plan and that a determination of choice of law must be made.

10 Hence, the motion for directions.

Analysis

11 I have concluded that the proper law governing the issues of limitation periods, categories of family members entitled to claim, and the quantum of damages those deemed eligible will be entitled to receive, is the law of Ontario. My reasons for arriving at that conclusion follow.

12 When interpreting a Court approved CCAA Plan, the Court must keep in mind "the purposes of the CCAA and the principles which guide the court's role in proceedings under

that statute [as well as] the overall purpose and intention of the plan in question": *Ontario v. Canadian Airlines Corp.* (2001), 29 C.B.R. (4th) 236 (Alta. Q.B.), at 243, per Romaine J. See also, *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.), aff'd (1995), 31 C.B.R. (3d) 157 (B.C. C.A.). This gives rise to the "fairness and reasonableness" considerations, and the general aim of minimizing the prejudice to creditors, that underlie such proceedings: *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 75 (Ont. Gen. Div. [Commercial List]); *Ontario v. Canadian Airlines Corp., supra.*

13 In addition, however, since a Plan of Compromise and Arrangement is in substance a contract, sanctioned by the Court, principles of contractual interpretation must also be applied.

14 The purpose of the CCAA, in broad terms, is to enable companies that would otherwise be lost to the community through bankruptcy to continue to operate if they can work out a satisfactory arrangement with their creditors. This benefits the company, the creditors, and the community as a whole. In this case, the Canadian Red Cross was able to make such an arrangement - after two years of exceedingly complex negotiations and court proceedings - and to continue to operate its non-blood-supply-related community activities, while at the same time establishing a Fund towards satisfying the claims of various groups of blood infected claimants, including the HIV Claimants.

15 Article 5 of the Plan contains the provisions of the compromise dealing with the treatment of Transfusion Claimants and HIV Claimants. Article 5.01 - a statement of general considerations in this regard - opens with these words:

> For the purposes of this Plan, the Transfusion Claimants and the HIV Claimants shall receive the treatment provided in this Article on account of their Transfusion Claims and HIV Claims, respectively, and, on the Plan Implementation Date, all Transfusion Claims and HIV Claims shall be compromised, as against the Society and the Plan Participants, in accordance with the terms hereof. [Emphasis added]

16 Thus, the rights of the Claimants *flow from the compromise*, as sanctioned by the Court on the basis of the CCAA principles outlined above.

17 In this case, the language of the compromise - as voted on and accepted by the HIV Claimants - is clear: the Plan "shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein" (i.e. in Ontario): Article 8.09.

18 There are sound policy reasons why the law of one jurisdiction should apply in a situation such as this. The HIV Fund is limited, and it is important to minimize the costs of assessing Claims. One law, applicable to all Claims - although perhaps cutting adversely against some Claimants in some respects, in comparison to their pre-insolvency positions - accomplishes this goal more effectively. One law, applicable to all Claims, avoids inequality of treatment as between claimants and uncertainty as to the amount of the HIV Fund required to compensate Claimants. As Mr. Strosberg noted, any participant who objected to the application of the law of Ontario in respect of all claims under the Plan could have voiced that objection and proposed an amendment to the Plan, or voted to defeat the Plan, during the approval and sanctioning phase. None did so.

19 On behalf of her Claimants, Ms. Ring argued very skillfully that the purpose of the Plan as a whole is to make the HIV Fund available to all persons in Canada affected with HIV, who had an outstanding claim against the Canadian Red Cross on July 20, 1998 - the date upon which the Red Cross was initially given CCAA protection. Accordingly, she submits, the proper law applying to those claims should be the law of the jurisdiction that would have governed had the claim been commenced before that date.

20 Ms. Ring stresses what she submits is the claim-specific wording of Article 5.10(a) of the Plan cited above. She notes that the Referee is to decide “whether limitation periods had expired prior to July 20, 1998” and that no award is to be made to “*an*” HIV Claimant where the limitation period “*in respect of such Claim*” had expired. The clause refers to limitation periods (plural), the argument goes, and does not specifically state that only Ontario’s time limitation period applies. Therefore, the language of the general governing law provisions of Article 8.09 should not override the specific provisions of Article 5.10(a).

21 Having regard to the terms of the Plan as a whole, however, I do not think that Article 5.10(a) can be given such a specific interpretation. There are a large number of HIV Claims to be dealt with. Hence the reference to “limitation periods” in the plural. However, the determination is to be made in relation to Claims where a limitation period issue arises. Hence the reference to “in respect of such Claim”. If Article 5.10(a) were viewed as an exception to the general governing law provision of the Plan, the parties could easily have said so, and those voting on the Plan could easily have ensured that it did or - as noted above - voted against the Plan.

22 The rights of the HIV Claimants now flow from the Amended Plan *of Compromise* and Arrangement, not from what their respective positions may have been in terms of suing the Canadian Red Cross before insolvency.

23 I agree that the effect of interpreting the Plan to apply Ontario law to the issues in question is to apply Ontario law retroactively to all claims across Canada. This has possibly adverse implications in the case of certain individual claims; but it has possibly beneficial implications for other individual claims. In any event, I am satisfied on reading the Plan as a whole and considering the underlying purposes and principles of the CCAA and principles of contractual interpretation, that that is precisely what was intended by the negotiators of the Plan and by those who approved it by their votes.

Conclusion

24 Accordingly, an Order is granted directing that the law of Ontario and the federal laws of Canada applicable therein govern issues relating to eligibility of persons to claim under the HIV Fund, including but not necessarily limited to applicable limitation periods and categories of family members entitled to claim, and the quantum those deemed eligible will receive.

Order accordingly.

See para. 8

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Can-Pacific Farms Inc. (Re)*,
2012 BCSC 760

Date: 20120330
Docket: S121930
Registry: Vancouver

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

and

In the matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 and the Business Corporation Act, S. B.C. 2002, c. 57

and

In the matter of Can-Pacific Farms Inc.

Petitioner

Before: The Honourable Mr. Justice Burnyeat

Oral Reasons for Judgment
In Chambers

Counsel for the Petitioner:	K.E. Siddall
Counsel for Canadian Imperial Bank of Commerce:	G. Thompson and M.C. Verbrugge
Place and Date of Hearing:	March 29-30, 2012 Vancouver, B.C.
Place and Date of Judgment:	March 30, 2012 Vancouver, B.C.

[1] THE COURT: This application is for an initial order in proceedings brought under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*Act* "). I am asked to make a declaration that the Petitioner is a corporation to which the *Act* applies. I am satisfied that is the case. The second order requested is that the Petitioner be permitted to file a formal plan with the Court for the approval of its creditors and that I order as a "comeback date" April 30, 2012.

[2] The application is opposed by the first mortgagee, Canadian Imperial Bank of Commerce, who, along with the second mortgagee, is owed roughly $8 million. The application is supported by some of the unsecured creditors of the Petitioner and by a lien holder.

[3] The opposition on behalf of the Canadian Imperial Bank of Commerce relates in part to the failure of the Petitioner to make disclosure. In particular, the following is not disclosed in the materials:

(a) The Petitioner, through its principal, Mr. Kooner, has failed to disclose numerous breaches under the various forbearance agreements that were entered into with the Canadian Imperial Bank of Commerce, including a covenant not to file for protection under the *Act* in consideration of the forbearance shown;

(b) The fact that the 2011 berry crop proceeds of between a two and four million dollars which should have been received by the Canadian Imperial Bank of Commerce were used otherwise, including depositing the proceeds with a different financial institution;

(c) The fact that the proceeds from the sale of equipment of the Petitioner have been received but not applied in accordance with the security held by the Canadian Imperial Bank of Commerce and the fact that other equipment of the Petitioner is being advertised for sale;

(d) The fact that there was a recent payment to prior or to subsequent creditors of as much as $250,000; and

(e) The fact that there was a filing by the Petitioner under the *Farm Debt Mediation Act*.

[4] It is submitted that the failure to disclose all material facts should lead to a refusal of the Court to make the order that is sought: *Hester Creek Winery Ltd.* (2004) 50 C.B.R. (4th) 73 (B.C.S.C.), and *Re Encore Developments Ltd.* (2009) 52 C.B.R. (5th) 30 (B.C.S.C.).

[5] Both of those decisions involved setting aside initial orders that had been obtained on an *ex parte* basis. These decisions are based on the assumption that, when you appear on an *ex parte* basis, it is incumbent upon an applicant to reveal to the Court anything that might have the possibility of influencing the decision that the Court is asked to make and that, if complete material disclosure is not made, the *ex parte* order may be set aside.

[6] With the change made to the *Act*, the initial order is not made on an *ex parte* basis. Having said that, it is incumbent upon a petitioning company to present fully the factual basis upon which the relief under the *Act* is sought. The making of any order under the *Act* is discretionary. That discretion should rarely be exercised in favour of an applicant who has not fully disclosed all of the material facts. It is still incumbent upon a petitioning company to bring forward everything that might be material or might affect the decision of the Court. I am satisfied that the Petitioner has not done so here.

[7] The Canadian Imperial Bank of Commerce also raises the issue that there is no broad interest to be protected here. At this point in the berry growing season, there are only two full-time employees of the Petitioner so that it is only their ongoing interest which needs to be protected. Having said that, the berry operation is such that hundreds will be called upon this summer on a part-time basis to harvest the crop and make it available for sale. I take into account that this is an interest which should be protected.

[8] The Canadian Imperial Bank of Commerce submits that any plan brought forward is doomed to fail as it will oppose any plan. I cannot accede to that argument. I think that argument has been generally discredited by various court decisions. The example I gave is that, if the plan foolishly said, "we will pay to the bank twice as much as it is owed", I am quite confident that even the Bank would vote for such a plan.

[9] I agree with the observations in *Pacific Shores Resort and Spa Ltd.*, [2011] B.C.J. No. 2482. The argument raised is an argument that should meet with no favour before the Court in these circumstances on the first order sought, although it may be given some credence on the comeback order:

> This argument is also part of the "doomed to failure" argument of [the creditor]. I have been referred by [the creditor] to *Hunters Trailer & Marine Ltd. (Re),* 2000 ABQB 952, as authority for the proposition that unless there is equity in the assets beyond that owed to secured creditors, a *CCAA* order is only appropriate if the secured creditors are supportive of it.
>
> To the contrary, at para. 19 of that case, the Court states quite clearly that a recalcitrant creditor should not necessarily prevent the granting of an order under the *CCAA*. This approach is consistent with the comments of Madam Justice Newbury in *Forest & Marine* who stated, in the face of a major secured creditor's insistence that it would vote against any plan:
>
> > [27] I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the Court's exercise of its statutory jurisdiction could be neutralized in this manner.
>
> (at paras. 40-41)

[10] I realize that what is being attempted by the Petitioner comes after some 19 months of default under the security of the Canadian Imperial Bank of Commerce. It is an attempt to find financing to pull the whole situation "out of the fire". Since default, there has been an order *nisi* of foreclosure with a redemption period that expired almost a year ago and an order for sale which has produced two offers neither of which would pay the secured creditors in full and neither of which had the subject clauses removed so that they could proceed.

[11] The Petitioner submits that it will make major advances between now and when they report back to the Court on April 30, 2012. The Petitioner submits it will

have the proceeds of up to $333,000 from the sale of a property, that there will be sales of other assets which may occur, and that Mr. Kooner is committed to putting these funds into the company so that the company has sufficient cash flow to meet the cash flow requirements that are set out in the materials before the Court. Mr. Kooner is also prepared to advance sufficient funds to allow $11,000 a month to be available to the Canadian Imperial Bank of Commerce and $6,000 per month to be available for the second mortgagee.

[12] The position of all of the creditors will be enhanced by April 30, 2012 if there can be the investment contemplated. The payments contemplated will maintain the status quo in the interim. In all of the circumstances, I will make the order that is sought. The comeback motion will be heard by me at 9:00 a.m. on April 30, 2012.

[13] The Petitioner also seeks an administrative charge in the amount of $100,000 which would rank ahead of the interest of the creditors. In the circumstances, I am satisfied that no administrative charge should be granted at this time. The funds that Mr. Kooner says will be available will allow those costs to be covered. Not granting an administrative charge is one way of assuring that the status quo will be maintained so that, along with the payment of $17,000 per month to the secured creditors, the position of the secured creditors will be no worse than it is presently. The sums of $11,000 and $6,000 will be payable in certified funds payable to each of the two mortgagees no later than close of business on April 2, 2012, and then no later than close of business on April 27, 2012.

[14] The stay of proceedings already ordered in the foreclosure proceedings including the application for the appointment of a receiver in those proceedings will be extended to 4:00 p.m. on April 30, 2012. I make no order staying the ability of the Canadian Imperial Bank of Commerce to continue with the order for conduct of sale which was granted by this court some considerable time ago.

[15] In addition to the requirement of the payment of $17,000, the costs previously incurred by the Canadian Imperial Bank of Commerce to hire security observers will be borne by Mr. Kooner by the payment of the sum of $36,000 to counsel for the

Canadian Imperial Bank of Commerce no later than close of business on April 4, 2012. Further costs of security observers will also be paid by Mr. Kooner.

[16] The secured creditors will be at liberty to apply on three days' clear notice if the sums set out above have not been paid in accordance with the order made.

[17] The Petitioner makes the further application that Murphy & Associates, Trustee in Bankruptcy, be appointed as Monitor to report to the Court and the creditors of the Petitioner regarding the arrangements that will be made by the Petitioner and the progress in that regard.

[18] While I have no doubt about the ability of Murphy & Associates to fulfill the role of being a monitor, I have grave reservations of about whether it is appropriate for Murphy & Associates to be appointed as Monitor. Murphy & Associates has been a consultant to the Petitioner. The financial records which are before the Court have been prepared with the assistance of Murphy & Associates. It is also apparent that the Plan which will be forthcoming has been prepared in its initial stages with the assistance of Murphy & Associates.

[19] A monitor under proceedings under the *Act* has an obligation to act independently: *Re United Used Auto & Truck Parts Ltd.* (1999), 12 C.B.R. (4th) 144 (B.C.S.C.); *Re Royal Oak Mines Inc.* (1999), 11 C.B.R. (4th) 122 (Ont. S.C.J.); *Re Laidlaw Inc.* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J.). The role of a monitor is also set out by the Learned Author of *Commercial Insolvency in Canada* (Markham, ON: LexisNexis Butterworths, 2005):

> The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any part in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors. (at p. 236)

[20] The Monitor must not only be impartial but also must appear to be impartial so that the confidence of creditors and members of the general public can be assured. Pursuant to s. 23(1) of the *Act*, a monitor must carry out a number of

functions in relation to a company as prescribed under the *Act* or as the court may direct.

[21] Section 11.7(2) of the *Act* places restrictions on who may serve as a monitor by excluding an auditor, accountant, legal counsel of the debtor if they acted as such within the previous two years. Those excluded from acting as monitors may be appointed "... with the permission of the court and on any conditions that the court may impose ..." (s. 11.7(2) of the *Act*). Murphy & Associates was not the auditor for the Company and, accordingly, does not have the intimate knowledge of the financial affairs of the Company which would be available to an auditor or an accountant for the Company. Decisions reached both prior to and after the enactment of s. 11.7 of the *Act* have come to opposite conclusions as to whether it appropriate for an auditor to be appointed as a monitor. While Murphy & Associates is not the auditor for the company, the decisions do reflect the debate of about whether or not it is appropriate to appoint as a monitor a company or an individual that has had prior dealings with the petitioning company.

[22] In *Re Stokes Building Supplies Ltd.* (1992), 13 C.B.R. (3d) 10 (Nfld. S.C.), the Court dismissed the application of a company to appoint its auditor as a monitor because the auditor lacked the requisite degree of "independence" that was necessary and that "... as agent of the Court, is independent of the parties." (at p. 15).

[23] In *Re Hickman Equipment (1985) Ltd.* (2002), 34 C.B.R. (4th) 203 (Nfld. L.S.C.), the Court came to the opposite conclusion about whether an auditor could also be appointed as a monitor:

> Permitting the auditor of a company to act as its monitor under a reorganization plan under the *CCAA* is merely a recognition of the commercial realities at play when a company is forced to seek protection under the *CCAA*. Under the *CCAA*, relief from one's creditors is not automatic. There is no automatic stay of proceedings against the applicant company by creditors merely because it has applied for such relief. The relief must be granted by the order of the Court after the application is filed and after the applicant company has declared and publically filed documents declaring that it is insolvent. Therefore, in order to prepare for a *CCAA* application, the applicant company will usually require the continuing

> assistance of its own accountants and auditors. These professionals would most likely be the accounting professionals most knowledgeable about the affairs and business of the applicant company and most competent to promptly assembly the requisite information and plans to support the initial application for relief under the *CCAA*. A mandatory requirement that the auditor of an applicant company not be permitted to serve as monitor would, in most cases, result in considerable additional delay because the proposed monitor (not being familiar with the affairs of the company) would need to be brought up to speed. This extra work would obviously result in a duplication of expense for a company which is already cash strapped. Most importantly, it would delay a *CCAA* application being made on a timely basis, resulting in obvious risk of adverse moves being made against the applicant company by its creditors before it can obtain court protection.
>
> Cognizant of these commercial realities and the fact that creditors were cancelling dealership agreements and commencing legal action against Hickman, this Court was satisfied to confirm the appointment of Deloitte & Touche Inc. as Monitor.
>
> (at paras. 8-9)

[24] It is difficult to come to the conclusion that Murphy & Associates is "independent of the parties" when it has served as the advisor to the Company. While the advice that Murphy & Associates provided to the Company may be viewed by the Company as invaluable, it cannot be said that Murphy & Associates is the most knowledgeable about the affairs and business of the Company. Murphy & Associates has not served as the auditor or the accountant for the Company.

[25] However, Murphy & Associates has had the opportunity of reviewing the financial affairs of the Company and has come to a satisfactory arrangement regarding the payment for services rendered to date. Because I am not prepared to order the administrative charge of $100,000 requested, any monitor will have to look to the principals of the Company for a retainer to cover its costs. Accordingly, it is not possible today to both appoint a different monitor and make the initial order sought by the Petitioner. Any different monitor will not have had the opportunity of negotiating an appropriate retainer to cover the cost of the obligations imposed upon the Monitor.

[26] In order to avoid a delay and in order to avoid the cost of expenses already incurred which would have to be repeated by a different monitor, the appointment of Murphy & Associates as Monitor is made.

[27] Without laying down a general rule that it is inappropriate for a petitioner to seek the appointment as a monitor of a financial adviser that has been working with a petitioner to prepare proceedings under the *Act*, such an appointment should not be made as a general rule.

"Burnyeat J."
Burnyeat J.

Metcalfe & Mansfield Alternative Investments II Corp. (Re)

92 O.R. (3d) 513

See para. 44

Court of Appeal for Ontario,
Laskin, Cronk and Blair JJ.A.
August 18, 2008

Debtor and creditor -- Companies' Creditors Arrangement Act -- Companies' Creditors Arrangement Act permitting inclusion of third-party releases in plan of compromise or arrangement to be sanctioned by court where those releases are reasonably connected to proposed restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

In response to a liquidity crisis which threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"), a creditor-initiated Plan of Compromise and Arrangement was crafted. The Plan called for the release of third parties from any liability associated with ABCP, including, with certain narrow exceptions, liability for claims relating to fraud. The "double majority" required by s. 6 of the Companies' Creditors Arrangement Act ("CCAA") approved the Plan. The respondents sought court approval of the Plan under s. 6 of the CCAA. The application judge made the following findings: (a) the parties to be released were necessary and essential to the restructuring; (b) the claims to be released were rationally related to the purpose of the Plan and necessary for it; (c) the Plan could not succeed without the releases; (d) the parties who were to have claims against them released were contributing in a tangible and realistic way to the Plan; and (e) the Plan would benefit not only the debtor companies but creditor noteholders generally. The application judge sanctioned the Plan. The appellants were holders of ABCP notes who opposed the Plan. On appeal, they argued that the CCAA does

not permit a release of claims against third parties and that the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867.

Held, the appeal should be dismissed.

On a proper interpretation, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; and (c) the express statutory effect of the "double majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to interpretation. The second provides the entre to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

While the principle that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect is an important one, Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself.

Interpreting the CCAA as permitting the inclusion of third-party releases in a plan of compromise or arrangement is not unconstitutional under the division-of-powers doctrine and does not contravene the rules of public order pursuant to the Civil Code of Quebec. The CCAA is valid federal legislation under the federal insolvency power, and the power to sanction a plan of compromise or arrangement that contains third-party releases is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action or trump Quebec rules of public order is constitutionally immaterial. To the extent that the provisions of the CCAA are inconsistent with provincial legislation, the federal legislation is paramount.

The application judge's findings of fact were supported by the evidence. His conclusion that the benefits of the Plan to the creditors as a whole and to the debtor companies outweighed the negative aspects of compelling the unwilling appellants to execute the releases was reasonable.

Cases referred to

Steinberg Inc. c. Michaud, [1993] J.Q. no 1076, 42 C.B.R. (5th) 1, 1993 CarswellQue 229, 1993 CarswellQue 2055, [1993] R.J.Q. 1684, J.E. 93-1227, 55 Q.A.C. 297, 55 Q.A.C. 298, 41 A.C.W.S. (3d) 317 (C.A.), not folld

Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 2000 ABQB 442, [2000] 10 W.W.R. 269, 84 Alta. L.R. (3d) 9, 265 A.R. 201, 9 B.L.R. (3d) 41, 20 C.B.R. (4th) 1, 98 A.C.W.S. (3d) 334 (Q.B.); NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749, 181 D.L.R. (4th) 37, 127 O.A.C. 338, 1 B.L.R. (3d) 1, 15 C.B.R. (4th) 67, 47 C.C.L.T. (2d) 213, 93 A.C.W.S. (3d) 391 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 2001 BCSC 1721, 19 B.L.R. (3d) 286, 110 A.C.W.S. (3d) 259 (S.C.); Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883, 261 D.L.R. (4th) 368, 204 O.A.C. 205, 11 B.L.R. (4th) 185, 15

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APPEAL from the sanction order of C.L. Campbell J., [2008] O.J. No. 2265, 43 C.B.R. (5th) 269 (S.C.J.) under the Companies' Creditors Arrangement Act.

See Schedule "C" -- Counsel for list of counsel.

The judgment of the court was delivered by

BLAIR J.A.: --

A. Introduction

[1] In August 2007, a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

[2] By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007, pending an attempt to resolve the crisis

through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

[3] Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the [page517] application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to appeal

[4] Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument, we encouraged counsel to combine their submissions on both matters.

[5] The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and -- given the expedited timetable -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as Cineplex Odeon Corp. (Re) (2001), 24 C.B.R. (4th) 201 (Ont. C.A.) and Re Country Style Food Services, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) are met. I would grant leave to appeal.

Appeal

[6] For the reasons that follow, however, I would dismiss the appeal.

B. Facts

The parties

[7] The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third-party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer and several holding companies and energy companies.

[8] Each of the appellants has large sums invested in ABCP -- in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants -- slightly over $1 billion -- represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

[9] The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies and some smaller holders of ABCP product. They participated in the market in a number of different ways. [page518]

The ABCP market

[10] Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment -- usually 30 to 90 days -- typically with a low-interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

[11] ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

[12] The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP, the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

[13] As I understand it, prior to August 2007, when it was frozen, the ABCP market worked as follows.

[14] Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

[15] The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

[16] When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP

[page519] Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The liquidity crisis

[17] The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature, there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

[18] When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

[19] The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes -- partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

[20] The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze -- the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement -- known as the Montreal Protocol -- the parties committed [page520] to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

[21] The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two-thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

[22] Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

[23] Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian

ABCP market.

The Plan

(a) Plan overview

[24] Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution". The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper -- which has been frozen and therefore effectively worthless for many months -- into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

[25] The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan [page521] adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

[26] Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

[27] The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1 million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be

designed to secure votes in favour of the Plan by various Noteholders and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

(b) The releases

[28] This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in art. 10.

[29] The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers and other market participants -- in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" -- from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

[30] The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

[31] The releases, in effect, are part of a quid pro quo. Generally speaking, they are designed to compensate various participants in [page522] the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

(a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets and provide below-cost financing for margin funding facilities that are

designed to make the notes more secure;
(b) Sponsors -- who in addition have co-operated with the Investors' Committee throughout the process, including by sharing certain proprietary information -- give up their existing contracts;
(c) the Canadian banks provide below-cost financing for the margin funding facility; and
(d) other parties make other contributions under the Plan.

[32] According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation".

The CCAA proceedings to date

[33] On March 17, 2008, the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25. The vote was overwhelmingly in support of the Plan -- 96 per cent of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan -- 99 per cent of those connected with the development of the Plan voted positively, as did 80 per cent of those Noteholders who had not been involved in its formulation.

[34] The vote thus provided the Plan with the "double majority" approval -- a majority of creditors representing two-thirds in value of the claims -- required under s. 6 of the CCAA.

[35] Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 [page523] and 13. On May 16, the application judge

issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

[36] The result of this renegotiation was a "fraud carve-out" -- an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

[37] A second sanction hearing -- this time involving the amended Plan (with the fraud carve-out) -- was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

[38] The appellants attack both of these determinations.

C. Law and Analysis

[39] There are two principal questions for determination on this appeal:

(1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its

directors?

(2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it? [page524]

(1) Legal authority for the releases

[40] The standard of review on this first issue -- whether, as a matter of law, a CCAA plan may contain third-party releases -- is correctness.

[41] The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [See Note 1 below] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

(a) on a proper interpretation, the CCAA does not permit such releases;

(b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;

(c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867;

(d) the releases are invalid under Quebec rules of public order; and because

(e) the prevailing jurisprudence supports these conclusions.

[42] I would not give effect to any of these submissions.

Interpretation, "gap filling" and inherent jurisdiction

[43] On a proper interpretation, in my view, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of

(a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including [page525] those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entre to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

[44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: Canadian Red Cross Society (Re), [1998] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[t]he history of CCAA law has been an evolution of judicial interpretation".

[45] Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

[46] These issues have recently been canvassed by the

Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", [See Note 2 below] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools -- statutory interpretation, gap-filling, discretion and inherent jurisdiction [page526] -- it is not necessary, in my view, to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

[47] The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, quoting E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983); Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

[48] More broadly, I believe that the proper approach to the judicial interpretation and application of statutes -- particularly those like the CCAA that are skeletal in nature -- is succinctly and accurately summarized by Jackson and Sarra in their recent article, supra, at p. 56:

The exercise of a statutory authority requires the statute to

be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in Qubec as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

[49] I adopt these principles. [page527]

[50] The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 318 C.B.R., Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

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., 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.

[51] The CCAA was enacted in 1933 and was necessary -- as the then secretary of state noted in introducing the Bill on First Reading-- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, House of Commons Debates (Hansard) (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.), per Doherty J.A. in dissent; Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).

[52] In this respect, I agree with the following statement of Doherty J.A. in Elan, supra, at pp. 306-307 O.R.:

> [T]he Act was designed to serve a "broad constituency of investors, creditors and employees". [See Note 3 below] 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.

(Emphasis added)

Application of the principles of interpretation

[53] An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the [page528] application judge pointed out, the restructuring underpins the financial viability of the Canadian

ABCP market itself.

[54] The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

[55] This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP Dealers, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as Asset Providers and Liquidity Providers, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore -- as the application judge found -- in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and . . . providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark, at para. 50, that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments, at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, it is unduly technical to classify

the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring.

(Emphasis added)

[56] The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper . . ." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor [page529] and creditors. His focus was on the effect of the restructuring, a perfectly permissible perspective given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated, at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal".

[57] I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The statutory wording

[58] Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

(a) the skeletal nature of the CCAA;

(b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in

(c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

[59] Sections 4 and 6 of the CCAA state:

> 4. Where a compromise or an 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, 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. [page530]
>
> . . . . .
>
> 6. Where a majority in number representing two-thirds 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 bankruptcy order has been made under the Bankruptcy and

> Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or arrangement

[60] While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: L.W. Houlden and C.H. Morawetz, Bankruptcy and Insolvency Law of Canada, looseleaf, 3rd ed., vol. 4 (Scarborough, Ont.: Carswell, 1992) at 10A-12.2, N10. It has been said to be "a very wide and indefinite [word]": Reference re Timber Regulations, [1935] A.C. 184, [1935] 2 D.L.R. 1 (P.C.), at p. 197 A.C., affg [1933] S.C.R. 616, [1933] S.C.J. No. 53. See also Guardian Assurance Co. (Re), [1917] 1 Ch. 431 (C.A.), at pp. 448, 450 Ch.; T&N Ltd. and Others (No. 3) (Re), [2007] 1 All E.R. 851, [2006] E.W.H.C. 1447 (Ch.).

[61] The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement". I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

[62] A proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") is a contract: Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, at p. 239 S.C.R.; [page531] Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 50 O.R. (3d) 688,

[2000] O.J. No. 3993 (C.A.), at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes and, therefore, is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See Air Canada (Re), [2004] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.), at p. 518 O.R.

[63] There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan -- including the provision for releases -- becomes binding on all creditors (including the dissenting minority).

[64] T&N Ltd. and Others (Re), supra, is instructive in this regard. It is a rare example of a court focusing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. Companies Act 1985, a provision virtually identical to the scheme of the CCAA -- including the concepts of compromise or arrangement. [See Note 4 below]

[65] T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the EL claimants)

would assert their claims. In return, T&N's former employees and dependants (the EL claimants) agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of [page532] compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

[66] Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The court rejected this argument. Richards J. adopted previous jurisprudence -- cited earlier in these reasons -- to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example. [See Note 5 below] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many

years to give the term its widest meaning. Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.
(Emphasis added)

[67] I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in T&N were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial [page533] third parties are making to the ABCP restructuring. The situations are quite comparable.

The binding mechanism

[68] Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes [See Note 6 below] and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The required nexus

[69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be

made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

[70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan. This nexus exists here, in my view.

[71] In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

(a) The parties to be released are necessary and essential to the restructuring of the debtor; [page534]
(b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
(c) the Plan cannot succeed without the releases;
(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and
(e) the Plan will benefit not only the debtor companies but creditor Noteholders generally.

[72] Here, then -- as was the case in T&N -- there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being

released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77, he said:

> I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

[73] I am satisfied that the wording of the CCAA -- construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation -- supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The jurisprudence

[74] Third-party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's [page535] Bench in Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 1028, 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, 293 A.R. 351. In Muscletech Research and Development Inc. (Re), [2006] O.J. No. 4087, 25 C.B.R. (5th) 231 (S.C.J.), Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

[75] We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of Canadian Airlines (Re), however, the releases in those restructurings -- including Muscletech -- were not opposed. The appellants argue that those cases are wrongly decided because the court simply does not have the authority to approve such releases.

[76] In Canadian Airlines (Re) the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the wellspring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

[77] Justice Paperny began her analysis of the release issue with the observation, at para. 87, that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company". It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in Michaud v. Steinberg, [See Note 7 below] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument -- dealt with later in these reasons -- that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92). [page536]

[78] Respectfully, I would not adopt the interpretive

principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court-sanctioning statutory mechanism that makes them binding on unwilling creditors.

[79] The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are Michaud v. Steinberg, supra; NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.); and Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883 (C.A.) ("Stelco I"). I do not think these cases assist the appellants, however. With the exception of Steinberg, they do not involve third-party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that Steinberg does not express a correct view of the law, and I decline to follow it.

[80] In Pacific Coastal Airlines, Tysoe J. made the following comment, at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

[81] This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question, it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to

certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of res judicata or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

[82] The facts in Pacific Coastal are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian -- at a contractual level -- may have had some involvement with the particular dispute. [page537] Here, however, the disputes that are the subject matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

[83] Nor is the decision of this court in the NBD Bank case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly owned subsidiary of Dofasco. The bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors". Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the bank. On appeal, he argued that since the bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process -- in short, he was personally protected by the CCAA release.

[84] Rosenberg J.A., writing for this court, rejected this argument. The appellants here rely particularly upon his following observations, at paras. 53-54:

> In my view, the appellant has not demonstrated that

allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289 at p. 297, . . . the CCAA is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.

In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of The 2000 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may [page538] not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. (Footnote omitted)

[85] Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third-party releases was not under consideration at all. What the court was determining in NBD Bank was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in NBD to the facts now before the Court" (para. 71). Contrary to the facts of this case, in NBD Bank the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release -- as is the situation here. Thus, NBD Bank is of little assistance in determining whether the court has authority to sanction a plan that calls for third-party releases.

[86] The appellants also rely upon the decision of this court in Stelco I. There, the court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement, one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis--vis the creditors themselves and not directly involving the company.

(Citations omitted; emphasis added)
See Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297 (S.C.J.), at para. 7.

[87] This court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the [page539] need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the court were quite different from those raised on this appeal.

[88] Indeed, the Stelco plan, as sanctioned, included third-party releases (albeit uncontested ones). This court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and, therefore, that they were entitled to a separate civil action to determine their rights under the agreement: Stelco Inc. (Re), [2006] O.J. No. 1996, 21 C.B.R. (5th) 157 (C.A.) ("Stelco II"). The court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The court said (para. 11):

> In [Stelco I] -- the classification case -- the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company . . . [H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process.

(Emphasis added)

[89] The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third-party releases here are very closely connected to the ABCP restructuring process.

[90] Some of the appellants -- particularly those represented by Mr. Woods -- rely heavily upon the decision of the Quebec

Court of Appeal in Michaud v. Steinberg, supra. They say that it is determinative of the release issue. In Steinberg, the court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 -- English translation):

> Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
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> . . . . .
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> The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
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> . . . . . [page540]
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> The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

[91] Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third-party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' and Their Officers and Employees Creditors Arrangement Act -- an awful mess -- and likely not attain its purpose, which is to enable the company to survive in the face of its creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of

> operation, contrary to its purposes and, for this reason, is to be banned.

[92] Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature -- they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company -- rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para., 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms encompass all that should enable the person who has recourse to it to fully dispose of his debts, both those that exist on the date when he has recourse to the statute and those contingent on the insolvency in which he finds himself . . .

(Emphasis added)

[93] The decision of the court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself", however. On occasion, such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in Steinberg, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision [page541] appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analyzing the Act -- an approach inconsistent with the jurisprudence referred to above.

[94] Finally, the majority in Steinberg seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases -- as I have concluded it does -- the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

[95] Accordingly, to the extent Steinberg stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in Steinberg considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 amendments

[96] Steinberg led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances. [page542]

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

[97] Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third-party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? Expressio unius est exclusio alterius, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

[98] The maxim is not helpful in these circumstances, however. The reality is that there may be another explanation why Parliament acted as it did. As one commentator has noted: [See Note 8 below]

Far from being a rule, [the maxim expressio unius] is not

even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

[99] As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in Steinberg. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden and Morawetz, vol. 1, supra, at 2-144, E11A; Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associs lte), [2003] J.Q. no. 9223, [2003] R.J.Q. 2157 (C.S.), at paras. 44-46.

[100] Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the [page543] BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third-party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The deprivation of proprietary rights

[101] Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect: Halsbury's Laws of England, 4th ed. reissue, vol. 44(1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., supra, at 183; E.A. Driedger and Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed., (Markham, Ont.: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The division of powers and paramountcy

[102] Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the Constitution Act, 1867, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the Civil Code of Quebec. [page544]

[103] I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: Reference re: Constitutional Creditors Arrangement Act (Canada), [1934] S.C.R. 659, [1934] S.C.J. No. 46. As the Supreme Court confirmed in that case (p.

661 S.C.R.), citing Viscount Cave L.C. in Royal Bank of Canada v. Larue, [1928] A.C. 187 (J.C.P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament". Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

[104] That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action -- normally a matter of provincial concern -- or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion with respect to legal authority

[105] For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "fair and reasonable"

[106] The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

[107] Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In [page545] the absence of a demonstrable error, an appellate court will not interfere: see Ravelston Corp. Ltd. (Re), [2007] O.J. No. 1389, 31 C.B.R. (5th) 233 (C.A.).

[108] I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties -- including leading Canadian financial institutions -- that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end, he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

[109] The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

[110] The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers; (ii) limits the type of damages that may be claimed (no punitive damages, for example); (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order; and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

[111] The law does not condone fraud. It is the most serious kind of civil claim. There is, therefore, some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: Fotini's Restaurant Corp. v. White Spot Ltd., [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

[112] The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, [page546] that the need "to avoid the potential cascade of litigation that . . . would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

[113] At para. 71, above, I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here -- with two additional findings -- because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

(a) The parties to be released are necessary and essential to the restructuring of the debtor;
(b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
(c) the Plan cannot succeed without the releases;
(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the

Plan;
(e) the Plan will benefit not only the debtor companies but creditor Noteholders generally;
(f) the voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
(g) the releases are fair and reasonable and not overly broad or offensive to public policy.

[114] These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

[115] The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they -- as individual creditors -- make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, [page547] Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

[116] All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only

acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

[117] In insolvency restructuring proceedings, almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices", inasmuch as everyone is adversely affected in some fashion.

[118] Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of all Noteholders, not just the interests of the appellants, whose notes represent only about 3 per cent of that total. That is what he did.

[119] The application judge noted, at para. 126, that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out [page548] specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized, at para. 134, that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity

among all stakeholders.

[120] In my view, we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. Disposition

[121] For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

Appeal dismissed.

SCHEDULE "A" -- CONDUITS

Apollo Trust
Apsley Trust
Aria Trust
Aurora Trust
Comet Trust
Encore Trust
Gemini Trust
Ironstone Trust
MMAI-I Trust
Newshore Canadian Trust
Opus Trust
Planet Trust
Rocket Trust
Selkirk Funding Trust
Silverstone Trust
Slate Trust
Structured Asset Trust
Structured Investment Trust III
Symphony Trust
Whitehall Trust

SCHEDULE "B" -- APPLICANTS

ATB Financial
Caisse de dpt et placement du Qubec
Canaccord Capital Corporation [page549]
Canada Mortgage and Housing Corporation
Canada Post Corporation
Credit Union Central Alberta Limited
Credit Union Central of BC
Credit Union Central of Canada

Credit Union Central of Ontario
Credit Union Central of Saskatchewan
Desjardins Group
Magna International Inc.
National Bank of Canada/National Bank Financial Inc.
NAV Canada
Northwater Capital Management Inc.
Public Sector Pension Investment Board
The Governors of the University of Alberta

SCHEDULE "C" -- COUNSEL

(1) Benjamin Zarnett and Frederick L. Myers, for the Pan-Canadian Investors Committee

(2) Aubrey E. Kauffman and Stuart Brotman, for 4446372 Canada Inc. and 6932819 Canada Inc.

(3) Peter F.C. Howard, and Samaneh Hosseini, for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG

(4) Kenneth T. Rosenberg, Lily Harmer, and Max Starnino, for Jura Energy Corporation and Redcorp Ventures Ltd.

(5) Craig J. Hill and Sam P. Rappos, for the Monitors (ABCP Appeals)

(6) Jeffrey C. Carhart and Joseph Marin, for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor

(7) Mario J. Forte, for Caisse de Dpt et Placement du Qubec

(8) John B. Laskin, for National Bank Financial Inc. and National Bank of Canada [page550]

(9) Thomas McRae and Arthur O. Jacques, for Ad Hoc Retail Creditors Committee (Brian Hunter, et al.)

(10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.

(11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank

(12) Jeffrey S. Leon, for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

(13) Usman Sheikh, for Coventree Capital Inc.
(14) Allan Sternberg and Sam R. Sasso, for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
(15) Neil C. Saxe, for Dominion Bond Rating Service
(16) James A. Woods, Sbastien Richemont and Marie-Anne Paquette, for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aroports de Montral, Aroports de Montral Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Mtropolitaine de Transport (AMT), Giro Inc., Vtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP
(17) Scott A. Turner, for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
(18) R. Graham Phoenix, for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Notes

Note 1: Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

Note 2: Georgina R. Jackson and Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., Annual Review of Insolvency Law, 2007 (Vancouver, B.C.: Carswell, 2007).

Note 3: Citing Gibbs J.A. in Chef Ready Foods, supra, at pp. 319-20 C.B.R.

Note 4: The legislative debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the Companies Act 1985 (U.K.): see House of Commons Debates (Hansard), supra.

Note 5: See Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 192; Ontario Business Corporations Act, R.S.O. 1990, c. B.16, s. 182.

Note 6: A majority in number representing two-thirds in value of the creditors (s. 6).

Note 7: Steinberg was originally reported in French: Steinberg Inc. c. Michaud, [1993] J.Q. no. 1076, [1993] R.J.Q. 1684 (C.A.). All paragraph references to Steinberg in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

Note 8: Reed Dickerson, The Interpretation and Application of Statutes (Boston: Little Brown and Company, 1975) at pp. 234-35, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at p. 621.

See page 2

1950 CarswellQue 23
Quebec Superior Court

Paris Fur Co. v. Nu-West Fur Corp.

1950 CarswellQue 23, 30 C.B.R. 193

In re Paris Fur Company Inc. (Debtor) and Nu-West Fur Corpn. of Canada Limited

Bertrand J.

Judgment: January 27, 1950

Counsel: *J. Rudner* and *Lawrence Marks*, for petitioners.
Clarence Gross and *Jacques Panneton, K.C.*, for debtor-respondent.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Effect of arrangement

:

The Court, having heard the parties on a demand by the above described petitioners to sanction a proposal of compromise on the debtor-company's outstanding unsecured debts, examined the proceedings and deliberated, renders the following judgment:

On December 3, 1949 the above debtor corporation presented before the Court its petition asking that, for reasons therein specified, particularly its inability to meet its liabilities as they became due, the Court order a special general meeting of its unsecured creditors for the purpose of submitting to them a scheme of settlement of its debts, pursuant to the dispositions of *The Companies' Creditors Arrangement Act 1933* [16 C.B.R. 447]; the whole with costs against the petitioners.

By a judgment of that very date, the Court granted the petition, ordered the meeting to be held on December 16, 1949 at the Montreal Old Court House, stayed and suspended all proceedings against the debtor company, and appointed a chairman to take charge of the meeting granted, the whole with costs against the company petitioner.

The record purports to show that notices stating the date and place for the meeting called for were sent by registered mail to all unsecured creditors, whose list as given under oath is attached to the debtor's petition and corresponds in figures to the balance sheet as at November 30, 1949 also attached.

A meeting was in fact held on December 16 and proces-verbal thereof kept and transcribed for the record under the signature of Joseph Duhamel as chairman. It appears thereby that 26 out of 46 unsecured creditors, representing $86,971.95 of ordinary debts out of a total of $95,210.49, therefore the majority in number and more than three-fourths in value, voted in favour of a plan of arrangement whereby the debtors would pay 100 cents on the dollar from now down to April 30, 1951 by instalments, the equivalent of 75 cents whereof would be guaranteed personally by Naphthali Nadel, president of the debtor-company, according to a written undertaking by said Nadel, who as a collateral security agrees to transfer hypothecarily to a committee of two for the creditors his property 5207-5209 Jeanne Mance in Montreal, by notarial deed, with a right in their favour to collect and deposit all revenues, but with obligation for them to pay all charges, including capital of mortgage, interest and taxes as they may become due, and all other accessories more fully particularized in the writing signed and filed in the Court's record.

On December 29, the petitioners whose petition is now considered, Nu-West Fur et al., without any notice to the debtors, had two guardians appointed by this Court to take possession of the debtor's business and premises, and also control all receipts and disbursements. That same day, the debtor filed in Court a desistment from its previous petition for calling the meeting of its creditors and from all proceedings thereunder, but said desistment made no mention of the costs incurred on them.

After these happenings, creditors Nu-West Fur and Turgel Fur presented on December 30 their petition now pondered, wherein they recite the above facts and pray that the Court sanction the proposal of compromise agreed to as above, same to be declared binding on and between all persons concerned therein, including the guarantor Nadel.

On January 3, 1950 when the petition just mentioned was being discussed in open Court, the debtor-company again filed a desistment from its demand by petition of December 3, 1949 for a meeting of its creditors and all proceedings thereunder, with an additional declaration "that it does not intend to take advantage of the provisions of the Companies' Creditors Arrangement Act, the whole with costs s'il y a lieu".

So the Court is now called upon to decide whether it still has to adjudicate on the petition under consideration by the named creditors to ratify the agreement already referred to, or is no longer seized of the said demand by the effect of the new desistment now providing for any costs incurred.

First of all, it is no longer within the debtor-company's discretion at the present stage to desist from its petition for a meeting of its creditors, as it has been granted by the Court at its request, and acted upon so completely that the parties involved could not be put back into their position previous to its presentation, contrary to the spirit of arts. 275 and 277 C.C.P.

Furthermore, the desistment, if countenanced, would amount to setting aside or nullifying a judgment of this Court, at the option of one only of the many parties now interested and involved therein, all of which makes no legal sense, and does not sound respectful of the orders of the Court and the process developed thereunder, even due account being taken of art. 548 C.C.P., as this disposition, by implication at least, protects vested rights.

(*St-Jacques v. Le Curé de St. Jean-Berchmans* (1917), 52 Que. S.C. 104; *White v. Reilly* (1937), 43 P.R. 261 cited).

If secs. 4 and 5 of *The Companies' Creditors Arrangement Act* are read together, it appears that the petition calling for a meeting can be urged by "any such creditor"; the text itself does not specify who should or could apply for the Court's sanction of the compromise concluded, and therefore no fundamental or founded objection to any creditor presenting such a demand can be raised. And this finding also disposes of the debtor-company's unilateral move of trying to dispense with the proceedings heretofore completed as a result of its first petition.

When sec. 5 of the Act disposes that the compromise arranged "may be sanctioned by the Court", it cannot be construed as implying that the Court has discretion to refuse its sanction for other reasons than those pertaining to fulfilment of the requirements related to conditions of validity and obligatory strength of the transaction effected between a debtor and its ordinary creditors. Our laws are not based on caprice, nor does their general inspiration exhibit any trend that the Court substitute for the interested parties on terms of their accord, except whenever violation of a legal disposition or principle is traced. No such exception would appear to exist in our case.

The petitioning creditors rely on another ground which is far from negligible. Their reasoning thus runs: the arrangement offered by the debtors and their guarantor in writing before the meeting presided over by a chairman named by the Court having been accepted and concurred in by a unanimous vote recorded in the proces-verbal signed by said chairman, a covenant was thereby formed by mutual consent which could now be enforced, according to articles 982 and 984 C.C.

If this be so, an obligation has been created and nothing but a mutual consent could set the covenant aside, as no cause is shown for its annulment for reasons of law (art. 1022 C.C.).

Finally, no sympathetic concurrence in the debtor's standpoint is warranted, because in final analysis it attempts avoiding payment of what has become due and legally recoverable on the debtor's recognized liabilities, while the guarantor whose

personal pledge secures payment does not withdraw his undertaking. And, be it noted, the engagement by the debtor to completely satisfy all claims in the extended delays assented to graces its creditors with no particular advantages, but just represents what it is obliged to in law.

Therefore considering that, according to the above observations and the juridical propositions connected therewith, the petition under review should be granted;

The Court doth sanction the proposal of compromise for payment of one hundred cents on the dollar more fully detailed in the writing filed wth the petition as exhibit P.1, and attached to the proces-verbal of the meeting held on December 16, 1949 under *The Companies' Creditors Arrangement Act*, in reference to the above debtor, and doth declare same binding on and between the petitioners, the debtor-respondent, its ordinary creditors and the guarantor Napthali Nadel; the whole with costs against the debtor-respondent.

End of Document

1992 CarswellBC 542
British Columbia Court of Appeal

See para. 7

Philip's Manufacturing Ltd., Re

1992 CarswellBC 542, [1992] B.C.W.L.D. 977, 32 A.C.W.S. (3d) 932, 4 B.L.R. (2d) 142, 67 B.C.L.R. (2d) 84, 9 C.B.R. (3d) 25

PHILIP'S MANUFACTURING LTD. v. HONGKONG BANK OF CANADA and PACIFIC LEAD & METAL INC., NORTHERN WAREHOUSE EQUIPMENT LTD. and CAMPBELL SAUNDERS LTD.

Carrothers, Cumming and Gibbs JJ.A.

Judgment: March 18, 1992
Docket: Doc. Vancouver CA014859

Counsel: *W.S. Berardino, Q.C.*, and *A.J. Bensler*, for appellants.
R.E. Breivik and *C.M. Emslie*, for respondent, Hongkong Bank of Canada.
W.E.J. Skelly, for receiver-manager, Coopers & Lybrand Ltd.
D.B. Hyndman and *P.S. Boles*, for unsecured creditors, A.B.L. Metals, Thyssen Canada, Pacific Lead & Metal, A.M.I. Metals.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Table of Authorities
Cases considered:
Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.) — *applied*
Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, *(*sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1 O.R. (3d) 289 — *considered*
Statutes considered:
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Appeal from the setting aside of *Companies' Creditors Arrangement Act* order [reported at p.17, ante].

The judgment of the court was delivered by *Gibbs J.A.* (orally):

1 This is an appeal from an order made by a chambers judge (the second chambers judge) on December 9, 1991 [reported ante, p.17 (B.C. S.C.)], setting aside an order made by another chambers judge (the first chambers judge) on September 3, 1991. The history of the proceedings discloses an unfortunate proliferation of applications, hearings and orders. There is, however, no need to recite that history. It is well known to the parties and unlikely to be of interest to anyone else. The appeal can be disposed of on the merits by having regard only to the orders made on September 3, 1991 and December 9, 1991, respectively.

2 On September 3, 1991, on the application of Philip's Manufacturing, the first chambers judge made an order granting the company protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("C.C.A.A."). The company was given six months within which to bring forward "a formal plan of compromise or arrangement between the Petitioner and its creditors". There were subsequent applications before the same chambers judge by various of the creditors, but not including the Hongkong Bank, to have the order set aside or, in the alternative, varied. In reasons delivered on October 17, 1991 [reported ante, p.1], the setting-aside relief was refused. In respect of the six-month period, in those reasons the first chambers judge said [at pp. 9-10, ante]:

> **The Six-Month Stay**
>
> Six months is the usual period for the initial stay. In complicated cases, it has been extended, sometimes more than once, to enable the company to arrive at agreement with a majority of the creditors in each class. After hearing argument on these motions, and in light of the expansion of the monitor's duties on which I have decided, I am satisfied that the length of the stay originally ordered is appropriate. One and one-half months of that six have already gone by. The first report of the monitor, filed October 8, 1991, makes it clear that much remains to be done before a reorganization plan can be presented to the creditors and the court.

3 In view of the concerns expressed to us about the possible disposition or dissipation of assets during the reorganization period, it is worth noting that in the October 17, 1991 reasons the first chambers judge also gave leave for bankruptcy-crystallization proceedings.

4 Although it was not one of the applicants, the Hongkong Bank was represented during the proceedings which culminated in the October 17, 1991 reasons. On the very next day, October 18, the bank as a creditor filed a notice of motion seeking by way of relief to have the original September 3, 1991 order set aside or varied. Ultimately the application came on before the second chambers judge and was heard over the course of several days in late October and in November of 1991. The second chambers judge delivered reasons on December 9, 1991 setting aside the original September 3, 1991 C.C.A.A. order. It is this setting-aside order that is the subject of this appeal. It is of significance that only a little over half of the six-month reorganization period had elapsed when the setting-aside order was made. It is also of significance that less than two months had gone by since the first chambers judge had observed that "much remains to be done before a reorganization plan can be presented to the creditors and the court".

5 It is apparent that the second chambers judge reached his setting-aside decision primarily on three submissions advanced by the bank: that as a secured creditor it was in a class by itself or was, in any event, so significant as to control a class of creditors on a compromise or arrangement vote; that the bank, on the affidavit of a bank employee, "is not prepared and will not agree, to any reorganization plan put forward by the company regardless of its content"; and that the judgment of the Ontario Court of Appeal in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, *(*sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1 O.R. (3d) 289 applied.

6 If what Mr. Justice Finlayson said at p. 302 of *Nova Metal Products Inc.* was intended as a test, and it is not clear that it was so intended, it is not the test to be applied in this province. In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136, this court said, at p.88 [B.C.L.R.]:

> 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. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. 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.

7 The burden on an applicant in this province and in these circumstances is therefore to lead evidence to the effect that the C.C.A.A.-protected company's attempt at making a compromise or arrangement is "doomed to failure". The evidence before the second chamber judge fell short of meeting that test. It went no further than demonstrating that the bank would not facilitate a compromise or arrangement. But it did not address the prospects of Philip's Manufacturing obtaining financing or making arrangements with some other source to the end that the compromise or arrangement would provide for the retirement of the bank debt in full. The possibility or probability of the company's officers achieving that goal was unknown to the chambers judge and is unknown to us. Whether it was or was not likely could not be more than speculation, and speculation cannot be accepted in lieu of evidence.

8 It follows that, as the bank did not meet the evidentiary burden of showing that the company's attempts to make a compromise or arrangement were doomed to failure, the trial judge erred in setting aside the original order of the first chambers judge.

9 That is not to say that a creditor can never succeed in an application to set aside a C.C.A.A. order. By a curious irony, that is what ultimately happened to *Chef Ready Foods*. Within about two weeks of the date this court handed down its judgment, a Supreme Court chambers judge set aside the C.C.A.A. order. He said that: "the situation has reached the point where for some days the company has not been doing any business. It is not so much at the point of collapsed as it is having collapsed". The obvious difference between that case and this is that there there was evidence that the attempt at compromise or arrangement was doomed to failure, whereas here there was not.

10 At the outset of this appeal the court, of its own volition, raised the question of the jurisdiction of the second chambers judge to set aside the order of the first chambers judge. As the appeal is being disposed of on the merits, it is not necessary to deal with jurisdiction. However, even apart from the question of jurisdiction, this is a circumstance where the second chambers judge would have been justified to conforming to the convention that, as a general rule and in the absence of other overriding considerations, an application to set aside or vary an order should be referred to the judge who made the order in the first instance.

11 It will be obvious from what I have said so far that in my opinion the appeal should be allowed, but there remains the question of a transition period. By reason of other orders made by other chambers judges, after the second chambers judge set aside the order of the first chambers judge, Coopers & Lybrand Ltd. have been in control of the day-to-day management of the Philip's Manufacturing enterprise. The activities of Coopers & Lybrand and the scope of their powers were limited by the terms of a stay order granted by Lambert J.A. of this court on January 29, 1992. We have been urged to impose a transition period for the orderly transfer of custody, management and control of the enterprise back to the executive officers of Philip's Manufacturing and for the reinstallation of the monitor appointed by the first chambers judge. I am persuaded that that would be a sensible and prudent thing to do.

12 Accordingly, I would allow the appeal and direct that the order of the second chambers judge be set aside, both to take effect at 4:00 p.m. on Friday, March 20, 1992. I would further order that the stay order granted by Lambert J.A. on January 29, 1992 be continued in effect also until 4:00 p.m. on Friday, March 20, 1992.

***Carrothers J.A.*:**

13 I agree.

***Cumming J.A.*:**

14 I agree.

***Carrothers J.A.*:**

15 The appeal is allowed effective at the close of the Court of Appeal Registry at 4:00 p.m. on March 20, 1992, to allow the parties the opportunity to arrange the orderly transition with respect to the receiver-manager, the trustee in bankruptcy, and the monitor. The order of Scarth J. is set aside and the order of Macdonald J. of September 3, 1991 pursuant to the *Companies' Creditors Arrangement Act* is restored. The stay order of Lambert J.A. is to continue until the effective time of this judgment.

Appeal allowed.

End of Document

CITATION: Re Crystallex International Corporation, 2013 ONSC 823
COURT FILE NO.: CV-11-9532-00CL
DATE: 20130205

See para. 9

SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CRYSTALLEX INTERNATIONAL CORPORATION

BEFORE: Newbould J.

COUNSEL: Markus Koehnen and Jeffrey Levine, for Crystallex International Corporation

Jay A. Carfagnini, Fred Myers and Christopher Armstrong, for Computershare Trust Company of Canada

David R. Byers and Maria Konyukhova, for Ernst & Young Inc., Monitor

R. Shayne Kukulowicz, Jane O. Dietrich and Ryan C. Jacobs for Tenor Special Situations Fund LP

John T. Porter, for J.A. Reyes

Erik Penz, for Forbes & Manhattan Inc. and Aberdeen International Inc.

DATE HEARD: January 31, 2013

E N D O R S E M E N T

[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 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 *Re Doman Industries Ltd*. (2003), 41 C.B.R. (4th) 29 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 *Re Sino-Forest* 2012 ONCA 816 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 *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379 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.

Newbould J.

DATE: February 05, 2013

SUPERIOR COURT
(COMMERCIAL DIVISION)

Canada
Province of Québec
District of Montréal
No: 500-11-055122-184
Date: August 24, 2018 (as amended on September 21, 2018)

Presiding: The Honourable Chantal Corriveau, S.C.J.

In the matter of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended:

LE GROUPE SMI INC./THE SMI GROUP INC.

LE GROUPE S.M. INC./THE S.M. GROUP INC.

CLAULAC INC.

SMi CONSTRUCTION INC.

ÉNERPRO INC.

LE GROUPE S.M. INTERNATIONAL (CONSTRUCTION) INC./S.M. INTERNATIONAL GROUP (CONSTRUCTION) INC.

Debtors

and

LE GROUPE S.M. INTERNATIONAL S.E.C./THE S.M. GROUP INTERNATIONAL LP

ÉNERPRO S.E.C./ENERPRO LP

LES SERVICES DE PERSONNEL S.M. INC.

LE GROUPE S.M. (ONTARIO) INC./THE S.M. GROUP (ONTARIO) INC.

AMÉNATECH INC.

LABO S.M. INC.

LES CONSULTANTS INDUSTRIELS S.M. INC./S.M. INDUSTRIAL CONSULTANTS INC.

LES CONSULTANTS S.M. INC./S.M. CONSULTANTS INC.

FACILIOP EXPERTS CORP.

LE GROUPE S.M. INTERNATIONAL INC./THE S.M. GROUP INTERNATIONAL INC.

CSP CONSULTANTS EN SÉCURITÉ INC./CSP SECURITY CONSULTING INC.

LE GROUPE S.M. INTERNATIONAL (S.A.) INC./THE S.M. GROUP INTERNATIONAL (S.A.) INC.

LE GROUPE S.M. INTERNATIONAL (CONSTRUCTION) EURL

SM SAUDI ARABIA CO LTD.

THE S.M. GROUP INTERNATIONAL SARL

THE S.M. GROUP INTERNATIONAL ALGÉRIE EURL

S.M. UNITED EMIRATES GENERAL CONTRACTING LLC

COMMANDITÉ SMi-ÉNERPRO FONDS VERT INC./SMi-ENERPRO GREEN FUND GP INC.

SMi-ÉNERPRO FONDS VERT S.E.C./SMi-ENERPRO GREEN FUND LP

9229-4263 QUÉBEC INC.

Mises-en-cause

and

ALARIS ROYALTY CORP.

INTEGRATED PRIVATE DEBT FUND V LP

Applicants

and

DELOITTE RESTRUCTURING INC.

Monitor

and

LGBM INC.

Chief Restructuring Officer

AMENDED AND RESTATED INITIAL ORDER

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[1] CONSIDERING the Motion for the Issuance of an Initial Order dated August 22, 2018 (the "**Petition**") of the Debtors;

[2] CONSIDERING the Application for an Initial Order dated August 23, 2018 (the "**Application**") of Alaris Royalty Corp. and Integrated Private Debt Fund V LP (the "**Applicants**") pursuant to the Companies' Creditors Arrangement Act, RSC 1985, c C-36 (the "**CCAA**"), the affidavit and the exhibits;

[3] CONSIDERING the notification of the Application;

[4] CONSIDERING the representations of the lawyers present;

THE COURT:

[5] GRANTS the Application.

[6] ISSUES an order pursuant to the CCAA (the "**Order**"), divided under the following headings:

- Service
- Application of the CCAA
- Effective Time
- Plan of Arrangement
- Administrative Consolidation

- Stay of Proceedings against the Debtors and the Property
- Stay of Proceedings against the Directors and Officers
- Possession of Property and Operations
- No Exercise of Rights or Remedies
- No Interference with Rights
- Continuation of Services
- Non-Derogation of Rights
- Key Employee Retention Plan
- Interim Financing
- Directors' and Officers' Indemnification
- Restructuring
- Powers of the Monitor
- Appointment of the Chief Restructuring Officer
- Priorities and General Provisions Relating to CCAA Charges
- General

Service

[7] ORDERS that any prior delay for the presentation of the Application is hereby abridged and validated so that the Application is properly returnable today and hereby dispenses with further service thereof.

[8] DECLARES that sufficient prior notice of the presentation of this Application has been given by the Applicants to interested parties, including the secured creditors who are likely to be affected by the charges created herein.

Application of the CCAA

[9] DECLARES that the Debtors are debtor companies to which the CCAA applies.

[10] DECLARES that the Mises-en-cause shall benefit from the stay of proceedings and other relief granted herein.

Effective Time

[11] DECLARES that this Order and all of its provisions are effective as of 12:01 a.m. Montreal time, province of Quebec, on August 24, 2018 (the "**Effective Time**").

Plan of Arrangement

[12] DECLARES that the Applicants shall have the authority to file with this Court and to submit to the Debtors' creditors one or more plans of compromise or arrangement (collectively, the "**Plan**") in accordance with the CCAA.

Administrative Consolidation

[13] ORDERS the consolidation of the CCAA proceedings of the Debtors and the Mises-en-cause (collectively, the "**Debtors**") under one single Court file, in file number 500-11-055122-184.

[14] ORDERS that all existing and future proceedings, filings, and other matters (including, without limitation, all applications, applications and cash flows) in the CCAA Proceedings henceforth be filed jointly and together by the Debtors under file number 500-11-055122-184.

[15] DECLARES that the consolidation of these CCAA proceedings in respect of the Debtors shall be for administrative purposes only and shall not effect a consolidation of the assets and property or of the debts and obligations of each of the Debtors including, without limitation, for the purposes of any Plan or Plans that may be hereafter proposed.

Stay of Proceedings against the Debtors and the Property

[16] ORDERS that, until and including November 14, 2018, or such later date as the Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Debtors, or affecting the Debtors' business operations and activities (the "**Business**") or the Property (as defined herein below), including as provided in paragraph [25] herein except with leave of this Court. Any and all Proceedings currently under way against or in respect of the Debtors or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court, the whole subject to subsection 11.1 CCAA.

[17] ORDERS that the rights of Her Majesty in right of Canada and Her Majesty in right of a Province are suspended in accordance with the terms and conditions of subsection 11.09 CCAA.

Stay of Proceedings against Directors and Officers

[18] ORDERS that during the Stay Period and except as permitted under subsection 11.03(2) of the CCAA, no Proceeding may be commenced, or continued against any former, present or future director or officer of the Debtors nor against any person deemed to be a director or an officer of any of the Debtors under subsection 11.03(3) CCAA (each, a "**Director**", and collectively the "**Directors**") in respect of any claim against such Director which arose prior to the Effective Time and which relates to any obligation of the Debtors where it is alleged that any of the Directors is under any law liable in such capacity for the payment of such obligation.

Possession of Property and Operations

[19] ORDERS that the Debtors shall remain in possession and control of their present and future assets, rights, undertakings and properties of every nature and kind whatsoever, and wherever situated, including all proceeds thereof (collectively the "**Property**"), the whole in accordance with the terms and conditions of this order including, but not limited, to paragraphs [44] and [57] hereof.

[20] ORDERS that the Debtors shall be entitled to continue to utilize the central cash management system currently in place as described in the Petition or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System

shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Debtors of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as defined herein below) other than the Debtors, pursuant to the terms of the documentation applicable to the Cash Management System.

[21] ORDERS that each of the Debtors are authorized to complete outstanding transactions and engage in new transactions with other Debtors, and to continue, on and after the date of this Order, to buy and sell goods and services, and allocate, collect and pay costs, expenses and other amounts from and to the other Debtors, or any of them (collectively, the "**Intercompany Transactions**") in the ordinary course of business. All ordinary course Intercompany Transactions among the Debtors shall continue on terms consistent with existing arrangements or past practice, subject to such changes thereto, or to such governing principles, policies or procedures as the Monitor may require, or subject to further Order of this Court.

[22] ORDERS that the Debtors shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, bonuses, expenses, benefits and vacation pay payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the fees and disbursements of any agents retained or employed by the Debtors in respect of these proceedings, at their standard rates and charges; and

(c) with the consent of the Monitor, amounts owing for goods or services actually supplied to the Debtors prior to the date of this Order by third party suppliers up to a maximum aggregate amount of $1,000,000, if, in the opinion of the Debtors, the supplier is critical to the business and ongoing operations of the Debtors.

[23] ORDERS that, except as otherwise provided to the contrary herein, the Debtors shall be entitled but not required to pay all reasonable expenses incurred by the Debtors in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business; and

(b) payment for goods or services actually supplied to the Debtors following the date of this Order.

[24] ORDERS that the Debtors shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be

deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Québec Pension Plan, and (iv) income taxes, or, in the case of foreign Debtors any similar amounts payable pursuant to applicable local law; and

(b) all goods and services, harmonized sales or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Debtors and in connection with the sale of goods and services by the Debtors, or, in the case of foreign Debtors, any similar amounts payable pursuant to applicable local law, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order.

No Exercise of Rights or Remedies

[25] ORDERS that during the Stay Period, and subject to, *inter alia*, subsection 11.1 CCAA, all rights and remedies, including, but not limited to modifications of existing rights and events deemed to occur pursuant to any agreement to which any of the Debtors is a party as a result of the insolvency of the foreign Debtors and/or these CCAA proceedings, any events of default or non-performance by the Debtors or any admissions or evidence in these CCAA proceedings, of any individual, natural person, firm, corporation, partnership, limited liability company, trust, joint venture, association, organization, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Debtors, or affecting the Business, the Property or any part thereof, are hereby stayed and suspended except with leave of this Court.

[26] DECLARES that, to the extent any rights, obligations, or prescription, time or limitation periods, including, without limitation, to file grievances, relating to the Debtors or any of the Property or the Business may expire (other than pursuant to the terms of any contracts, agreements or arrangements of any nature whatsoever), the term of such rights, obligations, or prescription, time or limitation periods shall hereby be deemed to be extended by a period equal to the Stay Period. Without limitation to the foregoing, in the event that the Debtors, or any of them, become(s) bankrupt or a receiver as defined in subsection 243(2) of the Bankruptcy and Insolvency Act (Canada) (the "**BIA**") is appointed in respect of any of the Debtors, the period between the date of this Order and the day on which the Stay Period ends shall not be calculated in respect of the Debtors in determining the 30 day periods referred to in Sections 81.1 and 81.2 of the BIA.

No Interference with Rights

[27] ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, resiliate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, except with the written consent of the Debtors, as applicable, and the Monitor, or with leave of this Court.

Continuation of Services

[28] ORDERS that during the Stay Period and subject to paragraph [30] hereof and subsection 11.01 CCAA, all Persons having verbal or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, utility or other goods or services made available to the Debtors, are hereby restrained until further order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Debtors, and that the Debtors shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses, domain names or other services, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Debtors, without having to provide any security deposit or any other security, in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Debtors, as applicable, with the consent of the Monitor, or as may be ordered by this Court.

[29] ORDERS that, notwithstanding anything else contained herein and subject to subsection 11.01 CCAA, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided to the Debtors on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to make further advance of money or otherwise extend any credit to the Debtors.

[30] ORDERS that, without limiting the generality of the foregoing and subject to Section 21 of the CCAA, if applicable, cash or cash equivalents placed on deposit by any Debtor with any Person during the Stay Period, whether in an operating account or otherwise for itself or for another entity, shall not be applied by such Person in reduction or repayment of amounts owing to such Person or in satisfaction of any interest or charges accruing in respect thereof; however, this provision shall not prevent any financial institution from: (i) reimbursing itself for the amount of any cheques drawn by a Debtor and properly honoured by such institution, or (ii) holding the amount of any cheques or other instruments deposited into a Debtor's account until those cheques or other instruments have been honoured by the financial institution on which they have been drawn.

Non-Derogation of Rights

[31] ORDERS that, notwithstanding the foregoing, any Person who provided any kind of letter of credit, guarantee or bond (the "**Issuing Party**") at the request of any of the Debtors shall be required to continue honouring any and all such letters, guarantees and bonds, issued on or before the date of this Order, provided that all conditions under such letters, guarantees and bonds are met save and except for defaults resulting from this Order; however, the Issuing Party shall be entitled, where applicable, to retain the bills of lading or shipping or other documents relating thereto until paid.

Key Employee Retention Plan

[32] ORDERS that the Draft Key Employee Retention Plan (the "**KERP**"), Exhibit A-10 to the

Application, is hereby approved.

[33] ORDERS the CRO to finalize the KERP before September 21, 2018.

[34] ORDERS the Debtors to pay to the Monitor, within five days of the date of this Order, an amount of $500,000 to be held in trust by the Monitor to make the payments contemplated by the KERP.

Interim Financing

[35] ORDERS that Debtors be and is hereby authorized to borrow, repay and reborrow from Integrated Asset Management Corp. (the "**Interim Lender**") such amounts from time to time as Debtors may consider necessary or desirable, up to a maximum principal amount of $2,000,000 outstanding at any time, on the terms and conditions as set forth in the Interim Financing Term Sheet, Exhibit A-9 to the Application, and in the Interim Financing Documents (as defined hereinafter), to fund the ongoing expenditures of Debtors and to pay such other amounts as are permitted by the terms of this Order and the Interim Financing Documents (as defined hereinafter) (the "**Interim Facility**").

[36] ORDERS that the CRO, for and on behalf of the Debtors, is hereby authorized to execute and deliver such credit agreements, security documents and other definitive documents (collectively the "**Interim Financing Documents**") as may be required by the Interim Lender in connection with the Interim Facility and the Interim Financing Term Sheet, and Debtors are hereby authorized to perform all of their obligations under the Interim Financing Documents.

[37] ORDERS that Debtors shall pay to the Interim Lender, when due, all amounts owing (including principal, interest, fees and expenses, including without limitation, all reasonable fees and disbursements of counsel and all other reasonably required advisers to or agents of the Interim Lender on a full indemnity basis (the "**Interim Lender Expenses**")) under the Interim Financing Documents and shall perform all of their other obligations to the Interim Lender pursuant to the Interim Financing Term Sheet, the Interim Financing Documents and this Order.

[38] DECLARES that all of the Property of the Debtors is hereby subject to a charge, hypothec and security for an aggregate amount of $2,400,000 (such charge, hypothec and security is referred to herein as the "**Interim Lender Charge**") in favour of the Interim Lender as security for all obligations of Debtors to the Interim Lender with respect to all amounts owing (including principal, interest and the Interim Lender Expenses) under or in connection with the Interim Financing Term Sheet and the Interim Financing Documents. The Interim Lender Charge shall have the priority established by paragraphs [65] and [66] of this Order.

[39] ORDERS that the claims of the Interim Lender pursuant to the Interim Financing Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the Interim Lender, in that capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan.

[40] ORDERS that the Interim Lender may:

(a) notwithstanding any other provision of this Order, take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the Interim Lender Charge and the Interim Financing Documents in all jurisdictions where it deems it is appropriate; and

(b) notwithstanding the terms of the paragraph to follow, refuse to make any advance to Debtors if the Debtors fails to meet the provisions of the Interim Financing Term Sheet and the Interim Financing Documents.

[41] ORDERS that the Interim Lender shall not take any enforcement steps under the Interim Financing Documents or the Interim Lender Charge without providing at least 5 business days written notice (the "**Notice Period**") of a default thereunder to the Debtors, the CRO, the Applicants, the Monitor and to creditors whose rights are registered or published at the appropriate registers or requesting a copy of such notice. Upon expiry of such Notice Period, the Interim Lender shall be entitled to take any and all steps under the Interim Financing Documents and the Interim Lender Charge and otherwise permitted at law, but without having to send any demands under Section 244 of the BIA.

[42] ORDERS that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs [35] to [41] hereof unless either (a) notice of an application for such order is served on the Interim Lender by the moving party within seven (7) days after that party was served with this Order or (b) the Interim Lender applies for or consents to such order.

Directors' and Officers' Indemnification

[43] ORDERS that the Debtors shall indemnify their Directors from all claims relating to any obligations or liabilities they may incur and which have accrued by reason of or in relation to their respective capacities as directors or officers of the Debtors after the Effective Time, except where such obligations or liabilities were incurred as a result of such Director's gross negligence, wilful misconduct or gross or intentional fault as further detailed in Section 11.51 CCAA.

Restructuring

[44] DECLARES that, to facilitate the orderly restructuring of their business and financial affairs (the "**Restructuring**") but subject to such requirements as are imposed by the CCAA, the Debtors shall have the right, subject to approval of the Monitor or further order of the Court, to:

(a) permanently or temporarily cease, downsize or shut down any of their operations or locations as they deem appropriate and make provision for the consequences thereof in the Plan;

(b) pursue all avenues to finance or refinance, market, convey, transfer, assign or in any other manner dispose of the Business or Property, in whole or part, subject to further order of the Court and sections 11.3 and 36 CCAA, and under reserve of subparagraph (c);

(c) convey, transfer, assign, lease, or in any other manner dispose of the Property, outside of the ordinary course of business, in whole or in part, and that the price and value in each case does not exceed $200,000 or $2,000,000 in the aggregate;

(d) terminate the employment of such of their employees or temporarily or permanently lay off such of their employees as they deem appropriate and, to the extent any amounts in lieu of notice, termination or severance pay or other amounts in respect thereof are not paid in the ordinary course, make provision, on such terms as may be agreed upon between the Debtors, as applicable, and such employee, or failing such agreement, make provision to deal with, any consequences thereof in the Plan, as the Debtors may determine;

(e) subject to the provisions of section 32 CCAA, disclaim or resiliate, any of their agreements, contracts or arrangements of any nature whatsoever, with such disclaimers or resiliation to be on such terms as may be agreed between the Debtors, as applicable, and the relevant party, or failing such agreement, to make provision for the consequences thereof in the Plan; and

(f) subject to section 11.3 CCAA, assign any rights and obligations of Debtors.

[45] DECLARES that, if a notice of disclaimer or resiliation is given to a landlord of any of the Debtors pursuant to section 32 of the CCAA and subsection [44](e) of this Order, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours by giving such Debtor and the Monitor 24 hours' prior written notice and (b) at the effective time of the disclaimer or resiliation, the landlord shall be entitled to take possession of any such leased premises and re-lease any such leased premises to third parties on such terms as any such landlord may determine without waiver of, or prejudice to, any claims or rights of the landlord against the Debtors, provided nothing herein shall relieve such landlord of their obligation to mitigate any damages claimed in connection therewith.

[46] ORDERS that the Debtors, as applicable, shall provide to any relevant landlord notice of the intention of any of the Debtors to remove any fittings, fixtures, installations or leasehold improvements at least seven (7) days in advance. If a Debtor has already vacated the leased premises, it shall not be considered to be in occupation of such location pending the resolution of any dispute between such Debtor and the landlord.

[47] DECLARES that, in order to facilitate the Restructuring, the Debtors may, subject to the approval of the Monitor, or further order of the Court, settle claims of customers and suppliers that are in dispute.

[48] DECLARES that, pursuant to sub-paragraph 7(3)(c) of the Personal Information Protection and Electronic Documents Act, SC 2000, c 5, the Debtors are permitted, in the course of these proceedings, to disclose personal information of identifiable individuals in their possession or control to stakeholders or prospective investors, financiers, buyers or strategic partners and to their advisers (individually, a "**Third Party**"), but only to the extent desirable or required to negotiate and complete the

Restructuring or the preparation and implementation of the Plan or a transaction for that purpose, provided that the Persons to whom such personal information is disclosed enter into confidentiality agreements with the Debtors binding them to maintain and protect the privacy of such information and to limit the use of such information to the extent necessary to complete the transaction or Restructuring then under negotiation. Upon the completion of the use of personal information for the limited purpose set out herein, the personal information shall be returned to the Debtors or destroyed. In the event that a Third Party acquires personal information as part of the Restructuring or the preparation or implementation of the Plan or a transaction in furtherance thereof, such Third Party may continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Debtors.

[49] ORDERS that pursuant to clause 3(c)(i) of the Electronic Commerce Protection Regulations, made under An Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain Activities that Discourage Reliance on Electronic Means of Carrying Out Commercial Activities, and to Amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, SC 2010, c 23, the Debtors, the CRO and the Monitor are authorized and permitted to send, or cause or permit to be sent, commercial electronic messages to an electronic address of prospective purchasers or bidders and to their advisors but only to the extent desirable or required to provide information with respect to any sales process in these CCAA proceedings.

Powers of the Monitor

[50] ORDERS that Deloitte Restructuring Inc. is hereby appointed to monitor the business and financial affairs of the Debtors as an officer of this Court (the "**Monitor**") and that the Monitor, in addition to the prescribed powers and obligations, referred to in Section 23 of the CCAA:

(a) shall, as soon as practicable, (i) publish once a week for two (2) consecutive weeks or as otherwise directed by the Court, in La Presse+ and the Globe & Mail National Edition and (ii) within five (5) business days after the date of this Order (A) post on the Monitor's website (the "**Website**") a notice containing the information prescribed under the CCAA, (B) make this Order publicly available in the manner prescribed under the CCAA, (C) send, in the prescribed manner, a notice to all known creditors having a claim against the Debtors of more than $1,000, advising them that this Order is publicly available, and (D) prepare a list showing the names and addresses of such creditors and the estimated amounts of their respective claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder;

(b) shall monitor the Debtors' receipts and disbursements;

(c) shall assist the Debtors, to the extent required by the Debtors, in dealing with their creditors and other interested Persons during the Stay Period;

(d) shall assist the Debtors, to the extent required by the Debtors, with the preparation of their cash flow projections and any other projections or reports and the development, negotiation and implementation of the Plan;

(e) shall advise and assist the Debtors, to the extent required by the Debtors, to review the Debtors' business and assess opportunities for cost reduction, revenue enhancement and operating efficiencies;

(f) shall assist the Debtors, to the extent required by the Debtors, with the Restructuring and in their negotiations with their creditors and other interested Persons and with the holding and administering of any meetings held to consider the Plan;

(g) shall report to the Court on the state of the business and financial affairs of the Debtors or developments in these proceedings or any related proceedings within the time limits set forth in the CCAA and at such time as considered appropriate by the Monitor or as the Court may order and may file consolidated Reports for the Debtors;

(h) shall report to this Court and interested parties, including but not limited to creditors affected by the Plan, with respect to the Monitor's assessment of, and recommendations with respect to, the Plan;

(i) may retain and employ such agents, advisers and other assistants as are reasonably necessary for the purpose of carrying out the terms of this Order, including, without limitation, one or more entities related to or affiliated with the Monitor;

(j) may engage legal counsel to the extent the Monitor considers necessary in connection with the exercise of its powers or the discharge of its obligations in these proceedings and any related proceeding, under this Order or under the CCAA;

(k) may act as a "foreign representative" of any of the Debtors or in any other similar capacity in any insolvency, bankruptcy or reorganisation proceedings outside of Canada;

(l) may give any consent or approval as may be contemplated by this Order or the CCAA;

(m) may hold and administer funds in connection with arrangements made among the Debtors, any counter-parties and the Monitor, or by Order of this Court; and

(n) may perform such other duties as are required by this Order or the CCAA or by this Court from time to time.

Unless expressly authorized to do so by this Court, the Monitor shall not otherwise interfere with the business and financial affairs carried on by the Debtors, and the Monitor is not empowered to take possession of the Property nor to manage any of the

business and financial affairs of the Debtors nor shall the Monitor be deemed to have done so.

[50.1] AUTHORIZES the Monitor, in consultation with the CRO and the Applicants and without any obligation to do so, to:

(a) examine under oath any Person reasonably thought to have knowledge relating to any of the Debtors, the Business or the Property; and

(b) order any Person liable to be examined pursuant to the preceding sub-paragraph to disclose to the Monitor and produce any books, documents, correspondence or papers in that person's possession or power relating to the Debtors, the Business or the Property.

[50.2] ORDERS that:

(a) the Monitor shall serve on the Person he wishes to examine pursuant to this Order, at least five days prior to the scheduled date of the examination, a summons to appear specifying the time, place and books, documents, correspondence or papers that the person must have in his or her possession during the examination.

(b) the examinations held pursuant to this Order shall be conducted in the District of Montréal, unless otherwise agreed between the Monitor and the person being examined.

(c) objections raised during examinations held pursuant to this Order shall not prevent the continuation of the examination, the witness being required to respond, unless they relate to the fact that the person being examined cannot be compelled or to fundamental rights or to a matter of substantial legitimate interest, in which case the person being examined may refrain from responding.

[50.3] AUTHORIZES the Monitor to execute banking and other transactions on behalf of any of the Debtors and to execute any documents or take any other action that is necessary or appropriate for the purpose of the exercise of this power.

[51] ORDERS that the Debtors and their Directors, officers, employees and agents, accountants, auditors and all other Persons having notice of this Order shall forthwith provide the Monitor with unrestricted access to all of the Business and Property, including, without limitation, the premises, books, records, data, including data in electronic form, and all other documents of the Debtors in connection with the Monitor's duties and responsibilities hereunder.

[52] DECLARES that the Monitor may provide creditors and other relevant stakeholders of the Debtors with information in response to requests made by them in writing addressed to the Monitor and copied to the counsel for the Debtors'. In the case of information that the Monitor has been advised by the Debtors is confidential, proprietary or competitive, the Monitor shall not provide such information to any Person without the consent of the Debtors or the CRO unless otherwise directed by this Court.

[53] DECLARES that if the Monitor, in its capacity as Monitor, carries on the business of the Debtors or continues the employment of the Debtors' employees, the Monitor shall benefit from the provisions of section 11.8 of the CCAA.

[54] DECLARES that no action or other proceedings shall be commenced against the Monitor relating to its appointment, its conduct as Monitor or the carrying out of the provisions of any order of this Court, except with prior leave of this Court, on at least seven days' notice to the Monitor and its counsel. The entities related to or affiliated with the Monitor referred to in subparagraph [50](i) hereof shall also be entitled to the protection, benefits and privileges afforded to the Monitor pursuant to this paragraph.

[55] ORDERS that the Debtors shall pay the reasonable fees and disbursements of the Monitor, the CRO, the Monitor's legal counsel, the Debtors' legal counsel, the legal counsel for the Applicants and other advisers, directly related to these proceedings, the Plan and the Restructuring, whether incurred before or after this Order, and shall be authorized to provide each with a reasonable retainer in advance on account of such fees and disbursements, if so requested.

[56] DECLARES that the Monitor, the Monitor's legal counsel (Stikeman Elliott LLP), the legal counsel for the Applicants (McCarthy Tétrault LLP and Miller Thomson LLP), Debtors' legal counsel (Blake, Cassels & Graydon LLP and Robinson Sheppard Shapiro, L.L.P.), the CRO, as security for the professional fees and disbursements incurred both before and after the making of this Order and directly related to these proceedings, the Plan and the Restructuring, be entitled to the benefit of and are hereby granted a charge, hypothec and security in the Property to the extent of the aggregate amount of $250,000 (the "**Administration Charge**"), having the priority established by paragraphs [65] and [66] of this Order.

Appointment of the Chief Restructuring Officer

[57] ORDERS that LGBM Inc. is hereby appointed Chief Restructuring Officer ("**CRO**") over the Debtors and, subject to the Orders of the Court that may be granted from time to time in these proceedings and in consultation with the Monitor and the Applicants, shall be authorized but not required, for and on behalf of the Debtors to:

(a) conduct and control the financial affairs and operations of the Debtors and carry on the business of the Debtors;

(b) execute and deliver the Interim Financing Documents, as provided for by paragraph [36] of this Order;

(c) finalize the KERP, as provided for by paragraph [33] of this Order;

(d) exercise the rights provided for by [44] of this Order;

(e) execute such documents as may be necessary in connection with any proceedings before or order of the Court;

(f) take steps for the preservation and protection of the Property;

(g) negotiate and enter into agreements with respect to the Property;

(h) engage and give instructions to legal counsel;

(i) apply to the Court for any vesting order or orders which may be necessary or appropriate in order to convey the Property to a purchaser or purchasers thereof with the prior consent of the Monitor;

(j) take any steps required to be taken by the Debtors under any Order of the Court;

(k) provide information to the Monitor and the Applicants regarding the business and affairs of the Debtors;

(l) exercise such shareholder or member or rights, as may be available to the Debtors; and

(m) take any steps, enter into any agreements or incur any obligations necessary or incidental to the exercise of the aforesaid powers.

[58] ORDERS that the Debtors and their Directors, officers, employees and agents, accountants, auditors and all other Persons having notice of this Order shall forthwith provide the CRO with unrestricted access to all of the Business and Property, including, without limitation, the premises, books, records, data, including data in electronic form, and all other documents of the Debtors.

[59] ORDERS that the Letter of Engagement of the CRO dated July 3, 2018, Exhibit A-6 to the Application (the "**CRO Agreement**"), is approved and the Debtors are authorized to perform all of their obligations pursuant to the CRO Agreement.

[60] ORDERS that neither the CRO nor any employee or agent of the CRO shall be deemed to be a director or trustee of the Debtors.

[61] ORDERS that neither the CRO, nor any officer, director, employee, or agent of the CRO, including, without limitation, Paul Lafrenière, shall incur any liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any liability or obligation incurred as a result of gross negligence or wilful misconduct on its or their part.

[62] ORDERS that, as provided for by paragraph [56] of this Order, the professional fees and disbursements payable to the CRO pursuant to the CRO Agreement are entitled to the benefit of the Administration Charge.

[63] ORDERS that during the Stay Period no action or other proceeding shall be commenced directly, or by way of counterclaim, third party claim or otherwise, against or in respect of the CRO and any officers, directors, employees or agents of the CRO who may assist the CRO with the exercise of its powers and obligations under this Order or the CRO Agreement (the "**CRO Indemnified Parties**") that in any way relates to the Debtors, and all rights and remedies of any Person against or in respect of the CRO Indemnified Parties that in any way relate to the Debtors are hereby stayed and suspended, except with the written consent of the CRO or with leave of this Court on

notice to the CRO and the Monitor. Notice of any such application seeking leave of this Court shall be served upon the CRO and the Monitor at least seven (7) days prior to the return date of any such application for leave.

[64] ORDERS that the Debtors' indemnity in favour of the CRO Indemnified Parties, as set out in the CRO Agreement, shall survive any termination, replacement or discharge of the CRO.

[64.1] ORDERS that as security for all obligations arising out of the indemnity granted in favour of the CRO Indemnified Parties, as provided for in the CRO Agreement and as approved and rendered effective pursuant to paragraphs [59] and [64] of this Order (the "**CRO Indemnity**"), the CRO Indemnified Parties shall be entitled to the benefit of and are hereby granted a charge (the "**CRO Indemnity Charge**") on the Property, which charge shall not exceed an aggregate amount of $1,500,000.

[64.2] ORDERS that, notwithstanding any language in any of the Debtors' applicable insurance policies to the contrary, (a) no insurer of the Debtors shall be entitled to be subrogated to or claim the benefit of the CRO Indemnity Charge, and (b) the CRO Indemnified Parties shall only be entitled to the benefit of the CRO Indemnity Charge to the extent that they do not have coverage under any directors' and officers' insurance policy of the Debtors, or to the extent that such coverage is insufficient to pay amounts for which the CRO Indemnified Parties are entitled to be indemnified in accordance with paragraph [64] of this Order.

[64.3] ORDERS that the establishment of the CRO Indemnity Charge shall not be read to limit or otherwise affect any of the protections afforded to the CRO under the CRO Agreement or this Order and in particular, paragraphs [59] to [64] of this Order.

Priorities and General Provisions Relating to CCAA Charges

[65] DECLARES that the priorities of the Administration Charge, the Interim Lender Charge and the CRO Indemnity Charge (collectively, the "**CCAA Charges**"), as between them with respect to any Property to which they apply, shall be as follows:

(a) first, the Administration Charge;

(b) second, the Interim Lender Charge; and

(c) third, the CRO Indemnity Charge.

[66] DECLARES that each of the CCAA Charges shall rank in priority to any and all other hypothecs, mortgages, liens, security interests, priorities, charges, encumbrances or security of whatever nature or kind (collectively, the "**Encumbrances**") affecting the Property whether or not charged by such Encumbrances.

[67] ORDERS that, except as otherwise expressly provided for herein, the Debtors shall not grant any Encumbrances in or against any Property that rank in priority to, or *pari passu* with, any of the CCAA Charges unless the Debtors, as applicable, obtain the prior written consent of the Monitor and the Applicants, and the prior approval of the Court.

[68] DECLARES that each of the CCAA Charges shall attach, as of the Effective Time, to all present and future Property of the Debtors, notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent.

[69] DECLARES that the CCAA Charges and the rights and remedies of the beneficiaries of the CCAA Charges, as applicable, shall be valid and enforceable and not otherwise be limited or impaired in any way by: (i) these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such application(s) or any assignment(s) in bankruptcy made or deemed to be made in respect of any of the Debtor; or (iii) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any agreement, lease, sub-lease, offer to lease or other arrangement which binds the Debtors (a "**Third Party Agreement**"), and notwithstanding any provision to the contrary in any Third Party Agreement:

(a) the creation of any of the CCAA Charges shall not create nor be deemed to constitute a breach by the Debtors of any Third Party Agreement to which any of the Debtor is a party; and

(b) the beneficiaries of the CCAA Charges shall not have any liability to any Debtors whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the CCAA Charges.

[70] DECLARES that notwithstanding: (i) these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such application(s) or any assignment(s) in bankruptcy made or deemed to be made in respect of any of the Debtor; and (iii) the provisions of any federal or provincial statute, the payments or disposition of Property made by any of the Debtor pursuant to this Order and the granting of the CCAA Charges, do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law.

[71] DECLARES that the CCAA Charges shall be valid and enforceable as against all Property of the Debtors and against all Persons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Debtors.

General

[72] ORDERS that no Person shall commence, proceed with or enforce any Proceedings against any of the Directors, employees, legal counsel or financial advisors of the Debtors or of the Monitor in relation to the Business or Property of the Debtors, without first obtaining leave of this Court, upon ten (10) days' written notice to the Debtors counsel, the Monitor's counsel, and to all those referred to in this paragraph whom it is proposed be named in such Proceedings.

[73] ORDERS that, subject to further Order of this Court, all applications in these CCAA proceedings are to be brought on not less than five (5) days' notice to all Persons on the

service list. Each application shall specify a date (the "**Initial Return Date**") and time (the "**Initial Return Time**") for the hearing.

[74] ORDERS that any Person wishing to object to the relief sought on an application in these CCAA proceedings must serve responding application materials or a notice stating the objection to the application and the grounds for such objection (a "**Notice of Objection**") in writing to the moving party, the Debtors and the Monitor, with a copy to all Persons on the service list, no later than 5 p.m. Montreal Time on the date that is three (3) days prior to the Initial Return Date (the "**Objection Deadline**").

[75] ORDERS that, if no Notice of Objection is served by the Objection Deadline, the Judge having carriage of the application (the "**Presiding Judge**") may determine: (a) whether a hearing is necessary; (b) whether such hearing will be in person, by telephone or by written submissions only; and (c) the parties from whom submissions are required (collectively, the "**Hearing Details**"). In the absence of any such determination, a hearing will be held in the ordinary course.

[76] ORDERS that, if no Notice of Objection is served by the Objection Deadline, the Monitor shall communicate with the Presiding Judge regarding whether a determination has been made by the Presiding Judge concerning the Hearing Details. The Monitor shall thereafter advise the service list of the Hearing Details and the Monitor shall report upon its dissemination of the Hearing Details to the Court in a timely manner, which may be contained in the Monitor's next report in these proceedings.

[77] ORDERS that, if a Notice of Objection is served by the Objection Deadline, the interested parties shall appear before the Presiding Judge on the Initial Return Date at the Initial Return Time, or such earlier or later time as may be directed by the Court, to, as the Court may direct: (a) proceed with the hearing on the Initial Return Date and at the Initial Return Time; or (b) establish a schedule for the delivery of materials and the hearing of the contested application and such other matters, including interim relief, as the Court may direct.

[78] DECLARES that this Order and any proceeding or affidavit leading to this Order, shall not, in and of themselves, constitute a default or failure to comply by the Debtors under any statute, regulation, licence, permit, contract, permission, covenant, agreement, undertaking or other written document or requirement.

[79] DECLARES that, except as otherwise specified herein, the Debtors and the Monitor are at liberty to serve any notice, proof of claim form, proxy, circular or other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to Persons or other appropriate parties at their respective given addresses as last shown on the records of the Debtors and that any such service shall be deemed to be received on the date of delivery if by personal delivery or electronic transmission, on the following business day if delivered by courier, or three business days after mailing if by ordinary mail.

[80] DECLARES that the Debtors and any party to these proceedings may serve any court materials in these proceedings on all represented parties electronically, by emailing a PDF or other electronic copy of such materials to counsels' email addresses, provided

that the Debtors shall deliver "hard copies" of such materials upon request to any party as soon as practicable thereafter.

[81] DECLARES that, unless otherwise provided herein, under the CCAA, or ordered by this Court, no document, order or other material need be served on any Person in respect of these proceedings, unless such Person has served a Notice of Appearance on counsel for the Applicants and counsel for the Monitor and has filed such notice with this Court, or appears on the service list prepared by counsel for the Monitor, save and except when an order is sought against a Person not previously involved in these proceedings.

[82] DECLARES that the Debtors, the Applicants or the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of this Order on notice only to each other.

[83] DECLARES that any interested Person may apply to this Court to vary or rescind this Order or seek other relief at the comeback hearing scheduled for ●, 2018 (the "**Comeback Hearing**") upon five (5) days' notice to the Debtors, the Applicants and the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

[84] DECLARES that this Order and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada.

[85] AUTHORIZES the Monitor or any of the Debtors, and in the case of the Monitor, with the prior consent of the Debtors, to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement this Order and any subsequent orders of this Court and, without limitation to the foregoing, any orders under Chapter 15 of the U.S. Bankruptcy Code, including an order for recognition of these CCAA proceedings as "**Foreign Main Proceedings**" in the United States of America pursuant to Chapter 15 of the U.S. Bankruptcy Code, and for which the Monitor, or the authorized representative of the Debtors, shall be the foreign representative of the Debtors. All courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance to the Debtors and the Monitor as may be deemed necessary or appropriate for that purpose.

[86] REQUESTS the aid and recognition of any Court, tribunal, regulatory or administrative body in any Province of Canada and any Canadian federal court or in the United States of America and any court or administrative body elsewhere, to give effect to this Order and to assist the Debtors, the CRO, the Monitor and their respective agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Debtors, the CRO and the Monitor as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor or the authorized representative of the Debtors in any foreign proceeding, to assist the Debtors, the CRO and the Monitor, and to act in aid of and to be complementary to this Court, in carrying out the terms of this Order.

[87] DECLARES that, for the purposes of any applications authorized by paragraphs [85] and [86], Debtors' centre of main interest is located in the province of Québec, Canada.

[88] ORDERS the provisional execution of this Order notwithstanding any appeal.

[89] DECLARES that the mandate letters of Deloitte dated July 27, 2017, January 12, 2018 and June 19, 2018, Exhibit A-4 En Liasse, the Mandate letter of Alternative Capital Group Inc. dated April 30, 2018, Exhibit A-5, the CRO Agreement, Exhibit A-6, the Letter of Intent of Thornhill Investments Inc. dated July 18, 2018, Exhibit A-8, the Interim Financing Term Sheet, Exhibit A-9, and the Draft Key Employee Retention Plan, Exhibit, Exhibit A-10, are confidential and are filed under seal.

The Honorable Justice Chantal Corriveau
Superior Court of the Province of Québec, Canada

Schedule 1 – Index of defined terms

Term	Paragraph of the Initial Order ascribing the meaning to the term
Administration Charge	[56]
Applicants	[2]
Application	[2]
BIA	[26]
Business	[16]
Cash Management System	[20]
CCAA	[2]
CCAA Charges	[65]
Comeback Hearing	[83]
CRO	[57]
CRO Agreement	[59]
CRO Indemnified Parties	[63]
CRO Indemnity Charge	[64.1]
Debtors	[13]
Directors	[18]
Effective Time	[11]
Encumbrances	[66]
Foreign Main Proceedings	[85]
Hearing Details	[75]
Initial Return Date	[73]
Initial Return Time	[73]
Intercompany Transactions	[21]
Interim Facility	[35]
Interim Financing Documents	[36]
Interim Lender	[35]
Interim Lender Charge	[38]
Interim Lender Expenses	[37]
Issuing Party	[31]

Term	Paragraph of the Initial Order ascribing the meaning to the term
KERP	[32]
Monitor	[50]
Notice of Objection	[74]
Notice Period	[41]
Objection Deadline	[74]
Order	[6]
Persons and each Person	[25]
Petition	[1]
Plan	[12]
Presiding Judge	[75]
Proceeding	[16]
Property	[19]
Restructuring	[44]
Sales Taxes	[24](b)
Stay Period	[16]
Third Party	[48]
Third Party Agreement	[69]
Website	[50](a)

Her Majesty The Queen *Appellant*

v.

D.A.I. *Respondent*

and

Women's Legal Education and Action Fund, DisAbled Women's Network Canada, Criminal Lawyers' Association (Ontario) and Council of Canadians with Disabilities *Interveners*

Sa Majesté la Reine *Appelante*

c.

D.A.I. *Intimé*

et

Fonds d'action et d'éducation juridiques pour les femmes, Réseau d'action des femmes handicapées du Canada, Criminal Lawyers' Association (Ontario) et Conseil des Canadiens avec déficiences *Intervenants*

Indexed as: R. *v.* D.A.I.

2012 SCC 5

File No.: 33657.

2011: May 17; 2012: February 10.

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

Répertorié : R. *c.* D.A.I.

2012 CSC 5

N° du greffe : 33657.

2011 : 17 mai; 2012 : 10 février.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Evidence — Testimonial competence — Adults with mental disabilities — Whether adult witnesses with mental disabilities must demonstrate understanding of nature of obligation to tell truth in order to be deemed competent to testify — Whether finding of testimonial competence without demonstration of understanding of obligation to tell truth breaches accused's right to fair trial — Canada Evidence Act, R.S.C. 1985, c. C-5, s. 16.

The Crown alleges that the complainant, a 26-year-old woman with the mental age of a three- to six-year-old, was repeatedly sexually assaulted by her mother's partner during the four years that he lived in the home. It sought to call the complainant to testify about the alleged assaults. After a *voir dire* to determine the complainant's capacity to testify, the trial judge found that she had failed to show that she understood the duty to speak the truth. In a separate *voir dire*, the trial judge also excluded out-of-court statements made by the complainant to the police and her teacher on the grounds that the statements were unreliable and would

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit criminel — Preuve — Habilité à témoigner — Adultes ayant une déficience intellectuelle — Les adultes ayant une déficience intellectuelle doivent-ils démontrer qu'ils comprennent la nature de l'obligation de dire la vérité pour être réputés habiles à témoigner? — La conclusion que le témoin est habile à témoigner sans qu'il ne soit démontré qu'il comprend l'obligation de dire la vérité porte-t-elle atteinte au droit de l'accusé à un procès équitable? — Loi sur la preuve au Canada, L.R.C. 1985, ch. C-5, art. 16.

Le ministère public prétend que la plaignante, une femme âgée de 26 ans ayant l'âge mental d'un enfant de trois à six ans, a été agressée sexuellement de façon répétée par le conjoint de sa mère au cours des quatre années où il a vécu avec elles. La poursuite a tenté de faire témoigner la plaignante à propos des agressions alléguées. À l'issue d'un voir-dire afin de déterminer si la plaignante était habile à témoigner, le juge du procès a conclu qu'elle n'avait pas démontré qu'elle comprenait l'obligation de dire la vérité. À l'issue d'un autre voir-dire, le juge du procès a également exclu les déclarations extrajudiciaires que la plaignante avait faites à

compromise the accused's right to a fair trial. While the remainder of the evidence raised some serious suspicions about the accused's conduct, the case collapsed and the accused was acquitted. The Ontario Court of Appeal affirmed this result.

Held (Binnie, LeBel and Fish JJ. dissenting): The appeal should be allowed, the acquittal set aside and a new trial ordered.

Per McLachlin C.J. and Deschamps, Abella, Charron, Rothstein and Cromwell JJ.: The question in issue is whether the trial judge correctly interpreted the requirements of s. 16 of the *Canada Evidence Act* for the testimonial competence of persons of 14 years of age or older (adults) with mental disabilities. Section 16(3) imposes two requirements for the testimonial competence of an adult with mental disabilities: (1) the ability to communicate the evidence; and (2) a promise to tell the truth. It is unnecessary and indeed undesirable to conduct abstract inquiries into whether the witness understands the difference between truth and falsity, the obligation to give true evidence in court, and what makes a promise binding. The plain words of s. 16(3) focus on the concrete acts of communicating and promising. Judges should not add other elements to the dual requirements imposed by s. 16(3). This approach does not transform the promise into an empty gesture. Adults with mental disabilities may have a practical understanding of the difference between the truth and a lie and know they should tell the truth without being able to explain what telling the truth means in abstract terms. When such a witness promises to tell the truth, the seriousness of the occasion and the need to say what really happened is reinforced.

Insofar as the authorities suggest that s. 16(3) requires an abstract understanding of the obligation to tell the truth, they should be rejected. That requirement was based on a version of s. 16 that explicitly required that the witness "understands the duty of speaking the truth". Although Parliament deleted that requirement in 1987, courts continued to require proof that child witnesses understood the duty to tell the truth. Parliament responded by enacting s. 16.1(7), which expressly forbade such inquiries of child witnesses. However, the existence of the s. 16.1(7) ban does not require us to infer that mentally disabled adults are to be questioned on the obligation to tell the truth. First, because s. 16(3)

la police et à son enseignante au motif que ces déclarations n'étaient pas dignes de foi et que leur admission en preuve compromettrait le droit de l'accusé à un procès équitable. Les autres éléments de preuve soulevaient de graves soupçons quant à la conduite de l'accusé, mais la preuve de la poursuite s'est effondrée et l'accusé a été acquitté. La Cour d'appel de l'Ontario a confirmé ce résultat.

Arrêt (les juges Binnie, LeBel et Fish sont dissidents) : Le pourvoi est accueilli, l'acquittement est annulé et la tenue d'un nouveau procès est ordonnée.

La juge en chef McLachlin et les juges Deschamps, Abella, Charron, Rothstein et Cromwell : La question en litige est de savoir si le juge du procès a correctement interprété les prescriptions de l'art. 16 de la *Loi sur la preuve au Canada* relativement à l'habilité à témoigner des personnes âgées de 14 ans ou plus (adultes) ayant une déficience intellectuelle. Le paragraphe 16(3) impose deux conditions relativement à l'habilité à témoigner d'un adulte ayant une déficience intellectuelle : (1) la capacité de communiquer les faits dans son témoignage et (2) une promesse de dire la vérité. Il n'est ni nécessaire, ni même souhaitable, de poser des questions de nature abstraite à la personne afin de voir si elle comprend la différence entre la vérité et la fausseté, l'obligation de dire la vérité devant le tribunal, et ce qui rend une promesse obligatoire. Le libellé explicite du par. 16(3) met l'accent sur les actes concrets que sont la communication et la promesse. Les juges ne devraient pas ajouter d'autres éléments aux deux conditions qu'impose le par. 16(3). Une telle approche ne vide pas de son sens la promesse de dire la vérité. Des adultes ayant une déficience intellectuelle peuvent concrètement faire la différence entre la vérité et le mensonge et savoir qu'ils doivent dire la vérité sans être capables d'expliquer en termes abstraits ce que signifie dire la vérité. Lorsqu'un tel témoin promet de dire la vérité, cela confirme le caractère sérieux de la situation et la nécessité de dire ce qui s'est vraiment produit.

Dans la mesure où les autorités prétendent que le par. 16(3) exige une compréhension, dans l'abstrait, de l'obligation de dire la vérité, elles doivent être rejetées. Cette exigence découlait d'une version de l'art. 16 qui prévoyait explicitement que le témoin « compren[ne] le devoir de dire la vérité ». Bien que le législateur ait éliminé cette exigence en 1987, les tribunaux ont maintenu l'exigence d'établir que les enfants qui témoignent comprennent l'obligation de dire la vérité. En réponse, le législateur a adopté le par. 16.1(7), qui interdit explicitement de tels interrogatoires lorsque des enfants sont en cause. Toutefois, l'interdiction prévue au par. 16.1(7) ne nous oblige pas à déduire que les adultes ayant une

only required a promise to tell the truth, Parliament had no need to ban such questioning of adult witnesses with mental disabilities. Second, s. 16(3) required only a promise to tell the truth, so there was no need for Parliament to enact a similar provision with respect to s. 16(3). Third, the enactment of s. 16.1(7) did not imply that the earlier judicial interpretation of s. 16(3) as it applied to children had been endorsed for adult witnesses. No inference as to the meaning of s. 16(3) flows from the mere adoption of s. 16.1(7) with respect to children, and the re-enactment of s. 16(3) does not imply that Parliament accepted the judicial interpretation that prevailed at the time of the re-enactment. Fourth, the fact that s. 16 does not have a provision equivalent to s. 16.1(7) does not mean that adult witnesses with mental disabilities must demonstrate an understanding of the nature of the duty to speak the truth — s. 16(3) sets two requirements for the competence of adults with mental disabilities, and nothing further need be imported. Fifth, there is no need to prove that, unless it can be shown that adult witnesses with mental disabilities are the same as, or like, child witnesses, they must be subjected to an inquiry into their understanding of the nature of the obligation to tell the truth before they can be held competent to testify.

The underlying policy concerns — bringing the abusers to justice, ensuring fair trials and preventing wrongful convictions — also support allowing adults with mental disabilities to testify. With respect to the first concern, rejecting the evidence of alleged victims on the ground that they cannot explain the nature of the obligation to tell the truth in philosophical terms would exclude reliable and relevant evidence, immunize an entire category of offenders from criminal responsibility for their acts, and further marginalize the already vulnerable victims of sexual predators. With respect to the second, allowing an adult witness with mental disabilities to testify when the witness can communicate the evidence and promises to tell the truth does not render a trial unfair. Generally, the reliability threshold is met by establishing that the witness has the capacity to understand and answer the questions put to her and by bringing home the need to tell the truth by securing an oath, affirmation or promise. There is no guarantee that any witness will tell the truth — the trial process seeks a basic indication of reliability. That, along with the rules governing admissibility and weight of the

déficience intellectuelle doivent être interrogés sur l'obligation de dire la vérité. Premièrement, parce que le par. 16(3) exigeait simplement une promesse de dire la vérité, il n'était pas nécessaire que le législateur interdise de tels interrogatoires dans le cas d'adultes ayant une déficience intellectuelle. Deuxièmement, étant donné que le par. 16(3) exigeait simplement une promesse de dire la vérité, il n'était pas nécessaire que le législateur adopte une disposition similaire en ce qui concerne le par. 16(3). Troisièmement, l'adoption du par. 16.1(7) ne permettait pas d'inférer que l'interprétation judiciaire du par. 16(3) relativement aux enfants s'appliquait aux adultes. Aucune inférence quant au sens du par. 16(3) ne découle de la simple adoption du par. 16.1(7) relativement aux enfants, et la nouvelle édiction du par. 16(3) ne permet pas d'inférer que le législateur a adopté l'interprétation judiciaire de la disposition qui prévalait à l'époque de la nouvelle édiction. Quatrièmement, l'absence, à l'art. 16, d'une disposition équivalente au par. 16.1(7) ne signifie pas que les adultes ayant une déficience intellectuelle doivent démontrer qu'ils comprennent la nature de l'obligation de dire la vérité afin de pouvoir témoigner — le par. 16(3) énonce deux conditions relatives à l'habilité à témoigner des adultes ayant une déficience intellectuelle, et il n'y a rien d'autre à y incorporer. Cinquièmement, il n'est pas nécessaire d'établir, sauf s'il peut être démontré qu'ils sont comme les enfants, ou leur ressemblent, que les adultes ayant une déficience intellectuelle doivent subir un interrogatoire pour que l'on vérifie, avant de déterminer s'ils sont habiles à témoigner, qu'ils comprennent la nature de l'obligation de dire la vérité.

Les considérations de politique générale qui sous-tendent la question, à savoir traduire en justice les agresseurs et garantir la tenue d'un procès équitable pour l'accusé ainsi que prévenir les déclarations de culpabilité injustifiées, militent également en faveur de permettre aux adultes ayant une déficience intellectuelle de témoigner. En ce qui concerne la première considération, rejeter le témoignage de victimes alléguées au motif qu'elles ne peuvent pas expliquer en termes philosophiques la nature de l'obligation de dire la vérité équivaudrait à écarter des témoignages fiables et pertinents, à dégager une catégorie entière de contrevenants de toute responsabilité criminelle relativement à leurs actes, et à marginaliser davantage les victimes déjà vulnérables des prédateurs sexuels. Pour ce qui est de la deuxième considération, permettre à l'adulte ayant une déficience intellectuelle de témoigner dans le cas où il est capable de communiquer les faits dans son témoignage et de promettre de dire la vérité ne rend pas le procès inéquitable. En règle générale, le seuil de fiabilité est satisfait s'il est établi que le témoin a la faculté de comprendre les questions qui lui sont posées et d'y

evidence work to ensure that a verdict of guilty is based on accurate and credible evidence and that the accused has a fair trial.

When applying s. 16(3) in the context of the *Canada Evidence Act*, eight considerations are appropriate. First, the *voir dire* on the competence of a proposed witness is an independent inquiry: it may not be combined with a *voir dire* on other issues. Second, the *voir dire* should be brief, but not hasty. It is preferable to hear all available relevant evidence that can be reasonably considered before preventing a witness to testify. Third, the primary source of evidence for a witness's competence is the witness herself. Her examination should be permitted. Questioning an adult with mental disabilities requires consideration and accommodation for her particular needs; questions should be phrased patiently in a clear, simple manner. Fourth, persons familiar with the proposed witness in her everyday situation understand her best. They may be called as fact witnesses to provide evidence on her development. Fifth, expert evidence may be adduced if it meets the criteria for admissibility, but preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness. Sixth, the trial judge must make two inquiries during the *voir dire* on competence: (a) does the proposed witness understand the nature of an oath or affirmation, and (b) can she communicate the evidence? Seventh, the second inquiry into the witness's ability to communicate the evidence requires the trial judge to explore in a general way whether she can relate concrete events by understanding and responding to questions. It may be useful to ask if she can differentiate between true and false everyday factual statements. Finally, the witness testifies under oath or affirmation if she passes both parts of the test, and on promising to tell the truth if she passes the second part only.

répondre, et si le témoin comprend qu'après avoir prêté serment ou fait une promesse ou une affirmation solennelle, il doit dire la vérité. Rien ne garantit qu'un témoin dira la vérité — on recherche simplement dans le cadre du procès un indice élémentaire de fiabilité. Cela, combiné aux règles régissant l'admissibilité et le poids de la preuve, permet de garantir qu'un verdict de culpabilité soit étayé par des éléments de preuve exacts et crédibles et que le procès de l'accusé soit équitable.

Lorsqu'il s'agit d'appliquer le par. 16(3) dans le contexte de la *Loi sur la preuve au Canada*, il faut tenir compte de huit considérations. Premièrement, le voir-dire relatif à l'habilité à témoigner d'un témoin éventuel constitue une enquête indépendante : il ne peut être combiné à un voir-dire relatif à d'autres questions. Deuxièmement, le voir-dire devrait être bref, mais non précipité. Il est préférable d'entendre toute la preuve pertinente disponible pouvant raisonnablement être prise en considération avant d'empêcher une personne de témoigner. Troisièmement, la source principale de preuve lorsqu'il s'agit de déterminer si une personne est habile à témoigner est la personne elle-même. Son interrogatoire devrait être autorisé. Pour interroger un adulte ayant une déficience intellectuelle, il faut tenir compte de ses besoins particuliers et prendre les mesures d'adaptation qui s'imposent; les questions devraient être formulées patiemment, de façon claire et simple. Quatrièmement, les personnes de l'entourage qui connaissent personnellement le témoin éventuel sont les mieux placées pour comprendre son état quotidien. Elles peuvent être appelées, à titre de témoins des faits, à témoigner sur son développement. Cinquièmement, une preuve d'expert peut être produite si elle satisfait aux critères d'admissibilité; on préfère cependant toujours le témoignage d'experts ayant eu un contact personnel et régulier avec le témoin éventuel. Sixièmement, le juge du procès doit répondre à deux questions durant le voir-dire relatif à l'habilité à témoigner : a) le témoin éventuel comprend-il la nature du serment ou de l'affirmation solennelle, et b) est-il capable de communiquer les faits dans son témoignage? Septièmement, pour répondre à la deuxième question relative à la capacité de la personne de communiquer les faits dans son témoignage, le juge du procès doit vérifier de façon générale si la personne est capable de relater des faits concrets en comprenant les questions qui lui sont posées et en y répondant. Il peut être utile de se demander si la personne est en mesure de différencier entre de vraies et de fausses affirmations factuelles de tous les jours. Finalement, la personne peut témoigner sous serment ou affirmation solennelle si elle satisfait aux deux volets du critère, ou, si elle satisfait uniquement au deuxième volet, en promettant de dire la vérité.

In the instant case, the trial judge erred in failing to consider the second part of the test under s. 16. This error of law led him to rule the complainant incompetent. This error cannot be rectified by comments made by the trial judge at other points in the trial or by the doctrine of deference.

Per Binnie, LeBel and Fish JJ. (dissenting): The majority judgment unacceptably dilutes the protection Parliament intended to provide to accused persons by turning Parliament's direction permitting a person "whose mental capacity is challenged" to testify only "on promising to tell the truth" into an empty formality — a mere mouthing of the words "I promise" without any inquiry as to whether the promise has any significance to the potential witness

Section 16 mandates a single inquiry which presents the trial judge dealing with a witness whose mental capacity is challenged with three options. Section 16(2) provides that, if the challenged witness is able to communicate the evidence and understands the nature of an oath or a solemn declaration in terms of ordinary, everyday social conduct, he or she shall testify under oath or solemn affirmation. If the challenged witness is able to communicate the evidence but does not understand the nature of an oath or a solemn affirmation, s. 16(3) provides that he or she may provide unsworn testimony on promising to tell the truth. If the challenged witness does not satisfy either criterion, s. 16(4) provides that the individual with a mental disability shall not testify.

There is agreement with the majority that promising is an act aimed at bringing home to the witness the seriousness of the situation and the importance of being careful and correct. The promise thus serves a practical, prophylactic purpose. It cannot be correct, however, that it is out of bounds for a trial judge to try to determine — in concrete everyday terms — whether there is in reality such a prophylactic effect in the case of a particular witness whose mental capacity has been challenged. If such a witness is so disabled as not to understand the seriousness of the situation and the importance of being careful and correct, there is no prophylactic effect, and the fair trial interests of the accused under s. 16, as enacted in 1987, are unfairly prejudiced.

In 2005, when Parliament amended the *Canada Evidence Act* to prohibit asking child witnesses "any questions regarding their understanding of the nature

En l'espèce, le juge du procès a commis une erreur en n'examinant pas le deuxième volet du critère établi à l'art. 16. Cette erreur de droit l'a amené à conclure que la plaignante n'était pas habile à témoigner. Des commentaires formulés par le juge du procès à d'autres étapes de l'instruction ou le principe de la déférence judiciaire ne peuvent corriger cette erreur.

Les juges Binnie, LeBel et Fish (dissidents) : Les juges majoritaires diluent de façon inacceptable la protection que le législateur voulait accorder aux accusés en transformant la directive du législateur, qui permet à une personne « dont la capacité mentale est mise en question » de témoigner « en promettant de dire la vérité », en une formalité vide de sens — le témoin éventuel ne fait que prononcer les mots « je promets » sans que l'on vérifie s'il accorde de l'importance à sa promesse.

L'article 16 ne requiert qu'une seule enquête qui présente au juge du procès trois possibilités à l'égard d'une personne dont la capacité mentale est mise en question. Selon le par. 16(2), si cette personne est capable de communiquer les faits dans son témoignage et comprend la nature du serment ou de l'affirmation solennelle au sens de la conduite sociale ordinaire de la vie quotidienne, elle témoignera sous serment ou affirmation solennelle. Si la personne est capable de communiquer les faits dans son témoignage mais ne comprend pas la nature du serment ou de l'affirmation solennelle, le par. 16(3) prévoit qu'elle peut témoigner sans prêter serment en promettant de dire la vérité. Si la personne dont la capacité mentale est mise en question ne satisfait à ni l'une ni l'autre de ces exigences, le par. 16(4) prévoit qu'elle ne peut témoigner.

Il y a accord avec les juges de la majorité pour dire que la promesse est un acte visant à renforcer, dans l'esprit du témoin éventuel, le caractère sérieux de la situation et l'importance de répondre de façon prudente et correcte. La promesse sert donc un objectif pratique et prophylactique. On ne saurait toutefois affirmer qu'un juge du procès ne peut pas tenter de déterminer — en termes concrets de la vie quotidienne — si un tel effet prophylactique existe effectivement dans le cas d'une personne dont la capacité mentale est mise en question. Si cette personne est à ce point déficiente qu'elle ne comprend pas le caractère sérieux de la situation et l'importance de répondre de façon prudente et correcte, il n'y a aucun effet prophylactique et le droit de l'accusé à un procès équitable aux termes de l'art. 16 adopté en 1987 subit une atteinte injustifiée.

En 2005, lorsque le législateur a modifié la *Loi sur la preuve au Canada* pour interdire que l'on ne pose aux enfants appelés à témoigner « [a]ucune question sur

of the promise to tell the truth" (s. 16.1(7)), the empirical evidence before Parliament related exclusively to children. No such empirical studies were carried out with respect to adults with mental disabilities. In their case, no "don't ask" provision was proposed, let alone adopted.

There is agreement with the majority that the words "on promising to tell the truth" in s. 16(3) must bear the same meaning as "to promise to tell the truth" in s. 16.1(6). That being the case, the majority must read the s. 16.1(7) "don't ask" rule applicable only to children into s. 16(3) applicable only to mentally challenged adults in order to read down the words "promising to tell the truth" in s. 16(3), and thus treat adults with mental disabilities as equivalent for the purposes of s. 16 to children without mental disabilities. The fact that psychiatrists speak of persons with mental disabilities in terms of mental ages does not mean that an adult with mental age of six is on the same footing as a six-year-old child with no mental disability whatsoever — a six-year-old with the mental capacity of a six-year-old does not suffer from a mental disability. No evidence was led to suggest equivalence and judicial notice cannot be taken of alleged "facts" that are neither notorious nor easily verifiable from undisputed sources.

On a competency *voir dire* where the mental capacity of an adult is challenged, and the adult is herself called as a proposed witness, the court may admit evidence from fact witnesses personally familiar with the complainant's verbal and cognitive abilities and limitations to help the court gain a better understanding of the person's capacity. These witnesses would not be in a position to express an expert opinion, but could testify about their direct personal observations of the proposed witness. Such evidence might, if the trial judge considered it helpful, better enable the judge or jury to appreciate her responses (or non-responses) in the witness box. However, ultimately, the judge must reach his or her own considered opinion about the mental capacity of the proposed witness prior to admitting the testimony.

In this case, the trial judge had serious concerns about the complainant's ability to communicate the evidence. The complainant's answers to a series of simple

la compréhension de la nature de la promesse » (par. 16.1(7)), la preuve empirique soumise au législateur se rapportait exclusivement aux enfants. Aucune étude empirique de ce genre n'a été effectuée relativement aux adultes ayant une déficience intellectuelle. Dans le cas de ces adultes, aucune règle interdisant de poser des questions n'a été proposée, et encore moins adoptée.

Il y a accord avec les juges de la majorité pour dire que les mots « en promettant de dire la vérité » au par. 16(3) doivent avoir le même sens que les mots « promettre [. . .] de dire la vérité » au par. 16.1(6). Cela étant, les juges majoritaires doivent incorporer, au par. 16(3) applicable uniquement aux adultes ayant une déficience intellectuelle, la règle du par. 16.1(7) interdisant de poser des questions, qui s'applique uniquement aux enfants, afin d'atténuer l'expression « en promettant de dire la vérité » au par. 16(3) et de traiter sur un pied d'égalité, pour le besoin de l'art. 16, les adultes ayant une déficience intellectuelle et les enfants n'ayant pas de déficience intellectuelle. Le fait pour les psychiatres de classer en fonction de l'âge mental les personnes ayant une déficience intellectuelle ne signifie pas qu'un adulte ayant l'âge mental d'un enfant de six ans soit sur un pied d'égalité avec un enfant âgé de six ans n'ayant aucune déficience intellectuelle — un enfant de six ans ayant la capacité mentale d'un enfant de six ans n'a pas une déficience intellectuelle. Aucun élément de preuve laissant croire que cette équivalence existe n'a été soumis et nous ne pouvons pas prendre connaissance d'office de « faits » allégués qui ne sont ni notoires, ni facilement vérifiables en ayant recours aux sources incontestées.

Dans le cadre d'un voir-dire relatif à l'habilité à témoigner, où la capacité mentale d'une personne adulte est mise en question et cette personne est assignée à témoigner, le tribunal peut admettre les dépositions de témoins des faits qui connaissent bien les habilités du témoin éventuel à s'exprimer et à comprendre, ainsi que ses limites, et ce, afin d'aider le tribunal à mieux saisir les capacités de la personne. Ces témoins ne seraient pas en mesure d'exprimer une opinion d'expert, mais ils pourraient témoigner à propos de ce qu'ils ont eux-mêmes directement observé chez le témoin éventuel. La preuve pourrait, si le juge du procès l'estime utile, aider le juge ou le jury à apprécier les réponses (ou l'absence de réponse) que lui donne la personne qui témoigne. Cependant, c'est le juge qui, en fin de compte, doit former sa propre opinion éclairée au sujet de la capacité mentale du témoin éventuel.

En l'espèce, le juge du procès avait de sérieuses réserves quant à la capacité de la plaignante de communiquer les faits dans son témoignage. Les réponses de la

and concrete questions left him fully satisfied that she did not understand what a promise to tell the truth involves. Much turned on the significance of the complainant's repeated "I don't know" answers. Clearly, it was an important advantage for the trial judge to watch the questions and answers unfold and to assess whether the complainant was actually able to "compute" her responses to what she was being asked. There was no allegation of bad faith, but she may nevertheless have been mistaken in her perception or recollection of events and the crucible of cross-examination was useless because there was no secure method of testing her credibility. Her inability to deal with simple questions would mean her evidence would be effectively immune to challenge by the defence, thereby prejudicing the interest of society as well as the accused in a fair trial. Sitting on appeal from this determination, and not having had the advantage of observing and questioning the complainant, there is no valid basis for this Court to reverse the trial judge's assessment of her mental capacity.

The trial judge's conclusion that the complainant lacked the ability to perceive, recall and communicate events and to understand the difference between truth and falsehood set up, but did not predetermine, his conclusion that her testimony lacked sufficient reliability. It was neither surprising nor an error however that the trial judge's reasoning on the threshold reliability in his hearsay ruling was quite similar to his reasoning on the s. 16 *voir dire*, and given his advantage in seeing and hearing the complainant, his exclusion of her out-of-court statements should equally be upheld by this Court.

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By McLachlin C.J.

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plaignante à une série de questions simples et concrètes ont entièrement convaincu le juge qu'elle ne comprenait pas ce que la promesse de dire la vérité signifie. L'instance reposait en grande partie sur l'importance des réponses de la plaignante lorsqu'elle répétait « je ne sais pas ». De toute évidence, il s'agissait d'un avantage important pour le juge du procès d'être témoin de l'enchaînement des questions et des réponses et de déterminer si la plaignante était réellement capable de « computer » les questions posées et d'y répondre. La bonne foi de la plaignante n'était aucunement en cause, mais elle aurait quand même pu se tromper pour ce qui est de percevoir ou de se rappeler les faits, et l'épreuve du contre-interrogatoire était inutile puisqu'il n'y avait aucun moyen sûr de vérifier sa crédibilité. Son incapacité de comprendre des questions simples et d'y répondre signifiait que son témoignage ne pourrait effectivement être attaqué par la défense, ce qui porterait atteinte à l'intérêt de la société et au droit de l'accusé à un procès équitable. Siégeant en appel de cette décision, et n'ayant pas eu l'avantage d'observer et d'interroger la plaignante, il n'y a aucune raison valable d'infirmer l'appréciation, par le juge, de sa capacité mentale.

Le fait que le juge du procès ait conclu que la plaignante n'avait pas la capacité de percevoir, de se souvenir et de raconter ce qui s'est passé et de comprendre la différence entre la vérité et la fausseté l'a amené, mais pas de façon automatique, à conclure que le témoignage de la plaignante n'était pas suffisamment fiable. Il n'était pas surprenant, et ce n'était pas une erreur, que le raisonnement du juge du procès sur la question du seuil de fiabilité dans sa décision relative au ouï-dire ait été très semblable à son raisonnement sur le voir-dire prévu à l'art. 16. Comme il a eu l'avantage de voir et d'entendre la plaignante, la Cour devrait aussi maintenir la décision du juge du procès d'exclure ses déclarations extrajudiciaires.

Jurisprudence

Citée par la juge en chef McLachlin

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General of Quebec v. Carrières Ste-Thérèse Ltée, [1985] 1 S.C.R. 831; *R. v. Caron* (1994), 72 O.A.C. 287; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

By Binnie J. (dissenting)

R. v. Rockey, [1996] 3 S.C.R. 829; *R. v. Khan*, [1990] 2 S.C.R. 531, aff'g (1988), 42 C.C.C. (3d) 197; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Marquard*, [1993] 4 S.C.R. 223; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458; *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Parrott*, 2001 SCC 3, [2001] 1 S.C.R. 178; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787.

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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, MacPherson and Armstrong JJ.A.), 2010 ONCA 133, 260 O.A.C. 96, 252 C.C.C. (3d) 178, 73 C.R. (6th) 50, [2010] O.J. No. 665 (QL), 2010 CarswellOnt 880, affirming a decision of McKinnon J., 2008 CanLII 21725, [2008] O.J. No. 1823 (QL), 2008 CarswellOnt 2637. Appeal allowed, Binnie, LeBel and Fish JJ. dissenting.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Doherty, MacPherson et Armstrong), 2010 ONCA 133, 260 O.A.C. 96, 252 C.C.C. (3d) 178, 73 C.R. (6th) 50, [2010] O.J. No. 665 (QL), 2010 CarswellOnt 880, qui a confirmé une décision du juge McKinnon, 2008 CanLII 21725, [2008] O.J. No. 1823 (QL), 2008 CarswellOnt 2637. Pourvoi accueilli, les juges Binnie, LeBel et Fish sont dissidents.

Jamie C. Klukach and *John Semenoff*, for the appellant.

Jamie C. Klukach et *John Semenoff*, pour l'appelante.

Howard L. Krongold and *Leonardo Russomanno*, for the respondent.

Howard L. Krongold et *Leonardo Russomanno*, pour l'intimé.

Joanna L. Birenbaum, for the interveners the Women's Legal Education and Action Fund and the DisAbled Women's Network Canada.

Joanna L. Birenbaum, pour les intervenants le Fonds d'action et d'éducation juridiques pour les femmes et le Réseau d'action des femmes handicapées du Canada.

Joseph Di Luca and *Erin Dann*, for the intervener the Criminal Lawyers' Association (Ontario).

Joseph Di Luca et *Erin Dann*, pour l'intervenante Criminal Lawyers' Association (Ontario).

David M. Wright and *Helga D. Van Iderstine*, for the intervener the Council of Canadians with Disabilities.

David M. Wright et *Helga D. Van Iderstine*, pour l'intervenant le Conseil des Canadiens avec déficiences.

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

[1] THE CHIEF JUSTICE — Sexual assault is an evil. Too frequently, its victims are the vulnerable in our society — children and the mentally handicapped. Yet rules of evidence and criminal procedure, based on the norm of the average witness, may make it difficult for these victims to testify in courts of law. The challenge for the law is to permit the truth to be told, while protecting the right of the accused to a fair trial and guarding against wrongful conviction.

[2] Parliament has addressed this challenge by a series of amendments to the *Canada Evidence Act*, R.S.C. 1985, c. C-5, that modify the normal rules of testimonial capacity for children and adults with mental disabilities. This Court has considered the provisions relating to children on a number of occasions. This appeal involves the provisions relating to adults with mental disabilities.

[3] At the heart of this case is a young woman, K.B., aged 26, with the mental age of a three- to six-year-old. The Crown alleges that she was repeatedly sexually assaulted by her mother's partner at the time, D.A.I. The prosecution sought to call the young woman to testify about the alleged assaults. It also sought to adduce evidence through her school teacher and a police officer of what she told them.

[4] The trial judge excluded this evidence, on the ground that K.B. was not competent to testify in a court of law (A.R., vol. I, at p. 2). As a result, the case collapsed and D.A.I. was acquitted (2008 CanLII 21725 (Ont. S.C.J.)). The Ontario Court of Appeal affirmed the acquittal (2010 ONCA 133, 260 O.A.C. 96).

[5] I respectfully disagree. In my view, the trial judge made a fundamental error of law in

Version française du jugement de la juge en chef McLachlin et des juges Deschamps, Abella, Charron, Rothstein et Cromwell rendu par

[1] LA JUGE EN CHEF — L'agression sexuelle est un fléau. Trop souvent, ses victimes sont les personnes les plus vulnérables de notre société — les enfants et les personnes ayant une déficience intellectuelle. Or, les règles de preuve et la procédure en matière criminelle, qui sont fondées sur la norme du témoin moyen, peuvent compliquer la tâche de ces victimes qui sont appelées à témoigner dans des cours de justice. Le droit est confronté au défi de permettre que la vérité soit révélée tout en protégeant le droit de l'accusé à un procès équitable et en évitant toute possibilité de déclarations de culpabilité injustifiées.

[2] Le législateur a relevé ce défi en apportant, dans la *Loi sur la preuve au Canada*, L.R.C. 1985, ch. C-5, une série de modifications aux règles relatives à l'habilité à témoigner afin d'accommoder les enfants et les adultes ayant une déficience intellectuelle. La Cour a examiné à plusieurs reprises les dispositions ayant trait aux enfants. Dans ce pourvoi, elle examine les dispositions relatives aux adultes ayant une déficience intellectuelle.

[3] La présente affaire met en cause une jeune femme, K.B., âgée de 26 ans, qui a l'âge mental d'un enfant de trois à six ans. Le ministère public prétend qu'elle a été agressée sexuellement de façon répétée par le conjoint de sa mère à l'époque, D.A.I. La poursuite a tenté de faire témoigner la jeune femme à propos des agressions alléguées. Elle a également tenté de présenter en preuve les révélations faites par K.B. à son institutrice et à un policier.

[4] Le juge du procès a exclu ces éléments de preuve au motif que K.B. n'était pas habile à témoigner dans une cour de justice (d.a., vol. I, p. 2). Par conséquent, la preuve de la poursuite s'est effondrée et D.A.I. a été acquitté (2008 CanLII 21725 (C.S.J. Ont.)). La Cour d'appel de l'Ontario a confirmé l'acquittement (2010 ONCA 133, 260 O.A.C. 96).

[5] En toute déférence pour l'opinion contraire, je ne souscris pas à cette décision. Selon moi, le juge

interpreting and applying the provisions of the *Canada Evidence Act* governing the testimonial competence of adult witnesses with mental disabilities. This error of law vitiates the trial judge's ruling that K.B. could not be allowed to testify. Subsequent evidence on other matters cannot overcome this fatal defect. I would therefore set aside the acquittal of D.A.I. and order a new trial.

I. Factual Background

[6] The complainant, K.B., was 22 at trial and 19 at the time of the alleged assault, but possessed the mental age of a three- to six-year-old. She lived with her mother and her mother's partner, D.A.I., as well as her sister. During the four years he was in the home, D.A.I. developed a close relationship with K.B.

[7] Sometime after D.A.I. separated from K.B.'s mother and left the home, K.B. told her special education teacher about a "game" that she and D.A.I. used to play together which involved D.A.I. touching her. She later repeated this statement to the police. K.B., through bodily gestures, described the game as involving touching her breasts and vagina. In her statement to the police, she indicated that D.A.I. had touched her vagina, buttocks and breasts beneath her pajamas, and that this had happened many times.

[8] At the preliminary inquiry, K.B. was ruled competent to testify on the basis that she was able to communicate the evidence. Her videotaped statement to the police was admitted as her examination-in-chief and she was cross-examined.

[9] The issue of K.B.'s testimonial capacity was raised at trial, and the trial judge held a *voir dire* to determine whether she could be allowed to testify. K.B. and Dr. K., the defence's expert witness, were the only ones to testify during the *voir dire* on competence. The Crown's examination of K.B.

du procès a commis une erreur de droit fondamentale dans l'interprétation et l'application des dispositions de la *Loi sur la preuve au Canada* régissant l'habilité à témoigner des personnes adultes ayant une déficience intellectuelle. Cette erreur de droit vicie la décision du juge du procès de ne pas permettre à K.B. de témoigner. Une preuve produite ultérieurement relativement à d'autres questions ne peut remédier à ce vice fatal. Je suis donc d'avis d'annuler l'acquittement de D.A.I. et d'ordonner la tenue d'un nouveau procès.

I. Le contexte factuel

[6] La plaignante, K.B., était âgée de 22 ans au moment du procès et de 19 ans au moment où elle aurait été agressée, mais elle avait l'âge mental d'un enfant de trois à six ans. Elle vivait avec sa mère et le conjoint de cette dernière, D.A.I., ainsi qu'avec sa sœur. Au cours des quatre années où il a vécu à la maison, D.A.I. a établi une relation étroite avec K.B.

[7] Quelque temps après que D.A.I. se soit séparé de la mère de K.B. et ait quitté la maison, K.B. a parlé à son enseignante spécialisée d'un « jeu » auquel elle se livrait avec D.A.I. et dans lequel ce dernier la touchait. Plus tard, elle a fait à la police une déclaration qui allait dans le même sens. K.B. a décrit par des gestes le jeu dans lequel l'intimé touchait ses seins et son vagin. Dans sa déclaration à la police, elle a mentionné que D.A.I. avait touché son vagin, ses fesses et ses seins sous son pyjama, et que cela s'était produit à plusieurs reprises.

[8] À l'enquête préliminaire, K.B. a été jugée habile à témoigner parce qu'elle était capable de communiquer les faits dans son témoignage. La déclaration enregistrée sur bande vidéo qu'elle a faite à la police a été admise à titre d'interrogatoire principal et elle a été contre-interrogée.

[9] La question de la capacité à témoigner de K.B. ayant été soulevée, le juge du procès a tenu un voir-dire afin de déterminer si K.B. pouvait être autorisée à témoigner. K.B. et le D[r] K., le témoin expert de la défense, ont été les seules personnes à témoigner durant le voir-dire sur la question de l'habilité

demonstrated that she understood the difference between telling the truth and lying in concrete situations. However, the trial judge went beyond this to question K.B. on her understanding of the nature of truth and falsity, of moral and religious duties, and of the legal consequences of lying in court. K.B. was unable to respond adequately to these more abstract questions, to which she frequently answered "I don't know" (A.R., vol. I, at pp. 117-19). Dr. K., a psychiatrist, testified for the defence. Dr. K's opinion was formed without personal contact with K.B. It was based on school and medical records, as well as on K.B.'s behaviour in her videotaped statement and during the *voir dire*. Dr. K. expressed the view that K.B. had "serious difficulty in differentiating the concept of truth and lie", noted her low tolerance for frustration, and said, "I don't think she ha[d] the ability to think what you're asking and come up with an answer" (*ibid*., at pp. 159 and 161).

à témoigner. L'interrogatoire de K.B. par le ministère public a démontré qu'elle comprenait la différence entre la vérité et le mensonge dans des situations concrètes. Cependant, le juge du procès est allé plus loin en interrogeant K.B. afin d'établir si elle comprenait la nature de la vérité et du mensonge, des obligations morales et religieuses, et des conséquences juridiques liées au fait de mentir au tribunal. K.B. n'a pas pu répondre adéquatement à ces questions plus abstraites, répétant à plusieurs reprises : [TRADUCTION] « Je ne sais pas » (d.a., vol. I, p. 117-119). Le D[r] K., un psychiatre, a témoigné pour la défense. Son opinion était formée sans qu'il ait eu de contact personnel avec K.B. mais en se fondant sur des dossiers scolaires et médicaux de K.B. ainsi que sur le comportement de cette dernière sur la bande vidéo de sa déclaration et durant le voir-dire. De l'avis du D[r] K., K.B. avait [TRADUCTION] « beaucoup de mal à différencier le concept de la vérité et celui du mensonge »; il a mentionné qu'elle avait une faible tolérance à la frustration et il a dit ce qui suit : « Je ne crois pas qu'elle a la capacité de penser à ce que vous demandez et de donner une réponse » (*ibid*., p. 159 et 161).

[10] At the end of the *voir dire* on competence, the trial judge refused to hear from K.B.'s teacher of six years, Ms. W., and ruled that K.B. was incompetent to testify. K.B. was held incompetent because she had "not satisfied the prerequisite that she understands the duty to speak to the truth", which the trial judge took to be required by s. 16(3) of the *Canada Evidence Act*: "She cannot communicate what truth involves or what a lie involves, or what consequences result from truth or lies" (*ibid*., at p. 3).

[10] À l'issue du voir-dire relatif à l'habilité à témoigner, le juge du procès a refusé d'entendre le témoignage de la personne qui enseignait à K.B. depuis six ans, M[me] W. Il a conclu que K.B. n'était pas habile à témoigner parce qu'elle n'avait [TRADUCTION] « pas satisfait à la condition préalable voulant qu'elle comprenne l'obligation de dire la vérité », ce qui, selon lui, est une condition exigée par le par. 16(3) de la *Loi sur la preuve au Canada* : « Elle est incapable de dire ce que comportent la vérité et le mensonge, ou de dire ce que sont les conséquences découlant de la vérité ou de mensonges » (*ibid*., p. 3).

[11] A second *voir dire* was held to decide on the Crown's application for admitting K.B.'s out-of-court statements to the police and to her teacher, Ms. W. The teacher testified that K.B. would not intentionally lie, but that her ability to understand was more developed than her ability to express herself: "This causes a lot of frustration for [K.B.], she frequently responds to questions by saying 'I don't know'" (*ibid*., at p. 176; see also pp. 184-85).

[11] Le juge du procès a tenu un deuxième voir-dire pour statuer sur la demande présentée par le ministère public en vue de faire admettre en preuve les déclarations extrajudiciaires faites par K.B. à la police et à son enseignante, M[me] W. L'enseignante a indiqué dans son témoignage que K.B. ne mentirait pas intentionnellement, mais que sa capacité à comprendre était plus développée que sa capacité à s'exprimer : [TRADUCTION] « Cela lui [K.B.]

Also, evidence was led corroborating K.B.'s allegations. A family friend testified that, while he was in D.A.I.'s room for another purpose, he found a Polaroid photo of K.B. with her breasts exposed and another photo of two unidentified people having sex. D.A.I.'s explanation of the first photo was that K.B. had flashed him while he was taking a photo of her. K.B.'s sister also testified that she had found such photos. However, she did not report it to her mother and the photos were not available at trial. K.B.'s sister also said she once saw D.A.I. touch K.B.'s breasts while she was lying on her bed.

[12] The *voir dire* on hearsay admissibility was concluded by the trial judge's dismissal of the Crown's application. The trial judge rejected K.B.'s out-of-court statements to Ms. W. and to the police, holding that K.B.'s hearsay evidence was inadmissible because it was "unreliable, and its admission would seriously compromise the accused's right to a fair trial" (2008 CanLII 21726 (Ont. S.C.J.), at para. 57).

[13] At trial, the judge concluded that while the remainder of the evidence raised "some serious suspicions" about D.A.I.'s conduct, it was too scant to support a conviction (para. 11). The case essentially collapsed because of the trial judge's ruling that K.B. was not competent to testify.

[14] The question we must decide is whether the trial judge correctly interpreted the requirements of the *Canada Evidence Act* for the testimonial competence of persons of 14 years of age or older (adults) with mental disabilities. If he applied too high a standard, his decision to preclude K.B. from testifying must be set aside and the case remitted for a new trial.

cause beaucoup de frustration, elle répond souvent aux questions en disant "je ne sais pas" » (*ibid*., p. 176; voir aussi p. 184-185). Des éléments de preuve étayant les prétentions de K.B. ont également été soumis. Un ami de la famille a affirmé dans son témoignage qu'il avait trouvé dans la chambre de D.A.I. une photo au polaroïd de K.B. la montrant les seins nus et une autre photo montrant deux inconnus ayant des rapports sexuels. D.A.I. a expliqué que la première photo avait été prise par accident — que K.B. avait soudainement montré ses seins pendant qu'il prenait une photo d'elle. La sœur de K.B. a également indiqué avoir trouvé des photos de ce genre. Toutefois, elle ne l'a pas dit à sa mère et les photos n'ont pas été produites au procès. La sœur de K.B. a également dit avoir déjà vu D.A.I. toucher les seins de K.B. pendant qu'elle était étendue sur son lit.

[12] À l'issue du voir-dire relatif à l'admissibilité de la preuve par ouï-dire, le juge du procès a rejeté la demande du ministère public. Il a rejeté les déclarations extrajudiciaires faites par K.B. à M^me^ W. et à la police, affirmant que la preuve par ouï-dire de K.B. était inadmissible parce qu'elle n'était [TRADUCTION] « pas digne de foi, et que son admission en preuve compromettrait sérieusement le droit de l'accusé à un procès équitable » (2008 CanLII 21726 (C.S.J. Ont.), par. 57).

[13] Le juge du procès a conclu que, bien que la preuve ait soulevé [TRADUCTION] « de graves soupçons » quant à la conduite de D.A.I., elle ne permettait pas d'étayer une déclaration de culpabilité (par. 11). La preuve de la poursuite s'est effondrée essentiellement en raison de la conclusion du juge du procès selon laquelle K.B. n'était pas habile à témoigner.

[14] Nous devons décider si le juge du procès a correctement interprété les prescriptions de la *Loi sur la preuve au Canada* relativement à l'habilité à témoigner des personnes âgées de 14 ans ou plus (adultes) ayant une déficience intellectuelle. S'il a appliqué une norme trop élevée, sa décision d'empêcher K.B. de témoigner doit être annulée et l'affaire doit être renvoyée pour un nouveau procès.

II. Legal Analysis

A. *Testimonial Competence: A Threshold Requirement*

[15] Before turning to s. 16(3) of the *Canada Evidence Act*, it is important to distinguish between three different concepts that are sometimes confused: (1) the witness's competence to testify; (2) the admissibility of his or her evidence; and (3) the weight of the witness's testimony. The evidentiary rules governing all three concepts share a common purpose: ensuring that convictions are based on solid evidence and that the accused has a fair trial. However, each concept plays a distinct role in achieving this goal.

[16] The first concept, and the one most relevant to this appeal, is the principle of competence to testify. Competence addresses the question of whether a proposed witness has the capacity to provide evidence in a court of law. The purpose of this principle is to exclude at the outset worthless testimony, on the ground that the witness lacks the basic capacity to communicate evidence to the court. Competence is a threshold requirement. As a matter of course, witnesses are presumed to possess the basic "capacity" to testify. However, in the case of children or adults with mental disabilities, the party challenging the competence of a witness may be called on to show that there is an issue as to the capacity of the proposed witness.

[17] The second concept is admissibility. The rules of admissibility determine what evidence given by a competent witness may be received into the record of the court. Evidence may be inadmissible for various reasons. Only evidence that is relevant to the case may be considered by the judge or jury. Evidence may also be inadmissible if it falls under an exclusionary rule, for example the confessions rule or the rule against hearsay evidence. Among the purposes of the rules of admissibility are improving the accuracy of fact finding, respecting policy considerations, and ensuring the fairness of the trial.

II. Analyse juridique

A. *L'habilité à témoigner : une condition préliminaire*

[15] Avant de passer à l'examen du par. 16(3) de la *Loi sur la preuve au Canada*, il importe de faire une distinction entre trois notions différentes qui sont parfois confondues : (1) l'habilité du témoin à témoigner; (2) l'admissibilité de son témoignage; (3) la force probante de celui-ci. Les règles de preuve régissant ces trois notions poursuivent un même objectif : garantir que les déclarations de culpabilité soient fondées sur une preuve solide et que l'accusé ait un procès équitable. Toutefois, chaque notion joue un rôle distinct dans l'atteinte de cet objectif.

[16] La première notion — la plus pertinente dans ce pourvoi — est le principe de l'habilité à témoigner. L'habilité porte sur la question de savoir si un témoin éventuel a la capacité de faire une déposition dans une cour de justice. Ce principe a pour objet d'exclure d'entrée de jeu la déposition n'ayant aucune valeur au motif que le témoin n'est pas en mesure de communiquer les faits dans son témoignage à la cour. L'habilité est une condition préliminaire. Ordinairement, les témoins sont présumés « habiles » à témoigner. Toutefois, dans le cas d'enfants ou d'adultes ayant une déficience intellectuelle, la partie qui met en question la capacité d'un éventuel témoin de faire une déposition peut être appelée à démontrer qu'il existe des motifs de douter de cette capacité.

[17] La deuxième notion est l'admissibilité. Les règles d'admissibilité déterminent quels éléments de preuve donnés par un témoin habile peuvent être consignés au dossier de la cour. Un témoignage peut être inadmissible pour diverses raisons. Le juge ou le jury ne peuvent prendre en compte que les témoignages pertinents dans l'instance. Le témoignage peut également être inadmissible s'il est visé par une règle d'exclusion, par exemple la règle des confessions ou la règle interdisant le ouï-dire. Les règles d'admissibilité visent notamment l'amélioration de l'exactitude des conclusions de fait, le respect des considérations de politique générale, et l'assurance que le procès est équitable.

[18] The third concept — the responsibility of the trier of fact to decide what evidence, if any, to accept — is based on the assumption that the witness is competent and the rules of admissibility have been properly applied. Fulfillment of these requirements does not establish that the evidence should be accepted. It is the task of the judge or jury to weigh the probative value of each witness's evidence on the basis of factors such as demeanour, internal consistency, and consistency with other evidence, and to thus determine whether the witness's evidence should be accepted in whole, in part, or not at all. Unless the trier of fact is satisfied that the prosecution has established all elements of the offence beyond a reasonable doubt, there can be no conviction.

[19] Together, the rules governing competence, admissibility and weight of the evidence work to ensure that a verdict of guilty is based on accurate and credible evidence and that the accused person has a fair trial. The point for our purposes is a simple one: the requirement of competence is only the first step in the evidentiary process. It is the initial threshold for receiving evidence. It seeks a minimal requirement — a basic ability to provide truthful evidence. A finding of competence is not a guarantee that the witness's evidence will be admissible or accepted by the trier of fact.

B. *The Requirements for Competence of Adult Witnesses With Mental Disabilities: Section 16 of the Canada Evidence Act*

[20] Against this background, I come to the provision at issue in this case, s. 16(3) of the *Canada Evidence Act*, which governs the capacity to testify of adults with mental disabilities. Section 16 provides:

16. (1) [Witness whose capacity is in question] If a proposed witness is a person of fourteen years of age

[18] La troisième notion — la responsabilité qui incombe au juge des faits de décider quels éléments de preuve, s'il en est, doivent être retenus — est fondée sur la prémisse que le témoin est habile à témoigner et que les règles d'admissibilité ont été correctement appliquées. Le respect de ces exigences n'établit pas que les éléments de preuve doivent être retenus. C'est au juge ou au jury qu'il revient d'apprécier la valeur probante de la déposition de chaque témoin au regard de facteurs comme le comportement, la cohérence et la compatibilité avec d'autres éléments de preuve et, donc, de déterminer si la déposition de la personne doit être retenue en entier, en partie ou pas du tout. Sauf si le juge des faits est convaincu que la poursuite a établi hors de tout doute raisonnable tous les éléments de l'infraction, il ne peut y avoir aucune déclaration de culpabilité.

[19] Ensemble, les règles régissant l'habilité à témoigner, l'admissibilité et le poids de la preuve permettent de garantir qu'un verdict de culpabilité est étayé par des éléments de preuve exacts et crédibles et que le procès de l'accusé est équitable. L'aspect important pour les besoins de l'analyse est simple : la condition relative à l'habilité à témoigner n'est que la première étape du processus de présentation de la preuve. C'est la première condition qui doit être satisfaite pour qu'un témoignage soit recevable. Elle repose sur une exigence minimale — une aptitude élémentaire à fournir un témoignage sincère. La seule conclusion que la personne est habile à témoigner ne garantit pas que sa déposition sera admissible ou retenue par le juge des faits.

B. *Les conditions relatives à l'habilité à témoigner des personnes adultes ayant une déficience intellectuelle : l'art. 16 de la Loi sur la preuve au Canada*

[20] Dans ce contexte, j'examine maintenant la disposition litigieuse en l'espèce, le par. 16(3) de la *Loi sur la preuve au Canada*, qui régit l'habilité à témoigner des adultes ayant une déficience intellectuelle. L'article 16 prévoit ce qui suit :

16. (1) [Témoin dont la capacité mentale est mise en question] Avant de permettre le témoignage d'une

or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

(*a*) whether the person understands the nature of an oath or a solemn affirmation; and

(*b*) whether the person is able to communicate the evidence.

(2) [Testimony under oath or solemn affirmation] A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

(3) [Testimony on promise to tell truth] A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.

(4) [Inability to testify] A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

(5) [Burden as to capacity of witness] A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

[21] Section 16(1) sets out what a judge must do when a challenge is raised. First, the judge must determine "whether the person understands the nature of an oath or a solemn declaration" and "whether the person is able to communicate the evidence" (s. 16(1)). If these requirements are met, the witness testifies under oath or affirmation, as other witnesses do (s. 16(2)). If these requirements are not met, the judge moves on to s. 16(3). Section 16(3) provides that "[a] person . . . who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may . . . testify on promising to tell the truth."

personne âgée d'au moins quatorze ans dont la capacité mentale est mise en question, le tribunal procède à une enquête visant à décider si :

a) d'une part, celle-ci comprend la nature du serment ou de l'affirmation solennelle;

b) d'autre part, celle-ci est capable de communiquer les faits dans son témoignage.

(2) [Témoignage sous serment] La personne visée au paragraphe (1) qui comprend la nature du serment ou de l'affirmation solennelle et qui est capable de communiquer les faits dans son témoignage témoigne sous serment ou sous affirmation solennelle.

(3) [Témoignage sur promesse de dire la vérité] La personne visée au paragraphe (1) qui, sans comprendre la nature du serment ou de l'affirmation solennelle, est capable de communiquer les faits dans son témoignage peut, malgré qu'une disposition d'une loi exige le serment ou l'affirmation, témoigner en promettant de dire la vérité.

(4) [Inaptitude à témoigner] La personne visée au paragraphe (1) qui ne comprend pas la nature du serment ou de l'affirmation solennelle et qui n'est pas capable de communiquer les faits dans son témoignage ne peut témoigner.

(5) [Charge de la preuve] La partie qui met en question la capacité mentale d'un éventuel témoin âgé d'au moins quatorze ans doit convaincre le tribunal qu'il existe des motifs de douter de la capacité de ce témoin de comprendre la nature du serment ou de l'affirmation solennelle.

[21] Le paragraphe 16(1) énonce ce qu'un juge doit faire lorsque la capacité mentale d'un éventuel témoin est mise en question. Premièrement, le juge doit déterminer si la personne « comprend la nature du serment ou de l'affirmation solennelle » et si elle « est capable de communiquer les faits dans son témoignage » (par. 16(1)). Si ces conditions sont satisfaites, la personne témoigne sous serment ou sous affirmation solennelle, tout comme les autres témoins (par. 16(2)). Si ces conditions ne sont pas remplies, le juge passe au par. 16(3), selon lequel une « personne [. . .] qui, sans comprendre la nature du serment ou de l'affirmation solennelle, est capable de communiquer les faits dans son témoignage peut [. . .] témoigner en promettant de dire la vérité ».

[22] In brief, s. 16(1) provides that an adult witness whose competence to testify is challenged should testify under oath or affirmation, if the witness "understands the nature of an oath or a solemn affirmation" and can "communicate the evidence". Here K.B. did not meet the first requirement. The inquiry therefore moved to s. 16(3), which states that if an adult witness cannot take the oath or affirm under s. 16(1), then she must be permitted to testify *if she is "able to communicate the evidence" and promises to tell the truth*.

[23] On its face, s. 16 says that in a case such as this where the witness cannot take the oath or affirm, the judge has only one further issue to consider — whether the witness can communicate the evidence. If the answer to that question is yes, the judge must then ask the witness whether she promises to tell the truth. If she does, she is competent to testify. It is not necessary to inquire into whether the witness understands the duty to tell the truth.

[24] The respondent argues, however, that the plain words of s. 16(3) do not suffice. They must be supplemented, he says, by the requirement that an adult witness with mental disabilities who cannot take an oath or affirm must not only be able to communicate the evidence and promise to tell the truth, but must also *understand the nature of a promise to tell the truth*.

[25] I cannot accept this submission. The words of an Act are to be interpreted in their entire context: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. The wording of s. 16(3), its history, its internal logic and its statutory context all point to the conclusion that s. 16(3) should be read as it stands, without reading in a further requirement that the witness demonstrate an understanding of the nature of the obligation to tell the truth. All that is required is that the witness be able to communicate the evidence and in fact promise to tell the truth.

[22] En bref, le par. 16(1) prévoit qu'une personne adulte dont l'habilité à témoigner est mise en question doit témoigner sous serment ou sous affirmation solennelle, si elle « comprend la nature du serment ou de l'affirmation solennelle » et si elle est capable de « communiquer les faits dans son témoignage ». En l'espèce, K.B. n'a pu satisfaire à cette première condition. Le juge a donc poursuivi en examinant le par. 16(3), selon lequel une personne adulte qui ne comprend pas la nature du serment ou de l'affirmation solennelle au sens du par. 16(1), mais *qui est « capable de communiquer les faits dans son témoignage »,* peut témoigner *en promettant de dire la vérité.*

[23] À première vue, l'art. 16 prévoit que, dans un cas tel celui qui nous occupe, où la personne ne peut prêter serment ni faire une affirmation solennelle, le juge n'a plus qu'une autre question à examiner — à savoir si la personne est capable de communiquer les faits dans son témoignage. Si tel est le cas, le juge doit alors demander à la personne si elle promet de dire la vérité. Dans l'affirmative, elle est habile à témoigner. Il n'est pas nécessaire de vérifier si elle comprend l'obligation de dire la vérité.

[24] Toutefois, l'intimé prétend que le libellé explicite du par. 16(3) n'est pas suffisant. Il doit être complété, selon lui, par l'ajout de la condition suivant laquelle un adulte ayant une déficience intellectuelle qui ne peut prêter serment ni faire une affirmation solennelle doit non seulement être capable de communiquer les faits dans son témoignage et promettre de dire la vérité, mais doit également *comprendre la nature de la promesse de dire la vérité.*

[25] Je ne peux pas accepter cette prétention. Il faut interpréter les termes d'une loi dans leur contexte global : *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21. Le libellé du par. 16(3), son historique, sa logique interne et son contexte législatif nous amènent à conclure que le par. 16(3) doit être interprété littéralement, sans qu'il soit besoin d'exiger que la personne démontre qu'elle comprend la nature de l'obligation de dire la vérité. La disposition exige seulement que la personne soit capable de communiquer les faits dans son témoignage et qu'elle promette de dire la vérité.

[26] First, as already mentioned, this interpretation goes beyond the words used by Parliament. To insist that the witness demonstrate understanding of the nature of the obligation to tell the truth is to import a requirement into the section that Parliament did not place there. The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision. Where ambiguity arises, it may be necessary to resort to external factors to resolve the ambiguity: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 44. However, Parliament has clearly stated the requirements for finding adult witnesses with mental disabilities to be competent. Section 16 shows no ambiguity.

[27] Second, the history of s. 16 supports the view that Parliament intended to remove barriers that had prevented adults with mental disabilities from testifying prior to the 1987 amendments (S.C. 1987, c. 24). The amendments altered the common law rule, by virtue of which only witnesses under oath could testify. To take the oath or affirm, a witness must have an understanding of the duty to tell the truth: *R. v. Brasier* (1779), 1 Leach 199, 168 E.R. 202. Adults with mental disabilities might not be able to do this. To remove this barrier, Parliament provided an alternative basis for competence for this class of individuals. Section 16(1) of the 1987 provision continued to maintain the oath or affirmation as the first option for adults with mental disabilities, but s. 16(3) provided for competence based simply on the ability to communicate the evidence and a promise to tell the truth.

[28] This history suggests that Parliament intended to eliminate an understanding of the abstract nature of the oath or solemn affirmation as a prerequisite for testimonial capacity. Failure to show that the witness *could demonstrate an understanding of the obligation to tell the truth* was no

[26] Premièrement, comme je l'ai déjà mentionné, cette interprétation va au-delà des mots employés par le législateur. En insistant pour que la personne démontre qu'elle comprend la nature de l'obligation de dire la vérité, on introduit dans la disposition une condition que le législateur n'y a pas énoncée. Suivant le principe fondamental de l'interprétation des lois, il faut examiner le libellé explicite de la disposition. En cas d'ambiguïté, il peut être nécessaire d'avoir recours à des facteurs externes pour la dissiper : R. Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 44. Toutefois, le législateur a clairement indiqué les conditions requises pour conclure qu'un adulte ayant une déficience intellectuelle est habile à témoigner. L'article 16 ne comporte aucune ambiguïté.

[27] Deuxièmement, l'historique de l'art. 16 étaye le point de vue selon lequel le législateur voulait éliminer les obstacles qui, avant les modifications apportées en 1987 (L.C. 1987, ch. 24), avaient empêché des adultes ayant une déficience intellectuelle de témoigner. Les modifications ont changé la règle de common law en vertu de laquelle seules les personnes ayant prêté serment pouvaient témoigner. Pour prêter serment ou faire une affirmation solennelle, une personne doit comprendre l'obligation de dire la vérité : *R. c. Brasier* (1779), 1 Leach 199, 168 E.R. 202. Des adultes ayant une déficience intellectuelle pourraient ne pas avoir cette faculté. Afin d'écarter cet obstacle, le législateur a prévu à l'égard des personnes de cette catégorie un autre fondement de l'habilité à témoigner. Le paragraphe 16(1) de la disposition de 1987 conservait encore le serment ou l'affirmation solennelle comme première possibilité dans le cas des adultes ayant une déficience intellectuelle, mais le par. 16(3) prévoyait que ces personnes étaient habiles à témoigner si elles étaient simplement capables de communiquer les faits dans un témoignage et si elles promettaient de dire la vérité.

[28] Cet historique donne à penser que le législateur voulait éliminer la condition préalable selon laquelle la personne, pour être habile à témoigner, devait comprendre la nature abstraite du serment ou de l'affirmation solennelle. Le défaut d'établir que la personne *pouvait démontrer qu'elle comprenait*

longer the end of the matter. Provided the witness (1) was able to *communicate the evidence*, and (2) promised to tell the truth, she should be allowed to testify.

[29] The drafters of s. 16(3) did not intend this provision to require an abstract understanding of the duty to tell the truth (see Appendix A). The original text of Bill C-15, which adopted the 1987 amendments, was changed by the Legislative Committee on Bill C-15 precisely to avoid that interpretation. The version of s. 16(3) first put before Parliament allowed testimony on promising to tell the truth if the witness was "sufficiently intelligent that the reception of the evidence is justified". A discussion was held on the meaning of "sufficient intelligence", after which the Committee concluded that all that was needed for a witness to be sufficiently intelligent was to understand the moral difference between telling the truth and lying. The Committee, fearing that this would open the door to abstract inquiries, ultimately replaced "sufficient intelligence" by "able to communicate the evidence". The deliberations that followed emphasized the practical ability to communicate the evidence. There was no suggestion that ability to communicate the evidence accompanied by a promise to tell the truth implicitly imposed a requirement that the witness demonstrate a more abstract understanding of the duty to tell the truth.

[30] The historic background against which s. 16(3) was enacted explains why Parliament might have wished in 1987 to lower the requirements of testimonial competence for adults with mental disabilities, who are nonetheless capable of communicating the evidence. While adults with mental disabilities received little consideration in the pre-1987 case law, the inappropriateness of questioning children on abstract understandings of the truth had been noted and criticized. In *R. v. Bannerman* (1966), 48 C.R. 110 (Man. C.A.), Dickson J. *ad hoc* (as he then was) rejected the practice of examining child witnesses on their religious beliefs and the philosophical meaning of truth. Meanwhile,

l'obligation de dire la vérité ne mettait plus fin à la question. Dès lors qu'elle (1) était capable de *communiquer les faits dans son témoignage* et qu'elle (2) promettait de dire la vérité, la personne devait être autorisée à témoigner.

[29] Les rédacteurs du par. 16(3) ne voulaient pas que cette disposition exige une compréhension abstraite de l'obligation de dire la vérité (voir annexe A). C'est précisément pour éviter une telle interprétation que le Comité législatif sur le projet de loi C-15 a modifié le texte original du projet de loi C-15 par lequel les modifications de 1987 ont été adoptées. La première version du par. 16(3) soumise au Parlement prévoyait qu'une personne pouvait témoigner en promettant de dire la vérité si elle était « suffisamment intelligente pour que le recueil de son témoignage soit justifié ». Après une discussion sur la signification de l'expression « suffisamment intelligente », le Comité a conclu qu'il fallait uniquement que le témoin apprécie la différence morale entre dire la vérité et mentir pour qu'il soit suffisamment intelligent. De crainte que cela n'ouvre la porte à des interrogatoires dans l'abstrait, le Comité a remplacé ces mots par « capable de communiquer les faits dans son témoignage ». Les délibérations qui ont suivi ont mis l'accent sur l'aptitude, en pratique, de communiquer les faits dans un témoignage. Rien n'indiquait que l'aptitude à communiquer les faits dans un témoignage, accompagnée d'une promesse de dire la vérité, exigeait implicitement du témoin qu'il comprenne de façon plus abstraite l'obligation de dire la vérité.

[30] Le contexte historique dans lequel le par. 16(3) a été adopté explique pourquoi le législateur a pu souhaiter, en 1987, assouplir les conditions relatives à l'habilité à témoigner imposées aux adultes ayant une déficience intellectuelle qui sont néanmoins capables de communiquer les faits dans leur témoignage. Bien qu'on ait accordé peu d'importance aux adultes ayant une déficience intellectuelle dans la jurisprudence antérieure à 1987, on avait souligné qu'il ne convenait pas de poser à des enfants des questions sur la compréhension qu'ils avaient, dans l'abstrait, de la vérité. Dans *R. c. Bannerman* (1966), 48 C.R. 110 (C.A. Man.), le juge Dickson *ad hoc* (plus tard Juge

awareness of the sexual abuse of children and adults with mental disabilities was growing. To rule out the evidence of children and adults with mental disabilities at the stage of competence — the effect of the requirement of an abstract understanding of the nature of the obligation to tell the truth — meant their stories would never be told and their cases never prosecuted. These concerns explain why Parliament moved to simplify the competence test for adult witnesses with mental disabilities.

[31] Third, and flowing from this history, the internal logic of s. 16 negates the suggestion that "promising to tell the truth" in s. 16(3) must be read as implying an understanding of the obligation to tell the truth. Two procedures are provided by s. 16. The preferred option is testimony under oath or affirmation (s. 16(1)), and the alternative procedure is testimony on a promise to tell the truth (s. 16(3)). If the witness is required under s. 16(3) to demonstrate that she understands the obligation to tell the truth, s. 16(3) adds little, if anything, to s. 16(1). In both cases, the witness is required to articulate abstract concepts of the nature of truth and the nature of the obligation to tell the truth in court. The result is essentially to render s. 16(3) a dead letter and to negate the dual structure of the provision. This runs against the principle of statutory interpretation that Parliament does not speak in vain: *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838.

[32] Fourth, s. 16(4) indicates that ability to communicate the evidence is the only quality that an adult with mental disabilities must possess in order to testify under s. 16(3). Section 16(4) provides that

en chef du Canada) a rejeté la pratique consistant à poser à des enfants des questions sur leurs croyances religieuses et sur le sens philosophique de la vérité. Entre-temps, on prenait de plus en plus conscience de la violence sexuelle envers les enfants et les adultes ayant une déficience intellectuelle. En raison de l'exclusion, à l'étape de l'examen de l'habilité à témoigner, des dépositions des enfants et des adultes ayant une déficience intellectuelle — la conséquence de l'obligation, pour ces derniers, de démontrer une compréhension abstraite de la nature de l'obligation de dire la vérité — ils ne pouvaient jamais faire le récit de leur expérience et aucune poursuite n'était entreprise. C'est en raison de ces problèmes que le législateur a simplifié le critère relatif à l'habilité à témoigner des personnes adultes ayant une déficience intellectuelle.

[31] Troisièmement, en lien avec cet historique, la logique interne de l'art. 16 contredit la thèse suivant laquelle les mots « en promettant de dire la vérité » qui figurent au par. 16(3) doivent être interprétés comme supposant une compréhension de l'obligation de dire la vérité. L'article 16 prévoit deux façons de procéder. Le témoignage sous serment ou affirmation solennelle constitue la solution privilégiée (par. 16(1)), l'autre possibilité étant le témoignage fait en promettant de dire la vérité (par. 16(3)). Si la personne est tenue, en vertu du par. 16(3), de démontrer qu'elle comprend l'obligation de dire la vérité, ce paragraphe n'ajoute rien, ou bien peu, au par. 16(1). Dans les deux cas, la personne doit formuler les concepts abstraits que sont la nature de la vérité et la nature de l'obligation de dire la vérité devant le tribunal. Cette interprétation a essentiellement pour résultat que le par. 16(3) devient lettre morte et que la structure en deux volets de la disposition est réduite à néant. Cela va à l'encontre du principe de l'interprétation des lois selon lequel le législateur ne parle pas en vain : *Procureur général du Québec c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831, p. 838.

[32] Quatrièmement, le par. 16(4) indique que la capacité de communiquer les faits dans son témoignage est la seule qualité qu'un adulte ayant une déficience intellectuelle doit posséder afin de

the proposed witness is unable to testify if she neither understands the nature of an oath or solemn affirmation nor is able to communicate the evidence. It follows that the witness is competent to testify if she is able to communicate the evidence; she may testify on promising to tell the truth under s. 16(3). The qualities envisaged in s. 16 as basis for testimonial competence are mentioned in s. 16(4). Imposing an additional qualitative requirement to understand the nature of a promise to tell the truth would flout the utility of s. 16(4).

pouvoir témoigner en vertu du par. 16(3). Le paragraphe 16(4) prévoit que le témoin éventuel est incapable de témoigner s'il ne comprend pas la nature du serment ou de l'affirmation solennelle et s'il n'est pas capable de communiquer les faits dans son témoignage. Il s'ensuit que la personne est habile à témoigner si elle est capable de communiquer les faits dans son témoignage; elle peut témoigner en promettant de dire la vérité aux termes du par. 16(3). Les qualités envisagées à l'art. 16 comme fondement de l'habilité à témoigner sont mentionnées au par. 16(4). L'imposition de la condition supplémentaire — comprendre la nature de la promesse de dire la vérité — équivaudrait à faire fi de l'utilité du par. 16(4).

[33] Fifth, the legislative context speaks against reading s. 16(3) as requiring that an adult witness with mental disabilities understand the nature of the obligation to tell the truth. If this requirement is added to s. 16(3), the result is a different standard for the competence of adults with mental disabilities under s. 16(3) and children under s. 16.1 (enacted in 2005 (S.C. 2005, c. 32) pursuant to the "Brief on Bill C-2: Recognizing the Capacities & Needs of Children as Witnesses in Canada's Criminal Justice System" (Child Witness Project, March 2005) (the "Bala Report")). As will be discussed more fully below, s. 16(3) governing the competence of adults with mental disabilities, and ss. 16.1(3), (5) and (6) governing the competence of children, set forth essentially the same requirements. Broadly speaking, both condition testimonial capacity on: (1) the ability to communicate or answer questions; and (2) a promise to tell the truth. While it was open to Parliament to enact different requirements for children and adults with the minds of children, consistency of Parliamentary intent should be assumed, absent contrary indications. No explanation has been offered as to why Parliament would consider a promise to tell the truth a meaningful procedure for children, but an empty gesture for adults with mental disabilities.

[33] Cinquièmement, le contexte législatif va à l'encontre d'une interprétation du par. 16(3) exigeant qu'un adulte ayant une déficience intellectuelle comprenne la nature de l'obligation de dire la vérité. L'ajout de cette exigence au par. 16(3) créerait pour les adultes ayant une déficience intellectuelle une norme relative à l'habilité à témoigner différente de la norme prévue pour les enfants au par. 16.1 (adopté en 2005 (L.C. 2005, ch. 32) comme suite au mémoire « Brief on Bill C-2 : Recognizing the Capacities & Needs of Children as Witnesses in Canada's Criminal Justice System » (Child Witness Project, mars 2005) (le « rapport Bala »)). Comme je l'expliquerai davantage plus loin, le par. 16(3) régissant l'habilité à témoigner des adultes ayant une déficience intellectuelle, ainsi que les par. 16.1(3), (5) et (6) relatifs à l'habilité à témoigner des enfants, énoncent essentiellement les mêmes exigences. De façon générale, dans les deux dispositions, l'habilité à témoigner dépend des éléments suivants : (1) la capacité de communiquer ou de répondre aux questions; (2) la promesse de dire la vérité. Bien qu'il ait été loisible au législateur d'adopter des exigences différentes selon qu'il s'agisse d'enfants ou d'adultes ayant les capacités mentales d'un enfant, il faut présumer la constance de l'intention législative en l'absence d'indications contraires. Aucune explication n'a été avancée quant à savoir pourquoi le législateur estimerait que la promesse de dire la vérité est une solution valable pour les enfants mais vide de sens pour les adultes ayant une déficience intellectuelle.

[34] The foregoing reasons make a strong case that s. 16(3) should be read as requiring only two requirements for competence of an adult with mental disabilities: (1) ability to communicate the evidence; and (2) a promise to tell the truth. However, two arguments have been raised in opposition to this interpretation: first, without a further requirement of an understanding of the obligation to tell the truth, a promise to tell the truth is an "empty gesture"; second, Parliament's failure in 2005 to extend to adults with mental disabilities the s. 16.1(7) prohibition on the questioning of children means that it intended this questioning to continue for adults. I will examine each argument in turn.

[35] The first argument is that unless an adult witness with mental disabilities is required to demonstrate that she understands the nature of the obligation to tell the truth, the promise is an "empty gesture". However, this submission's shortcoming is that it departs from the plain words of s. 16(3), on the basis of an assumption that is unsupported by any evidence and contrary to Parliament's intent. Imposing an additional qualitative condition for competence that is not provided in the text of s. 16(3) would demand compelling demonstration that a promise to tell the truth cannot amount to a meaningful procedure for adults with mental disabilities. No such demonstration has been made. On the contrary, common sense suggests that the act of promising to tell the truth may be useful, even in the absence of the witness's ability to explain what telling the truth means in abstract terms.

[36] Promising is an act aimed at bringing home to the witness the seriousness of the situation and the importance of being careful and correct. The promise thus serves a practical, prophylactic purpose. A witness who is able to communicate the evidence, as required by s. 16(3), is necessarily able to relate events. This in turn implies an understanding of what really happened — i.e. the truth — as

[34] Les motifs qui précèdent exposent de façon convaincante que, suivant l'interprétation du par. 16(3) qui s'impose, un adulte ayant une déficience intellectuelle est habile à témoigner s'il satisfait à deux exigences seulement : (1) la capacité de communiquer les faits dans son témoignage; (2) la promesse de dire la vérité. Toutefois, deux arguments ont été soulevés à l'encontre de cette interprétation. Premièrement, sans exiger en plus que la personne comprenne l'obligation de dire la vérité, la promesse de dire la vérité reste « vide de sens ». Deuxièmement, si le législateur a omis, en 2005, d'appliquer aux adultes ayant une déficience intellectuelle l'interdiction prévue au par. 16.1(7) de poser des questions à des enfants, c'est parce qu'il voulait que l'on continue de poser des questions aux adultes. Je vais examiner successivement chacun de ces arguments.

[35] Selon le premier argument, la promesse de dire la vérité « est vide de sens » si le témoin adulte ayant une déficience intellectuelle n'est pas tenu de démontrer qu'il comprend la nature de l'obligation de dire la vérité. Toutefois, cette prétention comporte une lacune en ce qu'elle s'écarte du libellé explicite du par. 16(3) car elle repose sur une hypothèse qui n'est étayée par aucun élément de preuve et qui est contraire à l'intention du législateur. L'imposition, relativement à l'habilité à témoigner, d'une condition qualitative supplémentaire que ne prévoit pas le texte du par. 16(3) exigerait une démonstration convaincante qu'une promesse de dire la vérité n'offre pas une façon valable d'obtenir le témoignage d'un adulte ayant une déficience intellectuelle. Cette démonstration n'a pas été faite. Au contraire, le bon sens donne à penser que la promesse de dire la vérité peut être utile, même si la personne n'a pas la faculté d'expliquer en termes abstraits ce que signifie dire la vérité.

[36] La promesse est un acte visant à renforcer, dans l'esprit du témoin éventuel, le caractère sérieux de la situation et l'importance de répondre de façon prudente et correcte. La promesse sert donc un objectif pratique et prophylactique. Une personne qui est capable de communiquer les faits dans son témoignage, comme l'exige le par. 16(3), est nécessairement capable de relater des

opposed to fantasy. When such a witness promises to tell the truth, this reinforces the seriousness of the occasion and the need to do so. In dealing with the evidence of children in s. 16.1, Parliament held that a promise to tell the truth was all that is required of a child capable of responding to questions. Parliament did not think a child's promise, without more, is an empty gesture. Why should it be otherwise for an adult with the mental ability of a child?

[37] The second argument raised in support of the proposition that "promising to tell the truth" in s. 16(3) implies a requirement that the witness must show that she understands the nature of the obligation to tell the truth is that Parliament has not enacted a ban on questioning adult witnesses with mental disabilities on the nature of the obligation to tell the truth, as it did for child witnesses in 2005 in s. 16.1(7). To understand this argument, we must briefly trace the history of s. 16.1.

[38] In 2005, following the Bala Report, Parliament once more modified the *Canada Evidence Act*'s provisions on testimonial competence, but this time only with respect to children. The central focus of the 2005 legislation relating to the *Canada Evidence Act* was the competence of *child* witnesses, with the aim of altering the restrictive gloss the case law had placed on the previous provisions relating to the capacity of children to testify. Chief among this case law was *R. v. Khan* (1988), 42 C.C.C. (3d) 197 (Ont. C.A.), which insisted that a child understand the nature of the obligation to tell the truth before the child could testify. Section 16.1, in unequivocal language, rejected this requirement. It stated:

16.1 (1) [Person under fourteen years of age] A person under fourteen years of age is presumed to have the capacity to testify.

événements. Cela sous-entend que la personne comprend ce qui s'est vraiment passé — c'est-à-dire la vérité — par opposition à l'imaginaire. Lorsqu'une telle personne promet de dire la vérité, cela confirme le caractère sérieux de la situation et la nécessité de dire la vérité. En ce qui concerne le témoignage des enfants dont il est question à l'art. 16.1, le législateur a conclu que la promesse de dire la vérité était tout ce qui était exigé de la part d'un enfant capable de répondre aux questions. Le législateur n'a pas envisagé que la promesse faite par un enfant, sans rien d'autre, est vide de sens. Pourquoi en serait-il autrement pour un adulte ayant la capacité mentale d'un enfant?

[37] Selon le deuxième argument soulevé à l'appui de l'affirmation selon laquelle les mots « en promettant de dire la vérité » figurant au par. 16(3) sous-entendent que la personne doit démontrer qu'elle comprend la nature de l'obligation de dire la vérité, le législateur n'a pas adopté une interdiction de poser aux adultes ayant une déficience intellectuelle des questions quant à la nature de l'obligation de dire la vérité, comme il l'a fait pour les enfants en 2005, au par. 16.1(7). Pour bien saisir cet argument, il nous faut relater brièvement l'historique de l'art. 16.1.

[38] En 2005, comme suite au rapport Bala, le législateur a encore une fois modifié les dispositions de la *Loi sur la preuve au Canada* portant sur l'habilité à témoigner, mais cette fois uniquement en ce qui a trait aux enfants. La loi de 2005 relative à la *Loi sur la preuve au Canada* portait principalement sur la compétence des *enfants* à rendre témoignage et visait à modifier l'interprétation restrictive, dans la jurisprudence, des dispositions antérieures relatives à l'habilité des enfants à témoigner. La décision la plus importante dans cette jurisprudence était *R. c. Khan* (1988), 42 C.C.C. (3d) 197 (C.A. Ont.), laquelle exigeait d'un enfant qu'il comprenne la nature de l'obligation de dire la vérité avant de pouvoir témoigner. L'article 16.1, qui a rejeté cette exigence en termes non équivoques, est libellé comme suit :

16.1 (1) [Témoin âgé de moins de quatorze ans] Toute personne âgée de moins de quatorze ans est présumée habile à témoigner.

(2) [No oath or solemn affirmation] A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

(3) [Evidence shall be received] The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

(4) [Burden as to capacity of witness] A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

(5) [Court inquiry] If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

(6) [Promise to tell truth] The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

(7) [Understanding of promise] No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

(8) [Effect] For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

(2) [Témoin non assermenté] Malgré toute disposition d'une loi exigeant le serment ou l'affirmation solennelle, une telle personne ne peut être assermentée ni faire d'affirmation solennelle.

(3) [Témoignage admis en preuve] Son témoignage ne peut toutefois être reçu que si elle a la capacité de comprendre les questions et d'y répondre.

(4) [Charge de la preuve] La partie qui met cette capacité en question doit convaincre le tribunal qu'il existe des motifs d'en douter.

(5) [Enquête du tribunal] Le tribunal qui estime que de tels motifs existent procède, avant de permettre le témoignage, à une enquête pour vérifier si le témoin a la capacité de comprendre les questions et d'y répondre.

(6) [Promesse du témoin] Avant de recevoir le témoignage, le tribunal fait promettre au témoin de dire la vérité.

(7) [Question sur la nature de la promesse] Aucune question sur la compréhension de la nature de la promesse ne peut être posée au témoin en vue de vérifier si son témoignage peut être reçu par le tribunal.

(8) [Effet] Il est entendu que le témoignage reçu a le même effet que si le témoin avait prêté serment.

[39] Section 16.1, like s. 16(3) governing adult witnesses with mental disabilities, imposed two preconditions for the testimony of children: (1) that the child be able to understand and respond to questions (s. 16.1(5)); and (2) that the child promise to tell the truth (s. 16.1(6)). But, taking direct aim at *Khan*'s insistence that children be questioned on their understanding of the nature of the obligation to tell the truth, s. 16.1(7) went on to state explicitly that children not "*be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court*".

[39] Tout comme le par. 16(3) régissant le témoignage des adultes ayant une déficience intellectuelle, l'art. 16.1 a imposé deux conditions préalables au témoignage des enfants : (1) l'enfant doit être capable de comprendre les questions et d'y répondre (par. 16.1(5)); (2) l'enfant doit promettre de dire la vérité (par. 16.1(6)). Mais, pour contrer l'arrêt *Khan* qui insistait pour que les enfants soient interrogés sur leur compréhension de la nature de l'obligation de dire la vérité, le législateur a énoncé explicitement au par. 16.1(7) qu'« *[a]ucune question sur la compréhension de la nature de la promesse ne peut être posée au témoin en vue de vérifier si son témoignage peut être reçu par le tribunal.* »

[40] The argument is that if Parliament had intended adult witnesses with mental disabilities to be competent to testify simply on the basis of the ability to communicate and the making of a promise, it would have enacted a ban on questioning them on their understanding of the nature of the obligation to tell the truth, as it did for child witnesses under s. 16.1(7). The absence of such a provision, it is said, requires us to draw the inference that Parliament intended that *adult* witnesses with mental disabilities *must* be questioned on the obligation to tell the truth.

[41] First, this argument overlooks the fact that Parliament's concern in enacting the 2005 amendment to the *Canada Evidence Act* was exclusively with children. The changes arose out of the Bala Report on the problems associated with prosecuting crimes against children. The Parliamentary debates on s. 16.1 attest to the fact that the focus of the 2005 amendment was on children, and only children.

[42] Moreover, it is apparent from the Parliamentary works on Bill C-2 that s. 16.1(7) was intended to confirm the existing formal requirement of a promise alone, and not to modify the law: see Appendix B. The record of the standing House of Commons committee which studied Bill C-2 contains a discussion between Joe Comartin and Professor Nicholas Bala, during a debate on the phrasing of s. 16.1(7), which revealed that the original intent of s. 16(3) was to allow children and adults with mental disabilities to testify by merely promising to tell the truth, once they were held to be able to communicate the evidence:

[Prof. Nicholas Bala:] . . . the concern I have arises out of the fact that the present legislation has been interpreted very narrowly by judges. When you actually go back through the transcripts — I was actually a witness in 1988, when the provisions came into effect — I think it was thought by people, well, we don't have to be very explicit here, because the judges will get this right.

[40] L'intimé plaide que si le législateur avait voulu que les adultes ayant une déficience intellectuelle soient habiles à témoigner tout simplement s'ils sont capables de communiquer les faits dans leur témoignage en promettant de dire la vérité, il aurait interdit expressément qu'ils soient interrogés sur leur compréhension de la nature de l'obligation de dire la vérité, comme il l'a fait pour les enfants au par. 16.1(7). L'absence d'une telle disposition, prétend-on, nous oblige à déduire que le législateur voulait que les *adultes* ayant une déficience intellectuelle soient *inévitablement* interrogés sur l'obligation de dire la vérité.

[41] Premièrement, cet argument ne tient pas compte du fait que, en adoptant en 2005 les modifications à la *Loi sur la preuve au Canada*, le législateur visait exclusivement les enfants. Les modifications ont été apportées comme suite au rapport Bala traitant des problèmes associés à la poursuite des actes criminels perpétrés contre les enfants. Les débats de la Chambre des communes portant sur l'art. 16.1 attestent que les modifications de 2005 avaient exclusivement trait aux enfants.

[42] En outre, il ressort des travaux parlementaires portant sur le projet de loi C-2 que le par. 16.1(7) visait à confirmer l'exigence formelle existante d'une promesse seulement, et non pas à modifier l'état du droit : voir l'annexe B. On trouve, aux procès-verbaux du comité parlementaire permanent de la Chambre des communes qui a étudié le projet de loi C-2, un échange entre Joe Comartin et le professeur Nicholas Bala survenu au cours d'un débat portant sur la formulation du par. 16.1(7); cet échange révèle que, à l'origine, le par. 16(3) devait permettre aux enfants et aux adultes ayant une déficience intellectuelle de témoigner en ne faisant que promettre de dire la vérité, dès qu'ils étaient jugés capables de communiquer les faits dans leur témoignage :

[Prof. Nicholas Bala :] . . . ma préoccupation découle du fait que la loi actuelle a été interprétée de façon très étroite par les juges. Quand on consulte les transcriptions — j'ai été témoin en 1988, quand les dispositions sont entrées en vigueur — je crois que les gens ont pensé : « Eh bien, nous n'avons pas besoin d'être explicites à cet endroit, car les juges comprendront. »

Obviously, on many issues we do have to trust our judiciary, but on certain issues I think it's important to give them as much direction as possible. My concern is that some judge might read this — and we have quite a lot of case law about this — and say, okay, I can't ask you about your understanding of the nature of the promise, but what about asking you questions about truth-telling? Parliament specifically said in subsection 16.1(6) that you'll be required to promise to tell the truth. We can't ask about the nature of the promise, but can we ask you about "truth" and "lie"? [Emphasis added; p. 7.]

(House of Commons, *Evidence of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, No. 26, 1st Sess., 38th Parl., March 24, 2005)

[43] This view was confirmed by Ms. Catherine Kane, Director of the Policy Centre for Victim Issues of the Department of Justice Canada, during her opening statement to the Standing Senate Committee on Legal and Constitutional Affairs:

[Ms. Catherine Kane:] . . . These amendments were made in 1988 with the purpose of trying to more readily permit children's evidence to be received. However, as the cases have interpreted this provision, we have not seen that ready acceptance of children's evidence.

If these two criteria are met, the child gives evidence under an oath or an affirmation. However, if the child does not understand the nature of the oath or the affirmation but has the ability to communicate the evidence, the evidence is received on a promise to tell the truth. That is the current law. While it may appear quite sensible on its face, the interpretations and practise of these provisions do not reflect Parliament's intention in amending the Evidence in an effort to permit children's evidence to be admitted more readily.

As interpreted by the courts, section 16 requires that before the child is permitted to testify, the child be subjected to an inquiry as to his or her understanding of the obligation to tell the truth, the concept of a promise, and an ability to communicate. [Emphasis added; pp. 105-6.]

(Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional*

Évidemment, nous devons faire confiance à notre magistrature au sujet d'un grand nombre de questions, mais, pour certains enjeux, je crois qu'il est important de les orienter le plus possible. Je crains qu'un juge lise ceci — et nous avons une imposante jurisprudence qui reflète cela — et se dis[e] : « Bon, je ne peux t'interroger pour déterminer si tu comprends la nature de la promesse, mais est-ce que je peux te poser des questions sur le sens de la vérité? » Le Parlement prévoit explicitement, au paragraphe 16.1(6), qu'ils seront tenus de promettre de dire la vérité. On ne peut interroger les enfants sur la nature de la promesse, mais est-ce qu'on peut leur poser des questions sur le sens de « vérité » et de « mensonge »? [Je souligne; p. 7.]

(Chambre des communes, *Témoignages devant le Comité permanent de la justice, des droits de la personne, de la sécurité publique et de la protection civile*, nº 26, 1re sess., 38e lég., 24 mars 2005)

[43] Cette opinion a été confirmée par Mme Catherine Kane, directrice du Centre de la politique concernant les victimes du ministère de la Justice du Canada, au cours de sa déclaration d'ouverture devant le Comité sénatorial permanent des Affaires juridiques et constitutionnelles :

[Mme Catherine Kane :] . . . Ces modifications ont été apportées en 1988 pour rendre plus facilement acceptables les témoignages des enfants. Cependant, d'après la manière dont cette disposition a été interprétée dans certains procès, nous n'avons pas encore observé d'acceptation sans réserve de témoignages d'enfants.

Si ces deux critères sont respectés, un enfant témoigne sous serment ou sous affirmation solennelle. Cependant, si l'enfant ne comprend pas la nature du serment ou de l'affirmation mais est capable de communiquer la preuve, celle-ci est reçue sur promesse de dire la vérité. C'est la loi actuelle. Bien que cela puisse paraître logique à première vue, les interprétations et applications de ces dispositions ne reflètent pas l'intention du Parlement de modifier la Loi sur la preuve de manière à ce que les témoignages des enfants soient plus facilement acceptés.

Tel qu'il est interprété par les tribunaux, l'article 16 stipule qu'avant qu'un enfant soit autorisé à témoigner, il doit être assujetti à un interrogatoire pour déterminer son degré d'entendement de l'obligation de dire la vérité et du concept d'une promesse, et ses capacités de communiquer. [Je souligne; p. 105-106.]

(Sénat, *Délibérations du Comité sénatorial permanent des Affaires juridiques et*

Affairs, No. 18, 1st Sess., 38th Parl., July 7, 2005)

Therefore, it cannot be inferred that Parliament's failure to extend the express ban on questioning in s. 16.1(7) to adult witnesses shows an intent to permit such questioning of adult witnesses with mental disabilities.

[44] Second, as already mentioned, the wording of s. 16(3) governing the competence of adult witnesses had since 1987 required only a promise to tell the truth. There was no need for Parliament to add a provision on questioning an adult witness's understanding of the nature of the obligation to tell the truth in s. 16(3). The fact that Parliament did so 18 years later for children's evidence under s. 16.1(7) reflects concern with the fact that courts in children's cases, such as *Khan*, were continuing to engage in this type of questioning, instead of accepting a simple promise to tell the truth. It does not evince an intention that Parliament intended the words "promising to tell the truth" to have different meanings in ss. 16(3) and 16.1(6).

[45] Third, the argument that the enactment of s. 16.1(7) for children but not for adults endorsed as applicable to adult witnesses the earlier judicial interpretation of the provisions relating to children does not take into account s. 45 of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, which provides:

45. (1) [Repeal does not imply enactment was in force] The repeal of an enactment in whole or in part shall not be deemed to be or to involve a declaration that the enactment was previously in force or was considered by Parliament or other body or person by whom the enactment was enacted to have been previously in force.

(2) [Amendment does not imply change in law] The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.

constitutionnelles, nº 18, 1re sess., 38e lég., 7 juillet 2005)

Par conséquent, on ne peut conclure que l'omission du législateur d'appliquer aux adultes l'interdiction explicite de poser des questions qui figure au par. 16.1(7) révèle une intention de permettre que des questions soient posées aux adultes ayant une déficience intellectuelle.

[44] Deuxièmement, comme je l'ai déjà mentionné, le libellé du par. 16(3) régissant l'habilité des adultes à témoigner exigeait uniquement, depuis 1987, une promesse de dire la vérité. Il n'était pas nécessaire que le législateur ajoute au par. 16(3) une disposition interdisant que l'on interroge un adulte pour vérifier s'il comprend la nature de l'obligation de dire la vérité. Le fait que le législateur ait, 18 ans plus tard, ajouté une telle disposition au par. 16.1(7) relativement au témoignage des enfants traduit son inquiétude de voir que, dans les affaires relatives à des enfants, comme l'affaire *Khan*, les tribunaux permettaient toujours ce type d'interrogatoire plutôt que d'accepter une simple promesse de dire la vérité. Cela ne démontre pas que le législateur voulait que les mots « en promettant de dire la vérité » aient des significations différentes au par. 16(3) et au par. 16.1(6).

[45] Troisièmement, l'argument selon lequel l'adoption du par. 16.1(7) relativement aux enfants et non aux adultes a confirmé que l'interprétation judiciaire des dispositions ayant trait aux enfants s'applique aux adultes ne tient pas compte de l'art. 45 de la *Loi d'interprétation* fédérale, L.R.C. 1985, ch. I-21, qui prévoit ce qui suit :

45. (1) [Absence de présomption d'entrée en vigueur] L'abrogation, en tout ou en partie, d'un texte ne constitue pas ni n'implique une déclaration portant que le texte était auparavant en vigueur ou que le Parlement, ou toute autre autorité qui l'a édicté, le considérait comme tel.

(2) [Absence de présomption de droit nouveau] La modification d'un texte ne constitue pas ni n'implique une déclaration portant que les règles de droit du texte étaient différentes de celles de sa version modifiée ou que le Parlement, ou toute autre autorité qui l'a édicté, les considérait comme telles.

(3) [Repeal does not declare previous law] The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.

(4) [Judicial construction not adopted] A re-enactment, revision, consolidation or amendment of an enactment shall not be deemed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language.

[46] Section 45(3) of the *Interpretation Act* provides that the amendment of an enactment (in this case the adoption of s. 16.1(7)) shall not be deemed to involve any declaration as to the meaning of the previous law (in this case s. 16(3)). Therefore, no inference as to the meaning of s. 16(3) flows from the mere adoption of s. 16.1(7) with respect to children.

[47] Additionally, s. 45(4) of the *Interpretation Act* states that the re-enactment of a provision (in this case, s. 16 with respect to adults with mental disabilities) is not sufficient to infer that Parliament adopted the provision's judicial interpretation which prevailed at the time of the re-enactment. It follows that the fact that s. 16 was re-enacted for adults with mental disabilities in 2005 does not, alone, imply that Parliament intended to countenance the judicial interpretation of this section which required understanding the obligation to tell the truth.

[48] Fourth, the argument that the absence of the equivalent of s. 16.1(7) in s. 16(3) means that adult witnesses with mental disabilities must demonstrate an understanding of the nature of the duty to speak the truth is logically flawed. The argument rests on the premise that s. 16(3), unless amended, requires an inquiry into the witness's understanding of the obligation to tell the truth. On this basis, it asserts that, unless the ban on questioning in s. 16.1(7) dealing with children is read into s. 16(3), such questioning must be conducted. Thus, my colleague Binnie J. states that "[t]he Crown invites us, in effect, to apply the 'don't ask' rule governing

(3) [Absence de déclaration sur l'état antérieur du droit] L'abrogation ou la modification, en tout ou en partie, d'un texte ne constitue pas ni n'implique une déclaration sur l'état antérieur du droit.

(4) [Absence de confirmation de l'interprétation judiciaire] La nouvelle édiction d'un texte, ou sa révision, refonte, codification ou modification, n'a pas valeur de confirmation de l'interprétation donnée, par décision judiciaire ou autrement, des termes du texte ou de termes analogues.

[46] Le paragraphe 45(3) de la *Loi d'interprétation* prévoit que la modification d'un texte (en l'espèce, l'adoption du par. 16.1(7)) ne constitue pas ni n'implique une déclaration sur l'état antérieur du droit (en l'espèce, le par. 16(3)). Ainsi, aucune inférence quant au sens du par. 16(3) ne découle de la simple adoption du par. 16.1(7) relativement aux enfants.

[47] De plus, le par. 45(4) de la *Loi d'interprétation* prévoit que la nouvelle édiction d'une disposition (en l'espèce, l'art. 16 relativement aux adultes ayant une déficience intellectuelle) ne permet pas d'inférer que le législateur a adopté l'interprétation judiciaire de la disposition qui prévalait à l'époque de la nouvelle édiction. Il s'ensuit que le fait que l'art. 16 ait été édicté de nouveau en 2005 en ce qui concerne les adultes ayant une déficience intellectuelle ne donne pas en soi à penser que le législateur voulait favoriser l'interprétation judiciaire de cet article qui exigeait que la personne comprenne l'obligation de dire la vérité.

[48] Quatrièmement, l'argument selon lequel l'absence, au par. 16(3), d'une disposition équivalente au par. 16.1(7) signifie que les adultes ayant une déficience intellectuelle doivent démontrer qu'ils comprennent la nature de l'obligation de dire la vérité n'est pas logique. Cet argument repose sur l'hypothèse selon laquelle le par. 16(3), s'il n'est pas modifié, exige que l'on vérifie si la personne comprend l'obligation de dire la vérité. Sur ce fondement, on fait valoir que les adultes doivent être interrogés à moins que l'interdiction de poser des questions aux enfants qui figure au par. 16.1(7) ne soit considérée comme incluse au par. 16(3). Ainsi,

children to adults whose mental capacity is challenged" (para. 127).

[49] The fallacy in this argument is the starting assumption that s. 16(3) requires importing a "don't ask" rule. As explained earlier, it does not. Section 16(3) sets two requirements for the competence of adults with mental disabilities: the ability to communicate the evidence and a promise to tell the truth. It is self-sufficient. Nothing further need be imported.

[50] Fifth, and following from the previous point, the argument relies on the assumption that unless it can be shown that adult witnesses with mental disabilities are the same as, or like, child witnesses, adult witnesses with mental disabilities must be treated differently, and subjected to an inquiry into their understanding of the nature of the obligation to tell the truth before they can be held competent to testify. Thus Binnie J. states that before s. 16(3) can be read as importing the "don't ask" rule, it is for the Crown to establish that there is no difference between children and adults with mental disabilities on the test of what reasonable people would accept. He opines that an assertion of equivalency is "pure assertion on a key issue" (para. 130).

[51] There are several answers to this "equivalency" argument. First, like the previous argument, it rests on the mistaken assumption that the Crown asks us to import a "don't ask" rule into s. 16(3). The plain words of s. 16(3) do not require an understanding of the obligation to tell the truth, and it is for the party seeking to depart from the text of s. 16(3) to demonstrate that adults with mental disabilities should be treated differently from children. Second, the argument suffers from inconsistency. It claims that the equivalency of the vulnerabilities of these two groups of witnesses is "pure assertion

selon mon collègue le juge Binnie, « [l]e ministère public nous invite, en réalité, à appliquer aux adultes dont la capacité mentale est mise en question la règle interdisant de poser des questions aux enfants » (par. 127).

[49] Cet argument est fallacieux car il suppose au départ qu'il faut incorporer au par. 16(3) une règle interdisant de poser des questions. Comme je l'ai déjà expliqué, ce n'est pas le cas. Le paragraphe 16(3) énonce deux conditions relatives à l'habilité à témoigner des adultes ayant une déficience intellectuelle : la capacité de communiquer les faits dans leur témoignage et la promesse de dire la vérité. Cette disposition est complète en soi. Il n'y a rien d'autre à y incorporer.

[50] Cinquièmement, et dans la lignée de ce qui précède, l'argument repose sur l'hypothèse voulant que, sauf s'il peut être démontré que les adultes ayant une déficience intellectuelle sont comme les enfants, ou leur ressemblent, alors ils doivent être traités différemment et doivent subir un interrogatoire pour que l'on vérifie, avant de déterminer s'ils sont habiles à témoigner, qu'ils comprennent la nature de l'obligation de dire la vérité. Ainsi, le juge Binnie affirme que, avant que l'on incorpore au par. 16(3) la règle interdisant de poser des questions, le ministère public doit démontrer qu'il n'existe aucune différence entre les enfants et les adultes ayant une déficience intellectuelle selon le critère de ce qu'accepteraient des personnes raisonnables. Il est d'avis qu'une prétention d'équivalence n'est que « pure prétention relativement à une question clé » (par. 130).

[51] Il existe plusieurs façons de répondre à cet argument de l'« équivalence ». Premièrement, à l'instar de l'argument précédent, il repose sur l'hypothèse erronée voulant que le ministère public nous demande d'incorporer au par. 16(3) une règle interdisant de poser des questions. Le libellé explicite du par. 16(3) n'exige pas que la personne comprenne l'obligation de dire la vérité, et il appartient à la partie qui cherche à dévier du texte du par. 16(3) de démontrer que les adultes ayant une déficience intellectuelle doivent être traités différemment des enfants. Deuxièmement, l'argument est incohérent.

on a key issue", but at the same time claims that the previous judge-made law for children (*Khan*) should apply to adult witnesses with mental disabilities. Third, one may question how equivalency, were it needed, should be established: Is the proper approach to competence what reasonable people would conclude, or judicial opinion informed by assessment of the situation and expert opinion?

[52] The final and most compelling answer to the equivalency argument is simply this: When it comes to testimonial competence, precisely what, one may ask, is the difference between an adult with the mental capacity of a six-year-old, and a six-year-old with the mental capacity of a six-year-old? Parliament, by applying essentially the same test to both under s. 16(3) and s. 16.1(3) and (6) of the *Canada Evidence Act*, implicitly finds no difference. In my view, judges should not import one.

[53] I conclude that s. 16(3) of the *Canada Evidence Act*, properly interpreted, establishes two requirements for an adult with mental disabilities to take the stand: the ability to communicate the evidence and a promise to tell the truth. A further requirement that the witness demonstrate that she understands the nature of the obligation to tell the truth should not be read into the provision.

C. *The Jurisprudence*

[54] I have concluded that s. 16(3), on its plain words and in its context, reveals only two requirements for an adult with mental disabilities to have the capacity to testify: (1) that the witness be able to communicate the evidence, and (2) that the person promise to tell the truth. It is necessary next to consider whether the jurisprudence requires a different result. My colleague Binnie J. argues that the cases, and in particular *Khan*, require that "promising to

D'une part, selon cet argument, l'équivalence entre ces deux groupes de témoins vulnérables n'est que « pure prétention relativement à une question clé », mais d'autre part, toujours selon cet argument, le droit jurisprudentiel relatif aux enfants (*Khan*) devrait s'appliquer aux adultes ayant une déficience intellectuelle. Troisièmement, il faut se demander de quelle façon établir l'équivalence, si elle est nécessaire : la démarche qu'il convient d'adopter à l'égard de l'habilité à témoigner est-elle ce qu'une personne raisonnable pourrait conclure, ou ce que le juge peut conclure en se fondant sur une appréciation de la situation et les opinions d'experts?

[52] La réponse finale, et la plus convaincante, à l'argument de l'équivalence est tout simplement celle-ci : en ce qui concerne l'habilité à témoigner, on peut se demander quelle est la différence, précisément, entre un adulte ayant la capacité mentale d'un enfant de six ans et un enfant de six ans ayant la capacité mentale d'un enfant de six ans. En appliquant essentiellement le même critère aux par. 16(3), 16.1(3) et 16.1(6) de la *Loi sur la preuve au Canada*, le législateur conclut implicitement qu'il n'y a aucune différence. Selon moi, les juges ne devraient pas en introduire une.

[53] Je conclus que le par. 16(3) de la *Loi sur la preuve au Canada*, interprété correctement, prévoit deux conditions pour qu'un adulte ayant une déficience intellectuelle témoigne : il doit être capable de communiquer les faits dans son témoignage et promettre de dire la vérité. Il n'y a pas lieu d'incorporer à la disposition une condition supplémentaire voulant que la personne démontre qu'elle comprend la nature de l'obligation de dire la vérité.

C. *La jurisprudence*

[54] J'ai conclu que suivant le libellé explicite et le contexte du par. 16(3), seulement deux conditions sont requises pour qu'un adulte ayant une déficience intellectuelle soit habile à témoigner : (1) la personne doit être en mesure de communiquer les faits dans son témoignage, et (2) la personne doit promettre de dire la vérité. Il faut ensuite se demander si la jurisprudence exige un résultat différent. Mon collègue le juge Binnie prétend

tell the truth" in s. 16(3) must be read as impliedly importing an additional requirement — an understanding of the nature of the obligation engaged by the promise. With respect, I cannot agree.

[55] It is necessary at the outset to describe what *Khan* decided. *Khan* was concerned with the predecessor of s. 16, which was first enacted in 1893 (S.C. 1893, c. 31, s. 25) and dealt only with children. The provision required that the proposed witness "understan[d] the duty of speaking the truth". This phrase was deleted when the provision was amended in 1987. Explaining the statutory requirement that the witness must "understan[d] the duty of speaking the truth" in *Khan*, Robins J.A. stated:

> To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity to tell the truth, and promises to do so. [Emphasis added; p. 206.]

[56] This oft-cited statement of the law proved difficult to apply. The first sentence suggests that the threshold for testimonial competence is low, based on truth telling in "everyday social conduct". This suggests that the judge need only be satisfied that the witness understands the difference between truth and falsehood in relation to everyday matters and activities — not in some abstract metaphysical sense. The second sentence in this passage from *Khan*, specifically the phrases "knows that it is wrong to lie" and "understands the necessity to tell the truth" (emphases added), move beyond everyday social conduct into more abstract, philosophical realms. In *obiter*, Robins J.A. opined that the same test should be applied to the post-1987 section, on the grounds that without the requirement

que la jurisprudence, et notamment l'arrêt *Khan*, exige que les mots « en promettant de dire la vérité » qui figurent au par. 16(3) soient interprétés comme incorporant implicitement une condition supplémentaire — que la personne comprenne la nature de l'obligation qui découle de la promesse. En toute déférence, je ne puis souscrire à cette opinion.

[55] D'entrée de jeu, il est nécessaire d'exposer la décision dans l'arrêt *Khan*. L'arrêt portait sur la disposition antérieure à l'art. 16, adoptée pour la première fois en 1893 (S.C. 1893, ch. 31, art. 25), qui n'avait trait qu'aux enfants. La disposition exigeait du témoin éventuel qu'il « compren[ne] le devoir de dire la vérité ». Ces mots ont été supprimés lorsque la disposition a été modifiée en 1987. Expliquant l'exigence prévue par la loi selon laquelle le témoin doit « comprend[re] le devoir de dire la vérité », le juge Robins de la Cour d'appel a déclaré ce qui suit dans *Khan* :

> [TRADUCTION] Pour satisfaire aux normes moins sévères applicables au témoignage qui n'est pas donné sous serment, il suffit que l'enfant comprenne le devoir de dire la vérité au sens de la conduite sociale ordinaire de la vie quotidienne. On peut en faire la preuve par une série de questions simples permettant de déterminer si l'enfant comprend la différence entre la vérité et le mensonge, s'il sait qu'il n'est pas bien de mentir, s'il comprend la nécessité de dire la vérité et promet de le faire. [Je souligne; p. 206.]

[56] L'application de cet énoncé du droit maintes fois cité s'est révélée difficile. La première phrase donne à penser que le critère relatif à l'habilité à témoigner est peu exigeant; il suffit de dire la vérité au sens de la [TRADUCTION] « conduite sociale ordinaire de la vie quotidienne ». Cela donne à penser que le juge doit simplement être convaincu que le témoin comprend la différence entre la vérité et le mensonge dans le contexte de la vie quotidienne — et non pas dans un contexte métaphysique abstrait. La deuxième phrase figurant dans ce passage tiré de *Khan*, plus précisément les mots « sait qu'il n'est pas bien de mentir » et « comprend la nécessité de dire la vérité » (je souligne), vont plus loin que la conduite sociale ordinaire de la vie quotidienne. Ils relèvent du domaine plus abstrait

that the witness understand what a promise is and the importance of keeping it, the promise would be an "empty gesture".

[57] In *R. v. Farley* (1995), 23 O.R. (3d) 445, the Ontario Court of Appeal adopted this *obiter dictum* and applied it to the post-1987 version of s. 16(3), the provision applicable in this case. Other provincial courts of appeal followed suit: *R. v. P.M.F.* (1992), 115 N.S.R. (2d) 38; *R. v. McGovern* (1993), 82 C.C.C. (3d) 301 (Man.); *R. v. S.M.S.* (1995), 160 N.B.R. (2d) 182. In *R. v. Rockey*, [1996] 3 S.C.R. 829, a minority of this Court, *per* McLachlin J., held that a child was incompetent to testify on the basis of his inability to *communicate* the evidence, referring to *Farley* with approval; the question of whether s. 16(3) incorporated the *Khan* test was not at issue in that case. Appellate courts continue to require demonstration of an understanding of the duty to speak the truth under s. 16(3): *R. v. Ferguson* (1996), 112 C.C.C. (3d) 342 (B.C.); *R. v. Parrott* (1999), 175 Nfld. & P.E.I.R. 89 (Nfld.); *R. v. A. (K.)* (1999), 137 C.C.C. (3d) 554 (Ont.); *R. v. R.J.B.*, 2000 ABCA 103, 255 A.R. 301; *R. v. Brouillard*, 2006 QCCA 1263, 44 C.R. (6th) 218; *R. v. E.E.D.*, 2007 SKCA 99, 304 Sask. R. 192. In the case at bar, the Ontario Court of Appeal affirmed that view, upholding the trial judge's insistence on the understanding of the duty to speak the truth not merely in "everyday social conduct", but on an understanding of the duty *abstracted* from everyday situations.

[58] This is the first case in which this Court has been squarely called upon to interpret s. 16(3) of the *Canada Evidence Act* and confront the legacy of the *obiter dicta* in *Khan*. In my view, the test proposed in *Khan* is unhelpful and inapplicable, insofar as it is read as requiring or condoning an

de la philosophie. Dans une remarque incidente, le juge Robins a exprimé l'avis que le même critère devrait être appliqué à la disposition adoptée en 1987, car la promesse serait un « geste vide de sens » si l'on n'exigeait pas du témoin qu'il comprenne ce qu'est une promesse et l'importance de la respecter.

[57] Dans l'arrêt *R. c. Farley* (1995), 23 O.R. (3d) 445, la Cour d'appel de l'Ontario a adopté cette remarque incidente et l'a appliquée à la version de 1987 du par. 16(3), la disposition applicable en l'espèce. D'autres cours d'appel provinciales ont emboîté le pas : *R. c. P.M.F.* (1992), 115 N.S.R. (2d) 38; *R. c. McGovern* (1993), 82 C.C.C. (3d) 301 (Man.); *R. c. S.M.S.* (1995), 160 R.N.-B. (2e) 182. Dans *R. c. Rockey*, [1996] 3 R.C.S. 829, la juge McLachlin, au nom des juges minoritaires de la Cour, a cité avec approbation l'arrêt *Farley* pour conclure qu'un enfant était inhabile à témoigner en raison de son incapacité à *communiquer* les faits dans son témoignage; la question de savoir si le par. 16(3) incorporait le critère formulé dans l'arrêt *Khan* n'a pas été soulevée dans cette affaire. Les tribunaux d'appel exigent toujours que la personne démontre qu'elle comprend l'obligation de dire la vérité en vertu du par. 16(3) : *R. c. Ferguson* (1996), 112 C.C.C. (3d) 342 (C.-B.); *R. c. Parrott* (1999), 175 Nfld. & P.E.I.R. 89 (T.-N.); *R. c. A. (K.)* (1999), 137 C.C.C. (3d) 554 (Ont.); *R. c. R.J.B.*, 2000 ABCA 103, 255 A.R. 301; *R. c. Brouillard*, 2006 QCCA 1263, 44 C.R. (6th) 218; *R. c. E.E.D.*, 2007 SKCA 99, 304 Sask. R. 192. En l'espèce, la Cour d'appel de l'Ontario a confirmé ce point de vue, en approuvant l'accent mis par le juge du procès sur la nécessité pour la personne de comprendre l'obligation de dire la vérité non pas seulement dans la [TRADUCTION] « conduite sociale ordinaire de la vie quotidienne », mais également que la personne comprenne l'obligation *sans égard* aux situations de tous les jours.

[58] Il s'agit en l'espèce de la première affaire dans laquelle la Cour est directement appelée à interpréter le par. 16(3) de la *Loi sur la preuve au Canada* et est confrontée à l'héritage laissé par les remarques incidentes formulées dans *Khan*. Selon moi, le critère proposé dans *Khan* n'est d'aucune

abstract inquiry into the nature of the obligation to tell the truth.

[59] First and foremost, *Khan* was concerned with a substantially different pre-1987 version of s. 16, which was adopted in 1893 and which explicitly required that the proposed witness "understands the duty of speaking the truth". The current provision requires only that the witness be able to communicate the evidence and promise to tell the truth. It speaks only of two practical, less abstract, requirements — the ability to communicate the evidence and a promise to tell the truth. In short, *Khan* imposed a requirement to demonstrate understanding of the nature of the obligation to tell the truth, based on the phrase "understands the duty of speaking the truth". That phrase has been removed from the current s. 16(3). It follows that *Khan* simply does not apply to this case, and that the *obiter dictum* in *Khan* suggesting that it does should be rejected. In 1987, Parliament deleted the requirement of understanding the nature of the duty to tell the truth. Judges should not bring it back in.

[60] Second, the *Khan* test, as already noted, is ambivalent. It first suggests that all that is required is an understanding of the duty to speak the truth "in terms of ordinary everyday social conduct" (p. 206). However, it then goes on to illustrate this test in terms abstracted from everyday social conduct. In my view, the former approach is preferable.

[61] This lower threshold recognizes that witnesses of limited mental ability, whether by reason of age or disability, understand and articulate events in the concrete terms of the world around them. The capacity to abstract from the concrete and draw generalizations about conduct unrelated to concrete situations typically develops at a later, more advanced stage of mental development. A

utilité et est inapplicable, dans la mesure où il est interprété comme exigeant ou justifiant un interrogatoire dans l'abstrait sur la nature de l'obligation de dire la vérité.

[59] D'abord et avant tout, l'arrêt *Khan* portait sur une version très différente, antérieure à 1987, de l'art. 16. Cette version, adoptée en 1893, exigeait explicitement que le témoin éventuel « compren[ne] le devoir de dire la vérité ». La disposition actuelle exige seulement que la personne soit capable de communiquer les faits dans son témoignage et promette de dire la vérité. Elle n'impose que deux conditions pratiques, moins abstraites — la capacité de communiquer les faits dans son témoignage et une promesse de dire la vérité. En bref, en se fondant sur les mots « comprend le devoir de dire la vérité », la cour dans l'arrêt *Khan* a imposé l'obligation pour la personne de démontrer qu'elle comprend la nature de l'obligation de dire la vérité. Ces mots ont été radiés dans la version actuelle du par. 16(3). Il s'ensuit que l'arrêt *Khan* ne s'applique tout simplement pas en l'espèce et qu'il faut rejeter la remarque incidente formulée dans *Khan* donnant à penser que cet arrêt s'applique toujours. En 1987, le législateur a supprimé l'exigence pour la personne de comprendre la nature de l'obligation de dire la vérité. Les juges ne devraient pas la réintroduire.

[60] Deuxièmement, le critère formulé dans l'arrêt *Khan*, comme je l'ai déjà signalé, est ambivalent. Il laisse d'abord entendre que le par. 16(3) exige seulement une compréhension du devoir de dire la vérité [TRADUCTION] « au sens de la conduite sociale ordinaire de la vie quotidienne » (p. 206). Toutefois, il poursuit en décrivant ce critère en termes qui font abstraction de la conduite sociale ordinaire de la vie quotidienne. Pour ma part, je préfère la première approche.

[61] Selon ce critère moins exigeant, les personnes ayant une capacité mentale limitée, en raison de leur âge ou d'une incapacité, comprennent concrètement les événements dans le monde qui les entoure et sont en mesure de les décrire. La capacité de considérer les choses dans l'abstrait et de faire des généralisations à propos de comportements non liés à des situations concrètes apparaît

child or adult with mental disabilities may be able to distinguish between what is true and false or right and wrong in a particular situation, yet lack the ability to articulate in general language the reasons for this understanding. To insist on the articulation of the nature of the obligation to tell the truth, abstracted from particular situations, may result in the witness's evidence being excluded, even though it is reliable.

[62] Third, as discussed above, Parliament's response to *Khan*'s insistence on an understanding of the duty to speak the truth in abstract terms and the metaphysical questioning this insistence gave rise to, was to expressly forbid such inquiries in the case of children by enacting s. 16.1(7) in 2005. Why then, one may ask, should courts struggle to read a contrary purpose into the plain language of s. 16, which requires only a concrete inquiry into whether the proposed witness can communicate the evidence and a promise to tell the truth?

[63] I conclude that, insofar as the authorities suggest that "promising to tell the truth" in s. 16(3) should be read as requiring an abstract inquiry into an understanding of the obligation to tell the truth, they should be rejected. All that is required is that the witness be able to communicate the evidence and promise to tell the truth.

D. *Policy Considerations*

[64] I have concluded that s. 16(3) imposes two requirements for the testimonial competence of an adult with mental disabilities: (1) the ability to communicate the evidence; and (2) a promise to tell the truth. It is unnecessary and indeed undesirable to conduct an abstract inquiry into whether the witness generally understands the difference between truth and falsity and the obligation to give true evidence in court. Mentally limited people may well understand the difference between the truth and

généralement à un stade plus avancé du développement mental. Un enfant ou un adulte ayant une déficience intellectuelle peut, dans une situation donnée, être capable de distinguer le vrai du faux, ou le bien du mal, mais ne pas pouvoir formuler en langage ordinaire les raisons de cette compréhension. Insister sur la formulation de la nature de l'obligation de dire la vérité, sans égard à des situations particulières, peut avoir pour conséquence que le témoignage de la personne soit exclu, même s'il est fiable.

[62] Troisièmement, comme je l'ai déjà mentionné, en adoptant le par. 16.1(7) en 2005 en réponse à l'accent mis dans l'arrêt *Khan* sur la compréhension, en termes abstraits, du devoir de dire la vérité et des questions d'ordre métaphysique que cet accent engendrait, le législateur a interdit explicitement ces interrogatoires lorsque des enfants sont en cause. Il faut alors se demander pourquoi les tribunaux s'évertueraient à donner un sens contraire au libellé clair de l'art. 16, lequel oblige seulement le juge à vérifier si, concrètement, le témoin éventuel est capable de communiquer les faits dans son témoignage et s'il promet de dire la vérité.

[63] Je conclus que dans la mesure où les autorités prétendent que les mots « en promettant de dire la vérité » figurant au par. 16(3) devraient être interprétés comme obligeant le juge de s'assurer que la personne comprend, dans l'abstrait, ce qu'est l'obligation de dire la vérité, leurs décisions doivent être rejetées. Tout ce qui est exigé, c'est que le témoin soit capable de communiquer les faits dans son témoignage et qu'il promette de dire la vérité.

D. *Considérations de politique générale*

[64] J'ai conclu que le par. 16(3) impose deux conditions relativement à l'habilité à témoigner d'un adulte ayant une déficience intellectuelle : (1) la capacité de communiquer les faits dans son témoignage et (2) une promesse de dire la vérité. Il n'est ni nécessaire, ni même souhaitable, de poser des questions de nature abstraite à la personne afin de voir si elle comprend d'une manière générale la différence entre la vérité et la fausseté et l'obligation de dire la vérité devant le tribunal. Des

a lie and know they should tell the truth, without being able to articulate in general terms the nature of truth or why and how it fastens on the conscience in a court of law. Section 16(3), in assessing the witness's capacity, focuses on the concrete acts of communicating and promising. The witness is not required to explain the difference between the truth and a lie, or what makes a promise binding. I have argued that this result follows from the plain words of s. 16 of the *Canada Evidence Act*, and that judges should not by implication add other elements to the dual requirements of an ability to communicate evidence and a promise to tell the truth imposed by s. 16(3).

[65] The discussion of the proper interpretation of s. 16(3) of the *Canada Evidence Act* would not be complete, however, without addressing the policy concerns underlying the issue. Two potentially conflicting policies are in play. The first is the social need to bring to justice those who sexually abuse people of limited mental capacity — a vulnerable group all too easily exploited. The second is to ensure a fair trial for the accused and to prevent wrongful convictions.

[66] The first policy consideration is self-evident and requires little amplification. Those with mental disabilities are easy prey for sexual abusers. In the past, mentally challenged victims of sexual offences have been frequently precluded from testifying, not on the ground that they could not relate what happened, but on the ground that they lacked the capacity to articulate in abstract terms the difference between the truth and a lie and the nature of the obligation imposed by promising to tell the truth. As discussed earlier, such witnesses may well be capable of telling the truth and in fact understanding that when they do promise, they should tell the truth. To reject this evidence on the ground that they cannot explain the nature of the

personnes ayant des capacités intellectuelles limitées peuvent bien faire la différence entre la vérité et le mensonge et savoir qu'elles doivent dire la vérité, sans être capables d'énoncer en termes généraux la nature de la vérité ou pourquoi et en quoi cela fait appel à la conscience dans une cour de justice. En ce qui a trait à l'appréciation de la capacité du témoin, le par. 16(3) met l'accent sur les actes concrets que sont la communication et la promesse. Le témoin n'a pas à expliquer la différence entre la vérité et le mensonge, ou ce qui rend une promesse obligatoire. J'ai indiqué que cela découle du libellé explicite de l'art. 16 de la *Loi sur la preuve au Canada*, et que les juges ne devraient pas ajouter implicitement d'autres éléments aux conditions de capacité de communiquer les faits dans son témoignage et de promesse de dire la vérité qu'impose le par. 16(3).

[65] L'analyse relative à l'interprétation correcte du par. 16(3) de la *Loi sur la preuve au Canada* ne serait toutefois pas complète sans que soient abordées les considérations de politique générale qui sous-tendent cette question. Deux principes susceptibles de s'opposer entrent en jeu. Le premier est le besoin social de traduire en justice ceux qui agressent sexuellement des personnes ayant des capacités mentales limitées — un groupe vulnérable trop facilement exploité. Le deuxième est la nécessité de garantir la tenue d'un procès équitable pour l'accusé et de prévenir les déclarations de culpabilité injustifiées.

[66] La première considération de politique générale va de soi et demande peu de précision. Les personnes ayant une déficience intellectuelle sont des proies faciles pour les agresseurs sexuels. Dans le passé, les victimes d'agressions sexuelles ayant une déficience intellectuelle ont souvent été empêchées de témoigner, non pas parce qu'elles ne pouvaient pas relater ce qui s'était passé, mais parce qu'elles n'étaient pas capables d'exprimer en termes abstraits la différence entre la vérité et le mensonge et la nature de l'obligation qu'impose la promesse de dire la vérité. Comme je l'ai déjà expliqué, ces personnes sont peut-être capables de dire la vérité et, en fait, de comprendre que lorsqu'elles promettent de dire la vérité, elles doivent dire la vérité.

obligation to tell the truth in philosophical terms that even those possessed of normal intelligence may find challenging is to exclude reliable and relevant evidence and make it impossible to bring to justice those charged with crimes against the mentally disabled.

Rejeter leur témoignage au motif qu'elles ne peuvent pas expliquer en termes philosophiques la nature de l'obligation de dire la vérité, ce que même les personnes ayant une intelligence normale peuvent avoir de la difficulté à faire, équivaut à écarter des témoignages fiables et pertinents et à empêcher que soient traduits en justice des auteurs de crimes contre des personnes ayant une déficience intellectuelle.

[67] The inability to prosecute such crimes and see justice done, whatever the outcome, may be devastating to the family of the alleged victim, and to the victim herself. But the harm does not stop there. To set the bar too high for the testimonial competence of adults with mental disabilities is to permit violators to sexually abuse them with near impunity. It is to jeopardize one of the fundamental desiderata of the rule of law: that the law be enforceable. It is also to effectively immunize an entire category of offenders from criminal responsibility for their acts and to further marginalize the already vulnerable victims of sexual predators. Without a realistic prospect of prosecution, they become fair game for those inclined to abuse.

[67] L'incapacité d'intenter des poursuites relativement à ces crimes afin que justice soit faite, quelle que soit l'issue de la cause, peut avoir un effet dévastateur pour la famille de la victime, et pour la victime elle-même. Mais le préjudice ne s'arrête pas là. En fixant des critères trop exigeants relativement à l'habilité à témoigner des adultes ayant une déficience intellectuelle, on permet à des contrevenants d'agresser sexuellement ces personnes presque impunément, ce qui compromet l'un des *desiderata* fondamentaux de la règle de droit, à savoir que la loi doit être susceptible d'application. Ainsi, une catégorie entière de contrevenants se trouvent dégagés de toute responsabilité criminelle relativement à leurs actes et l'on marginalise davantage les victimes déjà vulnérables des prédateurs sexuels. À défaut de véritables possibilités que des poursuites soient intentées, ces victimes sont laissées sans défense face à leurs agresseurs.

[68] What then of the policy considerations on the other side of the equation? Here again, the starting point is clear. The *Canadian Charter of Rights and Freedoms* guarantees a fair trial to everyone charged with a crime. This right cannot be abridged; an unfair trial can never be condoned.

[68] Qu'en est-il alors des considérations de politique générale relatives à l'autre aspect de l'équation? Là encore, le point de départ est clair. La *Charte canadienne des droits et libertés* garantit la tenue d'un procès équitable à toute personne accusée d'un acte criminel. Ce droit ne peut pas être enfreint; un procès inéquitable n'est jamais acceptable.

[69] It is neither necessary nor wise to enter on the vast subject of what constitutes a fair trial. One searches in vain for exhaustive definitions in the jurisprudence. Rather, the approach taken in the jurisprudence is to ask whether particular rules or occurrences render a trial unfair. It is from that perspective that we must approach this issue in this case.

[69] Il n'est ni nécessaire ni sage d'aborder le vaste sujet de ce qui constitue un procès équitable. On cherchera en vain des définitions exhaustives dans la jurisprudence. L'approche retenue par les tribunaux consiste plutôt à déterminer si des règles ou des faits particuliers rendent un procès inéquitable. C'est dans cette optique qu'il nous faut aborder ce sujet en espèce.

[70] The question is this: Does allowing an adult witness with mental disabilities to testify when the witness can communicate the evidence and promises to tell the truth render a trial unfair? In my view, the answer to this question is no.

[71] The common law, upon which our current rules of evidence are founded, recognized a variety of rules governing the capacity to testify in different circumstances. The golden thread uniting these varying and different rules is the principle that the evidence must meet a minimal threshold or reliability as a condition of being heard by a judge or jury. Generally speaking, this threshold of reliability is met by establishing that the witness has the capacity to understand and answer the questions put to her, and by bringing home to the witness the need to tell the truth by securing an oath, affirmation or promise. There is no guarantee that any witness — even those of normal intelligence who can take the oath or affirm — will in fact tell the truth, all the truth, or nothing but the truth. What the trial process seeks is merely a basic indication of reliability.

[72] Many cases, including *Khan*, have warned against setting the threshold for the testimonial competence too high for adults with mental disabilities: *R. v. Caron* (1994), 72 O.A.C. 287; *Farley*; *Parrott*. This reflects the fact that such witnesses may be capable of giving useful, relevant and reliable evidence. It also reflects the fact that allowing the witness to testify is only the first step in the process. The witness's evidence will be tested by cross-examination. The trier of fact will observe the witness's demeanour and the way she answers the questions. The result may be that the trier of fact does not accept the witness's evidence, accepts only part of her evidence, or reduces the weight accorded to her evidence. This is a task that judges and juries perform routinely in a myriad of cases involving witnesses of unchallenged as well as challenged mental ability.

[70] La question est la suivante : le fait de permettre à une personne adulte ayant une déficience intellectuelle de témoigner lorsqu'elle peut communiquer les faits dans son témoignage et qu'elle promet de dire la vérité rend-il un procès inéquitable? Selon moi, il faut répondre non à cette question.

[71] La common law, le fondement de nos règles de preuve actuelles, prévoit diverses règles régissant l'habilité à témoigner dans différentes circonstances. Le fil d'or qui unit ces règles différentes et variables est le principe selon lequel le témoignage doit satisfaire à un seuil minimal de fiabilité pour qu'il soit présenté à un juge ou un jury. En règle générale, ce seuil de fiabilité est satisfait s'il est établi que le témoin a la faculté de comprendre les questions qui lui sont posées et d'y répondre, et si le témoin comprend qu'après avoir prêté serment ou fait une promesse ou une affirmation solennelle, il doit dire la vérité. Rien ne garantit qu'un témoin — même un témoin doué d'une intelligence normale qui peut prêter serment ou faire une affirmation solennelle — dira vraiment la vérité, toute la vérité et rien que la vérité. On recherche simplement dans le cadre du procès un indice élémentaire de fiabilité.

[72] De nombreuses décisions, notamment l'arrêt *Khan*, ont mis en garde contre le danger de fixer des exigences trop élevées relativement à l'habilité à témoigner des adultes ayant une déficience intellectuelle : *R. c. Caron* (1994), 72 O.A.C. 287; *Farley*; *Parrott*. Cela traduit le fait que ces personnes peuvent être capables de rendre un témoignage utile, pertinent et fiable, et qu'en leur permettant de témoigner, elles franchissent seulement la première étape du processus. La déposition du témoin sera vérifiée par contre-interrogatoire. Le juge des faits examinera le comportement du témoin et sa façon de répondre aux questions. Il peut arriver que le juge des faits écarte la déposition de cette personne, qu'il ne la retienne qu'en partie ou qu'il y accorde une importance moindre. Il s'agit d'une tâche que les juges et les jurés effectuent couramment dans d'innombrables affaires mettant en cause des témoins dont les capacités mentales peuvent être, ou ne pas être, mises en question.

[73] The requirement that the witness be able to communicate the evidence and promise to tell the truth satisfies the low threshold for competence in cases such as this. Once the witness is allowed to testify, the ultimate protection of the accused's right to a fair trial lies in the rules governing admissibility of evidence and in the judge's or jury's duty to carefully assess and weigh the evidence presented. Together, these additional safeguards offer ample protection against the risk of wrongful conviction.

[73] La prescription selon laquelle le témoin doit être capable de communiquer les faits dans son témoignage et doit promettre de dire la vérité satisfait au seuil peu exigeant relatif à l'habilité à témoigner dans les cas comme celui en l'espèce. Dès lors que la personne est autorisée à témoigner, la protection du droit de l'accusé à un procès équitable repose ultimement sur les règles régissant l'admissibilité de la preuve et sur l'obligation du juge ou du jury d'examiner et d'apprécier soigneusement la preuve. Ensemble, ces mesures de sauvegarde supplémentaires offrent une protection adéquate contre le risque de déclaration de culpabilité injustifiée.

E. *Summary of the Section 16(3) Test*

[74] To recap, s. 16(3) of the *Canada Evidence Act* imposes two conditions for the testimonial competence of adults with mental disabilities:

(1) the witness must be able to communicate the evidence; and

(2) the witness must promise to tell the truth.

Inquiries into the witness's understanding of the nature of the obligation this promise imposes are neither necessary nor appropriate. It is appropriate to question the witness on her ability to tell the truth in concrete factual circumstances, in order to determine if she can communicate the evidence. It is also appropriate to ask the witness whether she in fact promises to tell the truth. However, s. 16(3) does not require that an adult with mental disabilities demonstrate an understanding of the nature of the truth *in abstracto*, or an appreciation of the moral and religious concepts associated with truth telling.

[75] The following observations may be useful when applying s. 16(3) in the context of s. 16 of the *Canada Evidence Act*.

[76] First, the *voir dire* on the competence of a proposed witness is an independent inquiry: it may

E. *Résumé du critère prévu au par. 16(3)*

[74] Pour résumer, le par. 16(3) de la *Loi sur la preuve au Canada* impose deux conditions relativement à l'habilité à témoigner des adultes ayant une déficience intellectuelle :

(1) la personne doit être capable de communiquer les faits dans son témoignage;

(2) la personne doit promettre de dire la vérité.

Il n'est ni nécessaire ni opportun de vérifier si la personne comprend la nature de l'obligation que cette promesse comporte. Il convient de poser à la personne des questions sur son aptitude à dire la vérité dans des circonstances factuelles concrètes, afin de déterminer si elle peut communiquer les faits dans son témoignage. Il convient également de demander à la personne si elle promet de dire la vérité. Toutefois, le par. 16(3) n'exige pas qu'un adulte ayant une déficience intellectuelle démontre qu'il comprend la nature de la vérité *in abstracto* ou qu'il comprend les concepts moraux et religieux liés au devoir de dire la vérité.

[75] Les observations suivantes peuvent être utiles lorsqu'il s'agit d'appliquer le par. 16(3) dans le contexte de l'art. 16 de la *Loi sur la preuve au Canada*.

[76] Premièrement, le voir-dire relatif à l'habilité à témoigner d'un témoin éventuel constitue une

not be combined with a *voir dire* on other issues, such as the admissibility of the proposed witness's out-of-court statements.

[77] Second, although the *voir dire* should be brief, it is preferable to hear all available relevant evidence that can be reasonably considered before preventing a witness to testify. A witness should not be found incompetent too hastily.

[78] Third, the primary source of evidence for a witness's competence is the witness herself. Her examination should be permitted. Questioning an adult with mental disabilities requires consideration and accommodation for her particular needs; questions should be phrased patiently in a clear, simple manner.

[79] Fourth, the members of the proposed witness's surrounding who are personally familiar with her are those who best understand her everyday situation. They may be called as fact witnesses to provide evidence on her development.

[80] Fifth, expert evidence may be adduced if it meets the criteria for admissibility, but preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness.

[81] Sixth, the trial judge must make two inquiries during the *voir dire* on competence: (a) does the proposed witness understand the nature of an oath or affirmation, and (b) can she communicate the evidence?

[82] Seventh, the second inquiry into the witness's ability to communicate the evidence requires the trial judge to explore in a general way whether she can relate concrete events by understanding and responding to questions. It may be useful to

enquête indépendante : il ne peut être combiné à un voir-dire relatif à d'autres questions, comme celui de l'admissibilité des déclarations extrajudiciaires du témoin éventuel.

[77] Deuxièmement, un voir-dire devrait être bref, mais il est préférable d'entendre toute la preuve pertinente disponible pouvant raisonnablement être prise en considération avant d'empêcher une personne de témoigner. Il ne faut pas conclure trop rapidement à l'inhabilité d'une personne à témoigner.

[78] Troisièmement, la source principale de preuve lorsqu'il s'agit de déterminer si une personne est habile à témoigner est la personne elle-même. Son interrogatoire devrait être autorisé. Pour interroger un adulte ayant une déficience intellectuelle, il faut tenir compte de ses besoins particuliers et prendre les mesures d'adaptation qui s'imposent; les questions devraient être formulées patiemment, de façon claire et simple.

[79] Quatrièmement, les personnes de l'entourage qui connaissent personnellement le témoin éventuel sont les mieux placées pour comprendre son état quotidien. Elles peuvent être appelées, à titre de témoins des faits, à témoigner sur son développement.

[80] Cinquièmement, une preuve d'expert peut être produite si elle satisfait aux critères d'admissibilité; on préfère cependant toujours le témoignage d'experts ayant eu un contact personnel et régulier avec le témoin éventuel.

[81] Sixièmement, le juge du procès doit répondre à deux questions durant le voir-dire relatif à l'habilité à témoigner : a) le témoin éventuel comprend-il la nature du serment ou de l'affirmation solennelle, et b) est-il capable de communiquer les faits dans son témoignage?

[82] Septièmement, pour répondre à la deuxième question relative à la capacité de la personne de communiquer les faits dans son témoignage, le juge du procès doit vérifier de façon générale si la personne est capable de relater des faits concrets en

ask if she can differentiate between true and false everyday factual statements.

[83] Finally, the witness testifies under oath or affirmation if she passes both parts of the test, and on promising to tell the truth if she passes the second part only.

III. Application

[84] During the *voir dire* on K.B.'s testimonial capacity, the Crown posed a line of questions going to whether she could tell the difference between true and false factual statements in concrete circumstances. These were relevant to K.B.'s basic ability to communicate the evidence:

MR. SEMENOFF:

Q. How old are you now, [K.B.]?

A. I'm 22, you know that.

Q. 22? When's your birthday?

A. [Birth date].

Q. [Birth date]. Are you going to school now or are you done with school?

A. I'm not done in school yet.

Q. What school do you go to, [K.B.]?

A. [Name of school].

Q. How long -- do you know how long you've been going to [name of school]?

A. I don't know.

Q. Did you go to any school before you went to [name of school]?

A. From [name of previous school].

Q. From [name of previous school]. Okay.

comprenant les questions qui lui sont posées et en y répondant. Il peut être utile de se demander si la personne est en mesure de différencier entre de vraies et de fausses affirmations factuelles de tous les jours.

[83] Finalement, la personne peut témoigner sous serment ou affirmation solennelle si elle satisfait aux deux volets du critère. Si elle satisfait uniquement au deuxième volet du critère, elle peut témoigner en promettant de dire la vérité.

III. Application

[84] Au cours du voir-dire relatif à l'habilité de K.B. à témoigner, le ministère public a posé à K.B. une série de questions en vue de déterminer si elle pouvait dire la différence entre de vraies et de fausses affirmations factuelles dans des situations concrètes. Ces questions étaient pertinentes quant à la faculté élémentaire de K.B. à communiquer les faits dans son témoignage :

[TRADUCTION]

M. SEMENOFF :

Q. Quel âge as-tu actuellement, [K.B.]?

R. J'ai 22 ans, vous le savez.

Q. 22 ans? Quelle est ta date de naissance?

R. [Date de naissance].

Q. [Date de naissance]. Est-ce que tu vas présentement à l'école ou que tu as terminé tes études?

R. Je n'ai pas terminé mes études.

Q. À quelle école vas-tu, [K.B.]?

R. [Nom de l'école].

Q. Depuis combien de temps -- sais-tu depuis combien de temps tu vas à [nom de l'école]?

R. Je ne sais pas.

Q. Es-tu allée à une autre école avant d'aller à [nom de l'école]?

R. [Nom de l'autre école].

Q. [Nom de l'autre école]. D'accord.

Did you have a teacher from that school, a Ms. [W.]?

A. Ms. [R.].

Q. Oh, [R.]. Okay. And I call her Ms. [W.], do you know what her name is, is it [R.] or is it Ms. [W.]?

A. [R.].

Q. Okay.

. . .

Q. [K.B.], if I were to tell you that the room that we're in that the walls in the room are black[,] would that be a truth or a lie, [K.B.]?

A. A lie.

Q. Why would it be a lie?

A. It's different colours in here.

Q. There are different colours in here. What colour are the walls?

A. Purple.

Q. Purple. Okay. If I were to tell you that the gown that I'm wearing that that is black, would that be a truth or a lie?

A. The truth.

Q. And why is that?

A. I don't know.

Q. You don't know. Is it a good thing or a bad thing to tell the truth?

A. Good thing.

Q. Is it a good thing or a bad thing to tell a lie?

A. Bad thing.

(A.R., vol. I, at pp. 111-13)

However, the trial judge went on to question K.B. on her understanding of the meaning of truth, religious concepts, and the consequences of lying.

[THE COURT:]

[Q.] Do you go to church, [K.B.]?

A. No.

As-tu eu dans cette école une enseignante du nom de M^me^ [W.]?

R. M^me^ [R.].

Q. Oh, [R.]. D'accord. Et je l'appelle M^me^ [W.], sais-tu quel est son nom, est-ce [R.], est-ce M^me^ [W.]?

R. [R.].

Q. D'accord.

. . .

Q. [K.B.], si je te disais que la pièce où nous nous trouvons, les murs de cette pièce sont noirs, s'agit-il de la vérité ou d'un mensonge, [K.B.]?

R. Un mensonge.

Q. Pourquoi est-ce un mensonge?

R. Les couleurs sont différentes ici.

Q. Les couleurs sont différentes ici. De quelle couleur sont les murs?

R. Mauve.

Q. Mauve. D'accord. Si je te disais que la toge que je porte présentement est noire, s'agirait-il de la vérité ou d'un mensonge?

R. De la vérité.

Q. Et pourquoi donc?

R. Je ne sais pas.

Q. Tu ne sais pas. Est-il bon ou mauvais de dire la vérité?

R. C'est bon.

Q. Est-il bon ou mal de dire un mensonge?

R. C'est mal.

(d.a., vol. I, p. 111-113)

Toutefois, le juge du procès a poursuivi en posant à K.B. des questions sur sa compréhension de la vérité, sur des concepts religieux et sur les conséquences que comporte le mensonge.

[LA COUR :]

[Q.] Vas-tu à l'église, [K.B.]?

R. Non.

Q. No. Have you ever been taught about God or anything like that?

A. No.

Q. No? All right. What happens if you steal something?

A. I don't know.

Q. You don't know. If you steal something and no one sees it, will anything happen to you? Nothing will happen. Why won't anything happen?

A. I don't know.

Q. You don't know. Tell me what you think about the truth.

A. I don't know.

Q. You don't know. All right. Is it important to tell the truth?

A. I don't know.

Q. You don't know. Tell me what a promise is when you make a --

A. I don't know.

Q. -- promise. What's a promise?

A. I don't know.

Q. You don't know what a promise is. Okay. Have you ever been in court before?

A. Once.

Q. Once? And do you think it's an important thing to be in court?

A. I don't know.

Q. You don't know. All right. Do you know what an oath is, to take an oath?

A. I don't know.

Q. No. Do you have any idea what it means to tell the truth?

A. I don't know.

Q. You don't know. If you tell a lie does anything happen to you? Nothing happens.

A. No.

. . .

Q. Non. Est-ce qu'on t'a déjà parlé de Dieu ou de quelque chose du genre?

R. Non.

Q. Non? D'accord. Qu'est-ce qui se passe si tu voles quelque chose?

R. Je ne sais pas.

Q. Tu ne sais pas. Si tu voles quelque chose et que personne ne te voit, est-ce qu'il arrivera quelque chose? Il n'arrivera rien. Pourquoi est-ce qu'il n'arrivera rien?

R. Je ne sais pas.

Q. Tu ne sais pas. Dis-moi ce que tu penses de la vérité.

R. Je ne sais pas.

Q. Tu ne sais pas. Très bien. Est-il important de dire la vérité?

R. Je ne sais pas.

Q. Tu ne sais pas. Dis-moi ce qu'est une promesse lorsque tu --

R. Je ne sais pas.

Q. -- promets. Qu'est-ce qu'une promesse?

R. Je ne sais pas.

Q. Tu ne sais pas ce qu'est une promesse. D'accord. Es-tu déjà allée devant un tribunal?

R. Une fois.

Q. Une fois? Et crois-tu qu'être devant un tribunal est une chose importante?

R. Je ne sais pas.

Q. Tu ne sais pas. Très bien. Sais-tu ce qu'est un serment, ce que veut dire prêter serment?

R. Je ne sais pas.

Q. Non. Sais-tu ce que signifie dire la vérité?

R. Je ne sais pas.

Q. Tu ne sais pas. Si tu dis un mensonge, est-ce qu'il arrive quelque chose? Il n'arrive rien.

R. Non.

. . .

[THE COURT:]

[Q.] Do you know why you're here today?

A. I don't know. To talk about [D.A.I.].

Q. Yes, and do you think that's really important?

A. Maybe yeah.

Q. Maybe yeah? Remember earlier I was asking you about a promise?

A. No.

Q. Have you ever made a promise to anybody?

A. I don't know.

Q. That you promised you'll be good, did you ever say that? Have you ever heard that expression "I promise to be good, mommy"?

A. Okay.

Q. All right. So do you know what a promise is, that you're going to do something the right way? Do you understand that?

A. Okay.

Q. Can you tell me whether you understand that, [K.B.]?

A. I don't know.

Q. Does anything happen if you break a promise?

A. I don't know.

Q. You told me you don't go to church, right?

A. Right.

Q. And no one has ever told you about God; is that correct? No one has ever told you about God?

A. No.

Q. Has anyone ever told you that if you tell big lies you'll go to jail?

A. Right.

Q. If you tell big lies will you go to jail?

A. No.

(*Ibid.*, at pp. 117-19 and 155-56)

[LA COUR :]

[Q.] Sais-tu pourquoi tu es ici aujourd'hui?

R. Je ne sais pas. Pour parler de [D.A.I.].

Q. Oui, et penses-tu que ce soit vraiment important?

R. Peut-être, oui.

Q. Peut-être oui? Te souviens-tu, plus tôt, quand je t'ai posé des questions à propos d'une promesse?

R. Non.

Q. As-tu déjà fait une promesse à quelqu'un?

R. Je ne sais pas.

Q. As-tu déjà promis d'être gentille, as-tu déjà dit cela? As-tu déjà entendu l'expression « je promets d'être gentille, maman »?

R. D'accord.

Q. Très bien. Alors, sais-tu ce qu'est une promesse, que tu vas agir de la bonne façon? Comprends-tu?

R. D'accord.

Q. Peux-tu me dire si tu comprends ça, [K.B.]?

R. Je ne sais pas.

Q. Est-ce qu'il arrive quelque chose si tu ne tiens pas une promesse?

R. Je ne sais pas.

Q. Tu m'as dit que tu ne vas pas à l'église, n'est-ce pas?

R. Exact.

Q. Et personne ne t'a jamais parlé de Dieu; est-ce exact? Personne ne t'a jamais parlé de Dieu?

R. Non.

Q. Est-ce qu'on t'a jamais dit que si tu dis de gros mensonges, tu vas aller en prison?

R. Exact.

Q. Si tu dis de gros mensonges, tu vas aller en prison?

R. Non.

(*Ibid.*, p. 117-119 et 155-156)

[85] As these passages demonstrate, the trial judge was not satisfied with the Crown's questions on K.B.'s ability to recount events and distinguish between telling the truth and lying in concrete, real-life situations. He went on to question her on the nature of truth, religious obligations and the consequences of failing to tell the truth. Because K.B. was unable to satisfactorily answer these more abstract questions, he ruled that she could not be allowed to promise to tell the truth and refused to allow her to testify.

[86] This ruling was based on an erroneous interpretation of s. 16(3), which the trial judge read as requiring an understanding of the duty to speak the truth. Hence, K.B. was precluded from testifying on promising to tell the truth. The trial judge summed up his conclusions as follows:

> Having questioned [K.B.] at length I am fully satisfied that [K.B.] has not satisfied the prerequisite that she understands the duty to speak to the truth. She cannot communicate what truth involves or what a lie involves, or what consequences result from truth or lies, and in such circumstances, quite independent of the evidence of [Dr. K.], I am not satisfied that she can be permitted to testify under a promise to tell the truth. [Emphasis added; *ibid.*, at p. 3.]

[87] The fatal error of the trial judge is that he did not consider the second part of the test under s. 16. He failed to inquire into whether K.B. had the ability to communicate the evidence under s. 16(3), insisting instead on an understanding of the duty to speak the truth that is not prescribed by s. 16(3). This error, an error of law, led him to rule K.B. incompetent and hence to the total exclusion of her evidence from the trial. This fundamental error vitiated the trial.

[88] This fundamental flaw in the trial cannot be rectified by comments made by the trial judge at other points in the trial or by the doctrine of deference. My colleague Binnie J. suggests that the trial judge's comments during the *voir dire* and hearing on hearsay admissibility (paras. 136, 138 and 139)

[85] Comme le montrent ces passages de l'interrogatoire, le juge du procès n'était pas satisfait des questions posées par le ministère public relativement à la capacité de K.B. de relater des événements et de faire la distinction entre dire la vérité et mentir dans des situations concrètes. Il lui a ensuite posé des questions sur la nature de la vérité, les obligations religieuses et les conséquences découlant du fait de ne pas dire la vérité. Comme K.B. était incapable de répondre de manière satisfaisante à ces questions plus abstraites, il a statué qu'il ne pouvait lui demander de promettre de dire la vérité et a refusé de l'autoriser à témoigner.

[86] Cette conclusion reposait sur une interprétation erronée du par. 16(3) qui, selon le juge du procès, exige une compréhension du devoir de dire la vérité. K.B. n'a donc pas été autorisée à témoigner en promettant de dire la vérité. Le juge du procès a résumé ses conclusions comme suit :

> [TRADUCTION] Après avoir longuement interrogé [K.B.], je suis entièrement convaincu que [K.B.] n'a pas satisfait à la condition préalable voulant qu'elle comprenne le devoir de dire la vérité. Elle est incapable de dire ce que comportent la vérité et le mensonge, ou de dire ce que sont les conséquences découlant de la vérité ou de mensonges. Dans de telles circonstances, tout à fait indépendantes de la déposition du [Dr K.], je ne suis pas convaincu qu'elle peut être autorisée à témoigner en promettant de dire la vérité. [Je souligne; *ibid.*, p. 3.]

[87] Le juge du procès a commis une erreur fatale en n'examinant pas le deuxième volet du critère établi à l'art. 16. Il n'a pas vérifié si, conformément au par. 16(3), K.B. était en mesure de communiquer les faits dans son témoignage et a insisté plutôt sur la nécessité qu'elle comprenne le devoir de dire la vérité, ce que n'exige pas le par. 16(3). Cette erreur, une erreur de droit, l'a amené à conclure que K.B. n'était pas habile à témoigner et à exclure complètement son témoignage du procès. Cette erreur fondamentale a vicié le procès.

[88] Des commentaires formulés par le juge du procès à d'autres étapes de l'instruction ou le principe de la déférence judiciaire ne peuvent corriger ce vice fondamental. Mon collègue le juge Binnie laisse entendre que les commentaires émis par le juge du procès durant le voir-dire et l'audience sur

support his conclusion on the earlier *voir dire* that K.B. was not competent to testify under s. 16(3). However, it is difficult to see how subsequent comments in the course of dealing with other issues could rehabilitate the trial judge's erroneous application of the requirements for competence under s. 16. The *voir dire* on competence and the *voir dire* on the admissibility of hearsay evidence were two different inquiries. The evidence of Ms. W., on which the trial judge relied in making the comments regarding hearsay, was not before the trial judge when he ruled K.B. incompetent to testify. Moreover, the threshold of reliability for hearsay evidence differs from the threshold ability to communicate the evidence for competence; a ruling on testimonial capacity cannot be subsequently justified by comments in a ruling on hearsay admissibility. Had the competence hearing been properly conducted, this might have changed the balance of the trial, including the hearing (if any) on hearsay admissibility. The trial judge's fundamental error in the s. 16 inquiry on competence cannot be corrected by speculation based on comments made in a different inquiry.

[89] Nor does the ruling that K.B. was incompetent, based as it was on a misstatement of the legal test under s. 16(3), attract deference. This amounted to an error of law, to be judged on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26-37. The defect in the trial judge's ruling cannot, in my view, be cured.

[90] I would allow the appeal, set aside the acquittal, and direct a new trial.

l'admissibilité de la preuve par ouï-dire (par. 136, 138 et 139) appuient la conclusion qu'il a tirée au voir-dire précédent, conclusion selon laquelle K.B. n'était pas habile à témoigner aux termes du par. 16(3). Il est toutefois difficile de voir comment des commentaires émis subséquemment par le juge du procès alors qu'il traitait d'autres questions pourraient remédier à une application erronée par celui-ci des exigences prévues à l'art. 16 relativement à l'habilité à témoigner. Le voir-dire relatif à l'habilité à témoigner et le voir-dire relatif à l'admissibilité de la preuve par ouï-dire constituaient deux enquêtes différentes. Le juge du procès ne disposait pas du témoignage de M^{me} W. — sur lequel il s'est fondé pour formuler les commentaires concernant le ouï-dire — lorsqu'il a jugé que K.B. n'était pas habile à témoigner. De plus, le seuil de fiabilité applicable à la preuve par ouï-dire diffère du seuil de la capacité à communiquer les faits dans un témoignage, applicable à l'habilité à témoigner; une conclusion sur l'habilité d'une personne à témoigner ne peut être justifiée après coup par des commentaires émis dans une décision sur l'admissibilité d'une preuve par ouï-dire. La tenue d'une audience régulière sur l'habilité à témoigner aurait peut-être modifié l'équilibre du procès, y compris l'audience (le cas échéant) sur l'admissibilité de la preuve par ouï-dire. On ne peut corriger l'erreur fondamentale commise par le juge du procès dans l'enquête relative à l'habilité à témoigner prévue à l'art. 16 en se fondant sur des conjectures tirées de commentaires formulés dans une enquête différente.

[89] La conclusion selon laquelle K.B. n'était pas habile à témoigner, fondée sur une mauvaise formulation du critère juridique applicable aux termes du par. 16(3), ne commande pas non plus la déférence. Il s'agissait là d'une erreur de droit devant être examinée selon la norme de la décision correcte : *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 26-37. Ce vice dans la décision de première instance ne peut, à mon avis, être corrigé.

[90] Je suis d'avis d'accueillir le pourvoi, d'annuler l'acquittement et d'ordonner la tenue d'un nouveau procès.

The reasons of Binnie, LeBel and Fish JJ. were delivered by

[91] Binnie J. (dissenting) — I agree with the Chief Justice that, in this case, "[t]wo potentially conflicting policies are in play", the first being to "bring to justice" those accused of sexual abuse and the second being "to ensure a fair trial for the accused and to prevent wrongful convictions" (para. 65). In my view, by turning Parliament's direction permitting a person "whose mental capacity is challenged" to testify only "on promising to tell the truth" into an empty formality — a mere mouthing of the words "I promise" without any inquiry as to whether the promise has any significance to the potential witness — the majority judgment unacceptably dilutes the protection Parliament intended to provide to accused persons.

[92] I prefer the contrary interpretation of s. 16(3) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, expressed by our Chief Justice herself in her concurring judgment in *R. v. Rockey*, [1996] 3 S.C.R. 829, where, as McLachlin J., drawing a distinction between "the ability to communicate the evidence and the ability to promise to tell the truth" (para. 25), wrote:

> The only inference that can be drawn from this evidence is that while [the potential witness] Ryan understood the difference between what is "so" and "not so", he had no conception of any moral obligation to say what is "right" or "so" in giving evidence or otherwise. In these circumstances, no judge could reasonably have concluded that Ryan was able to promise to tell the truth. [Emphasis added; para. 27.]

McLachlin J.'s views on the requirements of s. 16(3) were not disagreed with by the majority, and indeed on this point she simply reflected the Court's earlier unanimous opinion in *R. v. Khan*, [1990] 2 S.C.R. 531, at pp. 537-38.

Version française des motifs des juges Binnie, LeBel et Fish rendus par

[91] Le juge Binnie (dissident) — Je souscris à l'opinion de la Juge en chef selon laquelle, en l'espèce, « [d]eux principes susceptibles de s'opposer entrent en jeu » (par. 65). Le premier consiste à « traduire en justice » les personnes accusées d'agression sexuelle, et le deuxième vise à « garantir la tenue d'un procès équitable pour l'accusé et [à] prévenir les déclarations de culpabilité injustifiées » (*ibid.*). Selon moi, en transformant la directive du législateur, qui permet à une personne « dont la capacité mentale est mise en question » de témoigner « en promettant de dire la vérité », en une formalité vide de sens — le témoin éventuel ne fait que prononcer les mots « je promets » sans que l'on vérifie s'il accorde quelque importance à sa promesse — les juges majoritaires diluent de façon inacceptable la protection que le législateur voulait accorder aux accusés.

[92] Je préfère l'interprétation contraire du par. 16(3) de la *Loi sur la preuve au Canada*, L.R.C. 1985, ch. C-5, que notre Juge en chef elle-même a énoncée dans ses motifs concordants dans *R. c. Rockey*, [1996] 3 R.C.S. 829, où, alors juge puînée, elle a établi une distinction entre la « capacité de communiquer les faits dans son témoignage et celle de promettre de dire la vérité » (par. 25); elle a écrit ce qui suit :

> La seule inférence que l'on peut tirer de ce témoignage est que même si [le témoin éventuel] Ryan comprenait la différence entre ce qui était « exact » et « pas exact », il n'avait aucune idée de l'obligation morale de dire ce qui est « vrai » ou « exact » lorsqu'on témoigne ou dans d'autres situations. Dans ces circonstances, aucun juge n'aurait pu raisonnablement conclure que Ryan était capable de promettre de dire la vérité. [Je souligne; par. 27.]

Dans cette affaire, les juges de la majorité n'avaient pas désapprouvé les propos de la juge McLachlin au sujet des exigences du par. 16(3). En fait, sur ce point, la juge McLachlin reprenait simplement l'opinion unanime que la Cour avait déjà exprimée dans *R. c. Khan*, [1990] 2 R.C.S. 531, p. 537-538.

[93] The majority judgment in the present case repudiates the earlier jurisprudence and the balanced approach it achieved. It entirely eliminates any inquiry into whether the potential witness has any "conception of any moral obligation to say what is 'right'".

[94] I agree with the Chief Justice that "allowing the witness to testify is only the first step in the process" (para. 72). More particularly, my colleague continues:

> The witness's evidence will be tested by cross-examination. The trier of fact will observe the witness's demeanour and the way she answers the questions. [*Ibid*.]

In this case, the exchanges between the challenged witness, K.B., and the trial judge, demonstrated the futility of any such cross-examination. The trial judge noted that K.B. "did not 'compute' questions before giving answers, that she was not processing the information being communicated to her, and that she had serious problems relating to her ability to communicate and to recollect" (2008 CanLII 21726 (Ont. S.C.J.)) (the "hearsay decision"), at para. 7). As a practical matter, it is not possible to cross-examine such a witness meaningfully. The trial judge concluded correctly on this point that "there is no secure method of testing K.B.'s credibility" (para. 56). The result of the majority judgment in this case is to create unfair prejudice to the accused.

[95] What is fundamental, as was emphasized here by the Ontario Court of Appeal, is that the trial judge had the opportunity to observe the witness's demeanour and the way she answers the questions (McLachlin C.J., at para. 72). We do not have that advantage. The trial judge concluded, based on his direct observation, that, in light of the severity of her mental disability, K.B.'s evidence could not be relied upon for the truth-seeking purposes of a criminal trial and it ought to be altogether excluded. In a judge-alone trial, it goes without

[93] Le jugement majoritaire en l'espèce répudie les décisions antérieures ainsi que l'approche équilibrée qu'elles avaient établie. Il écarte complètement l'enquête permettant de vérifier si le témoin éventuel a une « idée de l'obligation morale de dire ce qui est "vrai" ».

[94] Je suis d'accord avec la Juge en chef pour dire qu'« en [. . .] permettant [aux personnes adultes ayant une déficience intellectuelle] de témoigner, elles franchissent seulement la première étape du processus » (par. 72). Plus particulièrement, ma collègue ajoute ce qui suit :

> La déposition du témoin sera vérifiée par contre-interrogatoire. Le juge des faits examinera le comportement du témoin et sa façon de répondre aux questions. [*Ibid*.]

En l'espèce, les échanges entre le juge du procès et K.B., la personne dont la capacité mentale est mise en question, ont démontré la futilité d'un tel contre-interrogatoire. Le juge du procès a souligné que K.B. [TRADUCTION] « ne "computait" pas les questions avant d'y répondre, qu'elle ne traitait pas l'information qui lui était communiquée et qu'elle avait de sérieux problèmes liés à sa capacité de communiquer et de se souvenir » (2008 CanLII 21726 (C.S.J. Ont.) (la « décision relative au ouï-dire »), par. 7). Concrètement, il n'est pas possible de contre-interroger de manière significative un tel témoin. Le juge du procès a correctement conclu sur ce point qu'« il n'y a aucun moyen sûr de vérifier la crédibilité de K.B. » (par. 56). Par conséquent, le jugement des juges majoritaires en l'espèce cause à l'accusé un préjudice inéquitable.

[95] La Cour d'appel de l'Ontario a souligné un aspect fondamental, soit que le juge du procès a eu l'occasion d'examiner le comportement du témoin et sa façon de répondre aux questions (la juge en chef McLachlin, par. 72). Nous ne bénéficions pas de cet avantage. Le juge du procès a conclu, selon ce qu'il a directement observé, que compte tenu de la gravité de la déficience intellectuelle de K.B., on ne pouvait se fier au témoignage de cette dernière pour les besoins de la recherche de la vérité — le but visé par un procès criminel — et que ce témoignage

saying, where the trial judge found that K.B.'s testimony did not meet even a threshold of admissibility, he would not — had the evidence been admitted — have accepted it as the basis for a proper conviction. An acquittal was inevitable.

[96] In the result, despite all the talk in our cases of the need to "defer" to trial judges on their assessment of mental capacity, a deference which, in my opinion, is manifestly appropriate, the majority judgment shows no deference to the views of the trial judge whatsoever and orders a new trial. I am unable to agree. I therefore dissent.

I. Judicial History

A. *Ontario Superior Court of Justice, 2008 CanLII 21726 (the "Hearsay Decision")*

[97] The Chief Justice has set out the substance of the trial judge's ruling. I should add that he found numerous contradictions in K.B.'s testimony. For example, K.B. testified that she had told her mother about D.A.I. touching her, but her mother contradicted this (para. 38). With respect to the out-of-court statements, the trial judge expressed serious concerns about the truth of the statements based on K.B.'s "serious problems in communicating her evidence, her incapacity to answer relatively simple questions surrounding the allegations, her confusion with respect to whether or not she spoke to her mother" (para. 53 (emphasis added)). He also noted the testimony of K.B.'s teacher that K.B.'s mother had told her that she viewed K.B.'s story with "disbelief" (para. 54). Given the close relationship between K.B. and the respondent D.A.I., the trial judge found that "[w]hat may have been innocent in intent has the potential to be misinterpreted" (para. 55).

[98] The trial judge concluded:

devait être complètement exclu. Il va sans dire que, dans un procès devant un juge seul, où le juge du procès a conclu que le témoignage de K.B. ne satisfaisait pas à un critère même minimal d'admissibilité, si le témoignage avait été accepté, il n'aurait pu servir de fondement d'une déclaration de culpabilité. Un verdict d'acquittement était inévitable.

[96] Par conséquent, malgré toutes les décisions dans lesquelles notre Cour signale la nécessité de « faire preuve de retenue » à l'égard de l'appréciation de la capacité mentale par les juges des procès — une retenue manifestement appropriée selon moi —, les juges majoritaires ne font preuve d'aucune retenue à l'égard des opinions du juge du procès et ordonnent la tenue d'un nouveau procès. Il m'est impossible de souscrire à leur décision. J'inscris donc ma dissidence.

I. Historique judiciaire

A. *Cour supérieure de justice de l'Ontario, 2008 CanLII 21726 (la « décision relative au ouï-dire »)*

[97] La Juge en chef a exposé la substance de la décision du juge du procès. J'ajouterais qu'il a relevé plusieurs contradictions dans les réponses de K.B. Par exemple, K.B. a déclaré avoir dit à sa mère que D.A.I. l'avait touchée, mais cette dernière l'a nié (par. 38). En ce qui concerne les déclarations extrajudiciaires, le juge du procès a exprimé d'importantes réserves sur la véracité des déclarations de K.B. en raison des [TRADUCTION] « sérieuses difficultés [de K.B.] à communiquer les faits dans son témoignage, de son incapacité à répondre à des questions relativement simples portant sur ses allégations, de sa confusion quant à savoir si elle avait ou non parlé à sa mère » (par. 53 (je souligne)). Il a aussi signalé que l'enseignante de K.B. a affirmé dans son témoignage que la mère de K.B. lui avait dit « ne pas croire » ces dires de sa fille (par. 54). Vu l'étroite relation entre K.B. et l'intimé, D.A.I., le juge du procès a conclu que « [c]e qui pouvait se vouloir inoffensif risquait d'être mal interprété » (par. 55).

[98] Le juge du procès a conclu comme suit :

I am convinced that to admit K.B.'s statement for its truth would effectively deprive the court of any reliable method of testing its truth. It is clear from the short cross-examination undertaken . . . at the preliminary inquiry, there is no secure method of testing K.B.'s credibility. . . . What the Crown purports to be confirmatory evidence is either ambiguous or itself unreliable. [Emphasis added; para. 56.]

B. *Ontario Court of Appeal, 2010 ONCA 133, 260 O.A.C. 96 (Doherty, MacPherson and Armstrong JJ.A.)*

[99] Doherty and MacPherson JJ.A. applied a "very deferential" standard of review to the trial judge's assessment under s. 16, noting that the trial judge heard not only what the proposed witness said, but also how it was said (paras. 20-21). In their view, Parliament chose to create a new testimonial competence test for children but to limit it so as only to apply to children under 14 (para. 41). For whatever reason, Parliament intended to treat children and adults with a mental disability differently when it comes to testimonial competence (para. 43).

[100] The Court of Appeal also held that the trial judge had correctly rejected the confirmatory evidence tendered by the Crown, namely K.B.'s sister's evidence and the photograph found in the respondent's bedroom (para. 50). He had carefully considered the sister's testimony, but decided that it was unreliable. The trial judge had also found that the respondent's explanation that K.B. flashed him when he took the photograph could have been true. Doherty and MacPherson JJ.A., speaking for a unanimous Court of Appeal, held that both of these conclusions were open to the trial judge (*ibid.*). The appeal was accordingly dismissed.

II. Analysis

[101] The substantial issue in this appeal concerns the correctness of the trial judge's approach to

[TRADUCTION] Je suis convaincu que le fait d'admettre comme véridique la déclaration de K.B. priverait effectivement la cour de toute méthode fiable pour en vérifier la véracité. Il ressort clairement du bref contre-interrogatoire mené [. . .] à l'enquête préliminaire qu'il n'y a aucun moyen sûr de vérifier la crédibilité de K.B. [. . .] Ce que le ministère public estime être une preuve corroborante est ambigu ou sujet à caution. [Je souligne; par. 56.]

B. *Cour d'appel de l'Ontario, 2010 ONCA 133, 260 O.A.C. 96 (les juges Doherty, MacPherson et Armstrong)*

[99] Les juges Doherty et MacPherson ont appliqué une norme de contrôle qui commande [TRADUCTION] « une très grande retenue » à l'égard de l'appréciation faite par le juge du procès aux termes de l'art. 16, soulignant que le juge du procès n'a pas seulement entendu ce que le témoin éventuel a dit, mais aussi comment il l'a dit (par. 20-21). Selon eux, le législateur a choisi de créer pour les enfants un nouveau critère relatif à l'habilité à témoigner, mais de le limiter de sorte qu'il ne s'applique qu'aux enfants de moins de 14 ans (par. 41). Pour une raison ou une autre, le législateur a voulu traiter les enfants différemment des adultes ayant une déficience intellectuelle lorsque l'habilité à témoigner est en cause (par. 43).

[100] La Cour d'appel a également conclu que le juge du procès avait rejeté à bon droit la preuve corroborante présentée par le ministère public, à savoir le témoignage de la sœur de K.B. et la photographie trouvée dans la chambre de l'intimé (par. 50). Le juge a soigneusement examiné le témoignage de la sœur de K.B., mais il a décidé qu'il était sujet à caution. Le juge du procès avait aussi conclu que l'explication de l'intimé — que K.B. lui avait soudainement montré ses seins au moment où il a pris la photographie — pouvait être vraie. Les juges Doherty et MacPherson, au nom d'une formation unanime de la Cour d'appel, ont affirmé qu'il était loisible au juge du procès de tirer ces deux conclusions (*ibid.*). L'appel a donc été rejeté.

II. Analyse

[101] La question importante dans le présent pourvoi porte sur le bien-fondé de la démarche retenue

assessment of the testimonial capacity of the complainant, K.B. The admissibility of her evidence turns on the interpretation of the rules established by Parliament in s. 16 of the *Canada Evidence Act*, which delineates the circumstances in which a proposed witness "of fourteen years of age or older whose mental capacity is challenged" may or may not testify.

[102] A trial judge is faced with three options. If the challenged witness is "able to communicate the evidence" and "understands the nature of an oath or a solemn affirmation", the person "shall testify under oath or solemn affirmation" (s. 16(2)). A person who satisfies the first criterion ("able to communicate the evidence") but not the second (i.e. does not understand "the nature of an oath or a solemn affirmation") may provide unsworn testimony "on promising to tell the truth" (s. 16(3)). A person who does not satisfy either criterion "shall not testify" (s. 16(4)).

[103] The few questions posed by the trial judge touching on religion in this case were relevant to the first option of having K.B. testify under oath or affirmation which, as the Chief Justice recognizes, is the "preferred option" (para. 31). If the trial judge had found that K.B. understood the nature of the oath, he would have been obliged to have her testimony given under oath. It was proper for the trial judge to test K.B.'s ability to satisfy this standard rather than assuming, on account of her mental disability, that she would fail the s. 16(1) test.

[104] As to the second option (unsworn evidence), it is clear that Parliament did not consider an ability to communicate the evidence to be the sole and sufficient condition of admissibility. A person giving unsworn testimony must nevertheless promise to tell the truth, and this additional requirement is not, in my view, an empty formality but is intended to bolster the court's effort to establish the true facts

par le juge du procès pour apprécier l'habilité à témoigner de la plaignante, K.B. L'admissibilité de son témoignage repose sur l'interprétation des règles établies par le législateur à l'art. 16 de la *Loi sur la preuve au Canada*, lequel énonce les circonstances dans lesquelles un témoin éventuel âgé « d'au moins quatorze ans dont la capacité mentale est mise en question » peut ou non témoigner.

[102] Trois possibilités s'offrent au juge du procès. Si la personne dont la capacité mentale est mise en question est « capable de communiquer les faits dans son témoignage » et « comprend la nature du serment ou de l'affirmation solennelle », elle « témoigne sous serment ou sous affirmation solennelle » (par. 16(2)). Une personne qui répond au premier critère (« capable de communiquer les faits dans son témoignage »), mais pas au deuxième (soit qu'elle ne comprend pas « la nature du serment ou de l'affirmation solennelle ») peut témoigner sans prêter serment « en promettant de dire la vérité » (par. 16(3)). Une personne qui ne satisfait à ni l'un ni l'autre de ces critères « ne peut témoigner » (par. 16(4)).

[103] Les quelques questions que le juge du procès a posées en l'espèce relativement à la religion avaient trait à la première possibilité, soit que K.B. témoigne sous serment ou sous affirmation solennelle, ce qui, comme le reconnaît la Juge en chef, constitue la « solution privilégiée » (par. 31). Si le juge du procès avait conclu que K.B. comprenait la nature du serment, il aurait été tenu de la faire témoigner sous serment. Il était approprié pour le juge du procès de vérifier si K.B. pouvait satisfaire à cette norme au lieu de supposer qu'elle échouerait le test du par. 16(1) en raison de sa déficience intellectuelle.

[104] En ce qui concerne la deuxième possibilité (témoignage sans avoir prêté serment), le législateur n'a manifestement pas considéré la capacité de communiquer les faits dans un témoignage comme étant une condition unique et suffisante d'admissibilité. Une personne qui témoigne sans avoir prêté serment doit tout de même promettre de dire la vérité, et cette condition supplémentaire n'est pas,

and to protect the legitimate interest of the accused to a fair trial.

[105] I agree with the Chief Justice that "[p]romising is an act aimed at bringing home to the witness the seriousness of the situation and the importance of being careful and correct. The promise thus serves a practical, prophylactic purpose" (para. 36). I do not agree with my colleague, however, that it is out of bounds for a trial judge to try to determine — in concrete everyday terms — whether there is in reality such a "prophylactic" effect in the case of a particular witness whose mental capacity has been challenged. If such a witness is so disabled as not to understand "the seriousness of the situation and the importance of being careful and correct", there is no prophylactic effect, and the fair trial interests of the accused are unfairly prejudiced.

A. *The Khan Test*

[106] It is, of course, true that an inability to deal with concepts ("oaths", "solemn affirmations" and "promises") does not mean that a person suffering from a mental disability is by that fact unable to relate the factual events that he or she encountered. Many individuals whose mental capacity is not open to challenge may have difficulty giving a correct explanation of these concepts.

[107] In an effort to solve this dilemma, this Court in *Khan* adopted the approach formulated by Robins J.A. in *Khan* when it was before the Ontario Court of Appeal ((1988), 42 C.C.C. (3d) 197, at p. 206):

> To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity

selon moi, une formalité vide de sens; elle vise à soutenir les efforts de la cour en vue d'établir les faits authentiques et à protéger le droit légitime d'un accusé à un procès équitable.

[105] Je suis d'accord avec la Juge en chef pour dire que « [l]a promesse est un acte visant à renforcer, dans l'esprit du témoin éventuel, le caractère sérieux de la situation et l'importance de répondre de façon prudente et correcte. La promesse sert donc un objectif pratique et prophylactique » (par. 36). Je ne suis cependant pas d'accord avec ma collègue pour affirmer qu'un juge du procès ne peut pas tenter de déterminer — en termes concrets de la vie quotidienne — si un tel effet « prophylactique » existe effectivement dans le cas d'une personne dont la capacité mentale est mise en question. Si cette personne est à ce point déficiente qu'elle ne comprend pas « le caractère sérieux de la situation et l'importance de répondre de façon prudente et correcte », il n'y a aucun effet prophylactique et le droit de l'accusé à un procès équitable subit une atteinte injustifiée.

A. *Le critère formulé dans l'arrêt Khan*

[106] Assurément, une incapacité de saisir des notions (« serments », « affirmations solennelles » et « promesses ») ne signifie pas qu'une personne ayant une déficience intellectuelle soit par le fait même incapable de décrire les événements dont elle a été témoin. Bien des personnes dont la capacité intellectuelle n'est pas mise en question peuvent avoir de la difficulté à expliquer correctement ces notions.

[107] Cherchant à résoudre ce dilemme, notre Cour a adopté dans *Khan* la solution élaborée par le juge Robins alors que l'affaire *Khan* se trouvait devant la Cour d'appel de l'Ontario ((1988), 42 C.C.C. (3d) 197, p. 206) :

> [TRADUCTION] Pour satisfaire aux normes moins sévères applicables au témoignage qui n'est pas donné sous serment, il suffit que l'enfant comprenne le devoir de dire la vérité au sens de la conduite sociale ordinaire de la vie quotidienne. On peut en faire la preuve par une série de questions simples permettant de déterminer si l'enfant comprend la différence entre la vérité et

to tell the truth, and promises to do so. [Emphasis added.]

This approach (adopted at a time before the *Canada Evidence Act* introduced its present distinction between children and adults with challenged mental capacity) gives meaningful content to the statutory language while recognizing that the "simple line of questioning" is to be factual, not metaphysical.

[108] It is true, as the Chief Justice points out, that *Khan* was decided under an earlier version of s. 16 which referred expressly to "the duty of speaking the truth". However, as both *Khan* and McLachlin J. in *Rockey* were at pains to point out, those words were not interpreted as contemplating an abstract inquiry. In *Rockey*, decided at a time when s. 16(3) read the same as it does now, McLachlin J. insisted on a determination of "the ability to promise to tell the truth" (para. 25 (emphasis added)), but not as the mere physical ability of a potential witness to say the words. In that case, the child witness was not called to testify and the issue was whether his out-of-court statements could nevertheless be admitted against the accused under the principled hearsay exception. To do so required a demonstration of necessity and reliability. McLachlin J. held that "necessity" was established. In her view, the child was incompetent to testify under s. 16(3) because, not only was it "unrealistic to conclude that Ryan could have communicated his evidence in any useful sense either in the courtroom or in a smaller room via closed circuit television", but, as stated, because "no judge could reasonably have concluded that Ryan was able to promise to tell the truth" (paras. 26-27). Although Parliament had by that time eliminated the words "duty of speaking the truth" from s. 16(3), McLachlin J. nevertheless concluded that the words "on promising to tell the truth" incorporated the understanding in practical terms of a "moral obligation to say what is 'right'" (para. 27).

le mensonge, s'il sait qu'il n'est pas bien de mentir, s'il comprend la nécessité de dire la vérité et promet de le faire. [Je souligne.]

Cette approche (adoptée avant que la *Loi sur la preuve au Canada* n'établisse la distinction que l'on trouve maintenant entre les enfants et les adultes dont la capacité mentale est mise en question) donne un contenu significatif au texte de la loi tout en reconnaissant que la « série de questions simples » doit porter sur des faits et ne doit pas relever de la métaphysique.

[108] Certes, comme la Juge en chef le souligne, lorsque l'arrêt *Khan* a été rendu, une version antérieure de l'art. 16 mentionnait expressément « le devoir de dire la vérité ». Toutefois, comme l'arrêt *Khan* et la juge McLachlin dans *Rockey* ont pris bien soin de le signaler, ces mots n'envisageaient pas, dans leur interprétation, une enquête menée dans l'abstrait. Dans l'arrêt *Rockey*, rendu alors que le texte du par. 16(3) était le même qu'aujourd'hui, la juge McLachlin a insisté sur une détermination de « [l]a capacité [. . .] de promettre de dire la vérité » (par. 25 (je souligne)) qui ne soit pas simplement la capacité physique d'un témoin éventuel de prononcer les mots. Dans cette affaire, l'enfant n'a pas été appelé à témoigner et la question en litige était de savoir si ses déclarations extrajudiciaires pouvaient tout de même être admises à l'encontre de l'accusé en vertu de l'exception raisonnée à la règle du ouï-dire. À cette fin, il fallait démontrer la nécessité et la fiabilité des déclarations de l'enfant. La juge McLachlin a conclu que la « nécessité » avait été établie. Selon elle, l'enfant était inhabile à témoigner aux termes du par. 16(3) parce que, non seulement « il n'[était] pas réaliste de conclure que Ryan aurait pu communiquer les faits d'une façon utile, que ce soit dans la salle d'audience ou depuis une plus petite pièce, au moyen d'un système de télévision en circuit fermé », mais parce qu'« aucun juge n'aurait pu raisonnablement conclure que Ryan était capable de promettre de dire la vérité » (par. 26-27). Même si le législateur avait déjà enlevé au par. 16(3) les mots « devoir de dire la vérité », la juge McLachlin a néanmoins conclu que les mots « en promettant de dire la vérité » supposaient concrètement une « obligation morale de dire ce qui est "vrai" » (par. 27).

[109] In the result, the child was held under s. 16(3) to be incompetent to testify. The necessity for the hearsay evidence was therefore established. His out-of-court evidence was admitted and the accused was convicted.

[110] There is nothing in McLachlin J.'s reasons in *Rockey* to suggest that the "ability to promise to tell the truth" is to be ascertained on a "don't ask" basis, i.e. not to endeavour to determine whether the potential witness has any sense of what it means in simple concrete terms to promise to tell the truth. On the contrary, McLachlin J. rested her conclusion on the evidence heard by the trial judge concerning the ability of the potential witness to explain events and to understand the difference in practical terms between telling the truth and lying.

[111] Nor was it suggested in *Rockey* that, by insisting on "the ability" to make the promise, McLachlin J. was reading extraneous words into the statute, which is now the cornerstone of the majority judgment in this case. The making of a promise is not just a physical act. The question is whether the potential witness recognizes a sense of obligation, however articulated or unarticulated, to stick to the truth. This interpretation was consistent with the Parliamentary record which, as we will see, demonstrates a legislative intention under s. 16(3) that a trial judge be satisfied that a witness — as a condition precedent to testimonial capacity — understands the difference in practical everyday terms between telling the truth and not telling the truth.

[112] Of course, there are witnesses who suffer no mental disability and who recognize perfectly well that they are undertaking an obligation to tell the truth but nevertheless do not do so. That is a different problem. Their mental capacity is not in issue. In their case, the courts rely on cross-examination and other techniques to ferret out the truth. In the case of K.B., there was no allegation whatsoever of bad faith, but she may nevertheless have been mistaken in her perception or recollection of events, and the crucible of cross-examination was considered by the trial judge to be useless because, as

[109] En définitive, l'enfant a été jugé inhabile à témoigner aux termes du par. 16(3). La nécessité de la preuve par ouï-dire a donc été établie. Sa déclaration extrajudiciaire a été admise et l'accusé a été déclaré coupable.

[110] Les motifs de la juge McLachlin dans *Rockey* n'indiquent nullement que la « capacité de promettre de dire la vérité » doive être déterminée « sans poser de questions », c'est-à-dire sans que l'on tente de déterminer si le témoin éventuel peut saisir ce que signifie, en termes simples et concrets, la promesse de dire la vérité. Au contraire, la juge McLachlin a appuyé sa conclusion sur la déposition faite devant le juge du procès concernant la capacité du témoin éventuel d'expliquer des faits et de comprendre la différence, en termes concrets, entre dire la vérité et mentir.

[111] L'arrêt *Rockey* ne donne pas non plus à penser que, en insistant sur « la capacité » de promettre, la juge McLachlin introduisait dans la loi des mots extrinsèques, ce qui constitue maintenant la pierre d'assise du jugement majoritaire en l'espèce. Faire une promesse ne se résume pas à un acte physique. La question est de savoir si le témoin éventuel se reconnaît une obligation, articulée ou non, de s'en tenir à la vérité. Cette interprétation était conforme à l'historique parlementaire qui démontre, comme nous le verrons, qu'aux termes du par. 16(3), le juge devait être convaincu que la personne comprend la différence, en termes ordinaires, entre dire et ne pas dire la vérité — une condition préalable à la reconnaissance de l'habilité à témoigner.

[112] Évidemment, certains témoins n'ayant aucune déficience intellectuelle ne diront pas la vérité tout en sachant parfaitement bien qu'elles se sont engagées à dire la vérité. Il s'agit là d'un problème différent. Leur capacité mentale n'est pas mise en question. Dans ces cas, le contre-interrogatoire et d'autres moyens permettront au tribunal de découvrir la vérité. Dans le cas de K.B., sa bonne foi n'était aucunement en cause, mais elle aurait quand même pu se tromper pour ce qui est de percevoir ou de se rappeler les faits, et le juge du procès considérait que l'épreuve du

stated, he found that "there is no secure method of testing K.B.'s credibility" (hearsay decision, at para. 56).

[113] The *Khan* test specifically framed the inquiry as being into "ordinary everyday social conduct" (C.A., at p. 206). At no point did this Court in *Khan* or McLachlin J. in *Rockey* require that the potential witness be able to *articulate* or even understand in the abstract concepts such as oaths, affirmations or promises. Leaving aside McLachlin J.'s reference to a "moral obligation" in *Rockey* — which, if anything, proposed a more strict test for admissibility than the Court's judgment in *Khan* — if it appears to the trial judge that the potential witness whose mental capacity is challenged has demonstrated an understanding of a promise to tell the truth in terms of ordinary, everyday social conduct, the witness has met the test for giving unsworn testimony. The same would be true in my view of a witness who understands the seriousness of the situation and "the importance of being careful and correct", to use the Chief Justice's words in this case (para. 36). However, even this approach could not be satisfied by K.B. according to the trial judge who was uniquely placed to observe her demeanour.

[114] I respectfully disagree with the Chief Justice's characterization of *Khan* as insisting "on an understanding of the duty to speak the truth in abstract terms and the metaphysical questioning this insistence gave rise to" (para. 62). The *Khan* test, in my view, did just the opposite. In that case, Robins J.A. found that the trial judge had erroneously applied the standards applicable to a child giving sworn testimony to a situation in which only the unsworn testimony of a child was sought and to which less onerous standards were applicable. Robins J.A. underscored the difference between the two standards in no uncertain terms:

contre-interrogatoire serait inutile puisque, comme il l'a dit, [TRADUCTION] « il n'y a aucun moyen sûr de vérifier la crédibilité de K.B. » (décision relative au ouï-dire, par. 56).

[113] Le critère de l'arrêt *Khan* mentionne précisément que l'interrogatoire ne doit pas sortir du cadre de la [TRADUCTION] « conduite sociale ordinaire de la vie quotidienne » (C.A., p. 206). Notre Cour dans *Khan*, ou la juge McLachlin dans *Rockey*, n'exigeaient aucunement que le témoin éventuel soit capable d'*articuler* ou même de comprendre dans l'abstrait des concepts comme le serment, l'affirmation ou la promesse. Abstraction faite de la mention d'une « obligation morale » par la juge McLachlin dans *Rockey* — qui a même proposé un critère d'admissibilité plus rigoureux que celui retenu par notre Cour dans *Khan* — s'il semble au juge du procès que le témoin éventuel dont la capacité mentale est mise en question a démontré qu'il comprend au sens de la conduite sociale ordinaire de la vie quotidienne ce qu'est une promesse de dire la vérité, le témoin a satisfait au critère requis pour témoigner sans avoir prêté serment. Il en serait de même, selon moi, d'un témoin qui comprend le sérieux de la situation et « l'importance de répondre de façon prudente et correcte », pour reprendre le propos de la Juge en chef en l'espèce (par. 36). Toutefois, K.B. ne pouvait satisfaire même à ces conditions, selon le juge du procès qui était particulièrement bien placé pour observer son comportement.

[114] Avec égards, je ne suis pas d'accord avec la Juge en chef pour dire que l'arrêt *Khan* insiste « sur la compréhension, en termes abstraits, du devoir de dire la vérité et des questions d'ordre métaphysique que cet accent engendrait » (par. 62). Le critère énoncé dans *Khan*, selon moi, a un effet diamétralement opposé. Dans cette affaire, le juge Robins a conclu que le juge du procès avait commis une erreur en appliquant à un enfant qui témoigne sous serment les normes applicables à une situation dans laquelle on cherchait seulement à obtenir le témoignage d'un enfant qui n'a pas prêté serment et auquel des normes moins rigoureuses s'appliquaient. Le juge Robins a souligné en termes on ne peut plus clairs la différence entre les deux normes :

An appreciation of the assumption of "a moral obligation" or "getting a hold on the conscience of the witness" or . . . an "appreciation of the solemnity of the occasion" or an awareness of an added duty to tell the truth over and above the ordinary duty to do so are all matters involving abstract concepts which are not material to a determination of whether a child's unsworn evidence may be received. A child need not comprehend "what it is to tell the truth in court" or to appreciate "what happens when you tell a lie in the courtroom" before he or she can give unsworn evidence. [Emphasis added; emphasis in original deleted; pp. 205-6.]

Therefore, I have no disagreement with the Chief Justice insofar as she affirms the existing law that the judge's inquiry should not ask the potential witness to "articulate abstract concepts" (para. 31) or tell what "the truth means in abstract terms" (para. 35) or venture into "abstract, philosophical realms" (para. 56) or conduct "an abstract inquiry into the nature of the obligation to tell the truth" (para. 58). Nor did *Khan*, or McLachlin J. in *Rockey*, in my view, "insist on the articulation of the nature of the obligation to tell the truth, abstracted from particular situations" (para. 61). On the contrary, it seems to me that *Khan* affirms — not denies — that "[i]t is unnecessary and indeed undesirable to conduct an abstract inquiry" (para. 64). At no point does *Khan* require an explanation of "the nature of the obligation to tell the truth in philosophical terms" (para. 66). The reasons of McLachlin J. in the later case of *Rockey* expressed no disagreement with the *Khan* approach. It is the present majority opinion that effects a marked departure from the existing jurisprudence.

B. *An Issue of Statutory Interpretation*

[115] The bottom line of the majority judgment in this case is that s. 16(3) precludes a court from conducting an inquiry into whether (as McLachlin J. in *Rockey* put it) the proposed witness has "the ability to promise to tell the truth" (para. 25). This is based, it is said, on "[t]he first and cardinal principle of statutory interpretation [which] is that one must look to the plain words of the provision. Where

[TRADUCTION] Apprécier le fait d'assumer « une obligation morale » ou « la prise de conscience du témoin » ou [. . .] « apprécier le caractère solennel de l'occasion » ou être conscient d'un devoir de dire la vérité qui va au-delà du devoir normal de dire la vérité sont toutes des questions comportant des concepts abstraits qui n'ont pas d'incidence au moment de déterminer si le témoignage d'un enfant qui n'a pas prêté serment peut être admis. Avant de faire une déposition sans avoir prêté serment, un enfant n'a pas à comprendre « ce que signifie dire la vérité devant le tribunal » ni à apprécier « les conséquences d'un mensonge dans la salle d'audience ». [Je souligne; italiques dans l'original omis; p. 205-206.]

Par conséquent, je ne conteste pas l'exposé que donne la Juge en chef de l'état du droit lorsqu'elle dit que, dans son interrogatoire, le juge ne devrait pas demander au témoin éventuel de « formuler [d]es concepts abstraits » (par. 31) ou d'expliquer « en termes abstraits ce que signifie dire la vérité » (par. 35) ni s'aventurer dans le « domaine plus abstrait de la philosophie » (par. 56) ou mener « un interrogatoire dans l'abstrait sur la nature de l'obligation de dire la vérité » (par. 58). Et selon moi, ni l'arrêt *Khan* ni la juge McLachlin dans l'arrêt *Rockey* n'ont « [i]nsist[é] sur la formulation de la nature de l'obligation de dire la vérité, sans égard à des situations particulières » (par. 61). Au contraire, il me semble que *Khan* confirme — au lieu de nier — qu'« [i]l n'est ni nécessaire, ni même souhaitable, de poser des questions de nature abstraite » (par. 64). L'arrêt *Khan* n'exige aucunement une explication « en termes philosophiques [de] la nature de l'obligation de dire la vérité » (par. 66). Dans ses motifs dans l'arrêt *Rockey*, la juge McLachlin ne rejette nullement l'approche retenue dans *Khan*. C'est l'opinion des juges de la majorité en l'espèce qui rompt nettement avec la jurisprudence.

B. *Une question d'interprétation de la loi*

[115] Les juges de la majorité affirment essentiellement en l'espèce que le par. 16(3) empêche le tribunal de procéder à une enquête visant à déterminer si (comme l'a dit la juge McLachlin dans *Rockey*) le témoin éventuel a « [l]a capacité [. . .] de promettre de dire la vérité » (par. 25). Ils disent se fonder sur « le principe fondamental de l'interprétation des lois, [suivant lequel] il faut examiner

ambiguity arises, it may be necessary to resort to external factors to resolve the ambiguity . . . . Section 16 shows no ambiguity" (McLachlin C.J., at para. 26).

[116] A more contextual approach to statutory interpretation has been emphasized by our Court on numerous occasions in recent years, as set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting Professor Driedger:

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

(E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87)

[117] Leaving aside for the moment the amendments relating to children in s. 16.1 added by the 2005 amendments, the relevant "three options" for persons with mental disability are set out in s. 16(1) to (4) as follows:

> **16.** (1) [Witness whose capacity is in question] If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
>
> (*a*) whether the person understands the nature of an oath or a solemn affirmation; and
>
> (*b*) whether the person is able to communicate the evidence.
>
> (2) [Testimony under oath or solemn affirmation] A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.
>
> (3) [Testimony on promise to tell truth] A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.

le libellé explicite de la disposition. En cas d'ambiguïté, il peut être nécessaire d'avoir recours à des facteurs externes pour la dissiper [. . .] L'article 16 ne comporte aucune ambiguïté » (la juge en chef McLachlin, par. 26).

[116] À plusieurs reprises au cours des dernières années, notre Cour a insisté sur une méthode d'interprétation des lois plus contextuelle telle qu'énoncée dans *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, au par. 21, où la Cour cite le professeur Driedger :

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

(E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87)

[117] Abstraction faite pour l'instant des modifications applicables aux enfants apportées en 2005 par l'ajout de l'art. 16.1, les « trois possibilités » applicables aux personnes ayant une déficience intellectuelle sont énoncées comme suit aux par. 16(1) à (4) :

> **16.** (1) [Témoin dont la capacité mentale est mise en question] Avant de permettre le témoignage d'une personne âgée d'au moins quatorze ans dont la capacité mentale est mise en question, le tribunal procède à une enquête visant à décider si :
>
> *a*) d'une part, celle-ci comprend la nature du serment ou de l'affirmation solennelle;
>
> *b*) d'autre part, celle-ci est capable de communiquer les faits dans son témoignage.
>
> (2) [Témoignage sous serment] La personne visée au paragraphe (1) qui comprend la nature du serment ou de l'affirmation solennelle et qui est capable de communiquer les faits dans son témoignage témoigne sous serment ou sous affirmation solennelle.
>
> (3) [Témoignage sur promesse de dire la vérité] La personne visée au paragraphe (1) qui, sans comprendre la nature du serment ou de l'affirmation solennelle, est capable de communiquer les faits dans son témoignage peut, malgré qu'une disposition d'une loi exige le serment ou l'affirmation, témoigner en promettant de dire la vérité.

(4) [Inability to testify] A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

(5) [Burden as to capacity of witness] A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

[118] Section 16 mandates only one "inquiry" by the trial judge in dealing with a witness "whose mental capacity is challenged". Section 16(3) is simply part of a single evaluation in which the trial judge considers the gamut from permitting the challenged witness to testify under oath to not being able to testify at all.

[119] As to whether the expression "promising to tell the truth" means more than the mere verbal ability to mouth the words I refer to what McLachlin J. herself said in *R. v. Marquard*, [1993] 4 S.C.R. 223, at p. 236: "The phrase 'communicate the evidence' indicates more than mere verbal ability." Equally, it seems to me, the requirement that a witness promise to tell the truth requires more than "mere verbal ability" to say the words. The trial judge is required to ascertain whether the witness possesses not only the "mere verbal ability" but understands "in ordinary, everyday terms" the difference between truth and fiction and the importance of sticking to the former in his or her testimony.

[120] In the initial version of s. 16 proposed by the government, there appeared a requirement that a child be "of sufficient intelligence" to testify. This was deleted. The Chief Justice suggests that the record of the Legislative Committee on Bill C-15 shows that "sufficient intelligence" was essentially understood as the ability to appreciate the moral difference between telling the truth and lying (para. 29). I disagree. As I read the legislative record, the term "sufficient intelligence" was dropped from the draft bill because in the

(4) [Inaptitude à témoigner] La personne visée au paragraphe (1) qui ne comprend pas la nature du serment ou de l'affirmation solennelle et qui n'est pas capable de communiquer les faits dans son témoignage ne peut témoigner.

(5) [Charge de la preuve] La partie qui met en question la capacité mentale d'un éventuel témoin âgé d'au moins quatorze ans doit convaincre le tribunal qu'il existe des motifs de douter de la capacité de ce témoin de comprendre la nature du serment ou de l'affirmation solennelle.

[118] L'article 16 ne requiert du juge du procès qu'une seule « enquête » à l'égard d'une personne « dont la capacité mentale est mise en question ». Le paragraphe 16(3) s'inscrit simplement dans une analyse unique par laquelle le juge du procès envisage toutes les solutions possibles, allant du témoignage sous serment à l'inhabilité à témoigner.

[119] Quant à savoir si l'expression « en promettant de dire la vérité » signifie plus que la simple capacité verbale d'articuler les mots, je renvoie aux propos de la juge McLachlin elle-même dans l'arrêt *R. c. Marquard*, [1993] 4 R.C.S. 223, p. 236 : « L'expression "communiquer les faits dans son témoignage" indique plus qu'une simple capacité verbale. » Il me semble de même que si l'on exige de la personne qu'elle promette de dire la vérité, il faut plus que la « simple capacité verbale » de prononcer les mots. Le juge du procès doit s'assurer que la personne possède non seulement la « simple capacité verbale », mais également qu'elle comprend « au sens ordinaire de la vie quotidienne » la différence entre la vérité et la fiction, ainsi que l'importance de s'en tenir à la vérité lors de son témoignage.

[120] Dans la version initiale de l'art. 16 proposée par le gouvernement, il était exigé de la personne qu'elle soit « suffisamment intelligente » pour témoigner. Cette exigence a été supprimée. Selon la Juge en chef, les procès-verbaux du Comité législatif sur le projet de loi C-15 révèlent que l'expression « suffisamment intelligente » s'entendait essentiellement de la capacité d'apprécier la différence morale entre dire la vérité et mentir (par. 29). Je ne partage pas cette opinion. Selon mon interprétation de ces procès-verbaux, l'expression « suffisamment

Committee's view it potentially risked being interpreted as requiring judges to evaluate a child witness's IQ rather than his or her capacity to communicate and understand the difference between truth and lies. The Parliamentarians were assured that s. 16(3), without the words "sufficient intelligence", still required that "the child understands the difference between telling the truth and lying", as demonstrated in the following exchange:

[The Hon. Mary] Collins: Yes. However, if we leave in the "sufficient intelligence", and with the interpretation that has been given, I still feel that is going to be a potential barrier.

Mr. Pink: It may be that the committee is going to have to decide on words other than "sufficient intelligence". What is the purpose of the query in the first place? Does it not really boil down to determining truth or falsehood? Is that not what it is all about?

[The Hon. Mary] Collins: I would think so. Yes. So if the child understands the difference between telling the truth and lying, that would seem to me to be all you would really need to find out.

Mr. Pink: I agree.

[The Hon. Mary] Collins: Thank you. [Emphasis added; p. 27.]

(House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15*, No. 2, 2nd Sess., 33rd Parl., December 4, 1986)

[121] This seems as clear a demonstration as one could ask for from the Parliamentary record that it was intended under s. 16(3) that the trial judge be satisfied that the witness "understands the difference between telling the truth and lying" (emphasis added). Nothing in the legislative record of the 1987 amendments suggests that the mere verbal ability to mouth the words of a promise would be sufficient.

[122] As to the "object of the Act", it seems clear that Parliament, in making the amendments to s. 16

intelligente » a été radiée de l'avant-projet de loi parce que, de l'avis du Comité, elle aurait pu prêter à une interprétation obligeant les juges à évaluer le quotient intellectuel des enfants plutôt que leur capacité de communiquer et de comprendre la différence entre la vérité et le mensonge. Les membres du Comité ont obtenu l'assurance que, même sans les mots « suffisamment intelligente », le par. 16(3) exigeait toujours que « l'enfant compren[ne] la différence entre dire la vérité et dire un mensonge », comme l'illustre l'échange qui suit :

[L'hon. Mary] Collins : Oui. Cependant, si nous conservons le concept de « l'intelligence suffisante », et si on l'interprète de la même façon que précédemment, j'ai quand même l'impression que cela constituera peut-être un obstacle.

M. Pink : Il faudra peut-être que le Comité choisisse alors d'autres termes que « intelligence suffisante ». De toute façon, pourquoi pose-t-on d'abord toutes ces questions? S'agit-il vraiment de savoir si le témoin sait distinguer entre le vrai et le faux? Est-ce que tout ne revient pas à cela?

[L'hon. Mary] Collins : Je le pense. Oui. En conséquence, si l'enfant comprend la différence entre dire la vérité et dire un mensonge, il me semble que l'on disposerait là de tout ce dont on a vraiment besoin.

M. Pink : J'abonde en ce sens.

[L'hon. Mary] Collins : Merci. [Je souligne; p. 27.]

(Chambre des communes, *Procès-verbaux et témoignages du Comité législatif sur le projet de loi C-15*, nº 2, 2e sess., 33e lég., 4 décembre 1986)

[121] Cet extrait des procès-verbaux du Comité démontre on ne peut plus clairement, il me semble, que le législateur voulait, au par. 16(3), que le juge du procès soit convaincu que la personne « comprend la différence entre dire la vérité et dire un mensonge » (je souligne). Les procès-verbaux du Comité relatifs aux amendements de 1987 ne donnent nullement à penser que la simple capacité verbale d'articuler les mots d'une promesse serait suffisante.

[122] En ce qui concerne l'« objet de la loi », il semble évident que le législateur, en modifiant

in 1987 (S.C. 1987, c. 24), was attempting to strike a balance between access to justice and the rights of an accused in enacting s. 16 (*ibid*., No. 1, November 27, 1986, at pp. 21, 24 and 33). A promise to tell the truth affords some protection to an accused, but not if "the promise" is reduced to an empty formality (or, to use McLachlin J.'s phrase in *Marquard*, to a "mere verbal ability" (p. 236)), which is the unfortunate result of the majority judgment in this case.

C. *The Proper Interpretation of Section 16(3) Was Not Altered by the 2005 Amendments Related to the Evidence of Children Under 14 Years Old*

[123] In 2005, Parliament amended the *Canada Evidence Act* with respect to the unsworn evidence of children based in part on the report of the Child Witness Project at Queen's University. I agree with the Chief Justice that "Parliament's concern in enacting the 2005 amendment to the *Canada Evidence Act* was exclusively with children. The changes arose out of the Bala Report on the problems associated with prosecuting crimes against children. The Parliamentary debates on s. 16.1 attest to the fact that the focus of the 2005 amendment was on children, and only children" (para. 41 (emphasis added)).

[124] The 2005 amendments provide as follows (S.C. 2005, c. 32):

16.1 (1) [Person under fourteen years of age] A person under fourteen years of age is presumed to have the capacity to testify.

(2) [No oath or solemn affirmation] A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

(3) [Evidence shall be received] The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

l'art. 16 en 1987 (L.C. 1987, ch. 24), tentait en adoptant cette disposition d'établir un juste équilibre entre l'accès à la justice et les droits de l'accusé (*ibid*., nº 1, 27 novembre 1986, p. 21, 24 et 33). Une promesse de dire la vérité fournit à l'accusé une certaine protection, mais pas si « la promesse » est réduite à une formalité vide de sens (ou une « simple capacité verbale », les mots qu'emploie la juge McLachlin dans *Marquard* (p. 236)), ce qui est le résultat regrettable auquel parviennent les juges majoritaires en l'espèce.

C. *Les modifications apportées en 2005 relativement au témoignage des enfants âgés de moins de 14 ans n'ont pas changé l'interprétation qu'il convient de donner au par. 16(3)*

[123] En 2005, en se fondant en partie sur le rapport du Child Witness Project de l'Université Queen's, le législateur a modifié la *Loi sur la preuve au Canada* en ce qui concerne les dispositions relatives au témoignage des enfants qui ne prêtent pas serment. Je suis d'accord avec la Juge en chef pour dire qu'« en adoptant en 2005 les modifications à la *Loi sur la preuve au Canada*, le législateur visait exclusivement les enfants. Les modifications ont été apportées comme suite au rapport Bala traitant des problèmes associés à la poursuite des actes criminels perpétrés contre les enfants. Les débats de la Chambre des communes portant sur l'art. 16.1 attestent que les modifications de 2005 avaient exclusivement trait aux enfants » (par. 41 (je souligne)).

[124] Les modifications apportées en 2005 prévoient ce qui suit (L.C. 2005, ch. 32):

16.1 (1) [Témoin âgé de moins de quatorze ans] Toute personne âgée de moins de quatorze ans est présumée habile à témoigner.

(2) [Témoin non assermenté] Malgré toute disposition d'une loi exigeant le serment ou l'affirmation solennelle, une telle personne ne peut être assermentée ni faire d'affirmation solennelle.

(3) [Témoignage admis en preuve] Son témoignage ne peut toutefois être reçu que si elle a la capacité de comprendre les questions et d'y répondre.

(4) [Burden as to capacity of witness] A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

(5) [Court inquiry] If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

(6) [Promise to tell truth] The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

(7) [Understanding of promise] No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

(8) [Effect] For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

(4) [Charge de la preuve] La partie qui met cette capacité en question doit convaincre le tribunal qu'il existe des motifs d'en douter.

(5) [Enquête du tribunal] Le tribunal qui estime que de tels motifs existent procède, avant de permettre le témoignage, à une enquête pour vérifier si le témoin a la capacité de comprendre les questions et d'y répondre.

(6) [Promesse du témoin] Avant de recevoir le témoignage, le tribunal fait promettre au témoin de dire la vérité.

(7) [Question sur la nature de la promesse] Aucune question sur la compréhension de la nature de la promesse ne peut être posée au témoin en vue de vérifier si son témoignage peut être reçu par le tribunal.

(8) [Effet] Il est entendu que le témoignage reçu a le même effet que si le témoin avait prêté serment.

[125] The Crown acknowledges that there are "obvious distinctions" between Parliament's test for adults with limited mental capacity under s. 16 and children under 14 years of age under s. 16.1 (A.F., at para. 57). For adults, s. 16(3) retains the more expansive test developed in the jurisprudence regarding the ability to communicate the evidence: see *Marquard*. A child need only be able "to understand and respond to questions" (s. 16.1(5)). Section 16(1) retains the potential for a challenged adult to testify under oath, whereas s. 16.1(2) provides that a child witness shall *not* take an oath or make a solemn affirmation. The child, as in the case of the challenged adult, must promise to tell the truth (s. 16.1(6)), but s. 16.1(7) specifically prohibits asking children "any questions regarding their understanding of the nature of the promise to tell the truth". The Crown contends that research shows "that regardless of an inability to define these abstract concepts, the making of a promise to tell the truth by a child makes it more likely that a

[125] Le ministère public reconnaît qu'il existe des [TRADUCTION] « distinctions évidentes » entre le critère établi par le législateur à l'art. 16 à l'égard des adultes ayant une capacité mentale limitée et celui établi à l'art. 16.1 à l'égard des enfants âgés de moins de 14 ans (m.a., par. 57). Pour les adultes, le par. 16(3) conserve le critère plus large élaboré dans la jurisprudence en ce qui concerne la capacité de communiquer les faits dans un témoignage : voir *Marquard*. Pour l'enfant, il suffit qu'il soit capable « de comprendre les questions et d'y répondre » (par. 16.1(5)). Aux termes du par. 16(1), un adulte dont la capacité mentale est mise en question peut témoigner sous serment alors qu'aux termes du par. 16.1(2), un enfant *ne* peut prêter serment *ni* faire une affirmation solennelle. L'enfant, tout comme l'adulte dont la capacité mentale est mise en question, doit promettre de dire la vérité (par. 16.1(6)), mais le par. 16.1(7) interdit expressément de poser aux enfants une « question sur la compréhension de la nature

child will tell the truth" (A.F., at para. 79 (emphasis added)).

[126] I agree with the Chief Justice that the words "on promising to tell the truth" in s. 16(3) and s. 16.1(6) should receive the same interpretation. It is for that very reason that, in my view, Parliament felt it necessary in 2005 to introduce the s. 16.1(7) "don't ask" rule. Otherwise, the "simple line of questioning" to determine whether the potential witness understands "the seriousness of the situation and the importance of being careful and correct" would continue to apply to children under the 2005 amendments as well as to adults whose mental capacity is challenged. The point, however, is that s. 16.1(6), unlike s. 16(3), must be read together with s. 16.1(7) (the "don't ask" rule), and s. 16.1(7) was limited to children because the empirical research related to "children, and only children". Thus, the witness from the Department of Justice told the Parliamentary Committee:

> Professor Bala's research seems to highlight that there's significance in giving that promise because children understand what a promise is all about. [Emphasis added; 17:20.]

(House of Commons, *Evidence of the Standing Committee on Justice and Human Rights*, No. 77, 2nd Sess., 37th Parl., October 29, 2003)

Senator Landon Pearson emphasized the empirical foundation of the "don't ask" rule:

> I want to put on the record the degree to which this provision of the bill is based on a considerable body of research on the capacity of children to understand that when they say "I promise to tell the truth," that

de la promesse ». Le ministère public plaide que la recherche démontre [TRADUCTION] « que même s'il n'est pas en mesure de définir ces notions abstraites, un enfant qui promet de dire la vérité est plus susceptible de dire la vérité » (m.a., par. 79 (je souligne)).

[126] Je suis d'accord avec la Juge en chef pour dire que l'expression « en promettant de dire la vérité » qui figure au par. 16(3) et au par. 16.1(6) devrait être interprétée de la même manière dans les deux dispositions. C'est exactement pour cette raison, selon moi, que le législateur a cru nécessaire d'introduire en 2005 la règle du par. 16.1(7) interdisant de poser des questions. Autrement, la « série de questions simples » visant à déterminer si le témoin éventuel comprend « le caractère sérieux de la situation et l'importance de répondre de façon prudente et correcte » continuerait de s'appliquer aux enfants aux termes de la modification apportée en 2005 ainsi qu'aux adultes dont la capacité mentale est mise en question. Le fait est, toutefois, que contrairement au par. 16(3), le par. 16.1(6) doit être interprété conjointement avec le par. 16.1(7) (l'interdiction de poser des questions), et l'application du par. 16.1(7) a été limitée aux enfants parce que la recherche empirique avait « exclusivement trait aux enfants ». Ainsi, la représentante du ministère de la Justice a dit ce qui suit en comité parlementaire :

> Selon les recherches de M. Bala, le fait pour des jeunes de faire une promesse a de l'importance puisqu'ils comprennent de quoi il retourne. [Je souligne; 17:20.]

(Chambre des communes, *Témoignages devant le Comité permanent de la justice et des droits de la personne*, n^o^ 77, 2^e^ sess., 37^e^ lég., 29 octobre 2003)

La sénatrice Landon Pearson a insisté sur le fondement empirique de la règle interdisant de poser des questions :

> Je veux simplement dire, pour mémoire, dans quelle mesure les dispositions de ce projet de loi sont fondées sur un corpus impressionnant de recherches sur la capacité des enfants à comprendre leur affirmation « Je

they know what they are doing. [Emphasis added; p. 19.]

(Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 17, 1st Sess., 38th Parl., June 23, 2005)

No such empirical studies were carried out with respect to adults with mental disabilities. In their case, there was no "don't ask" equivalent to s. 16.1(7) even proposed, let alone adopted. As the Chief Justice emphasizes, the 2005 amendments deal with "children, and only children" (para. 41).

[127] The Crown invites us, in effect, to apply the "don't ask" rule governing children to adults whose mental capacity is challenged, despite evidence of legislative intent to the contrary. It does so on the basis that both are members of a "vulnerable group" (A.F., at para. 58) and should be treated as equivalent. That is a policy argument for Parliament, not a change to be brought about by judicial amendment.

[128] The Chief Justice endorses a version of this equivalence argument in posing a rhetorical question:

When it comes to testimonial competence, precisely what, one may ask, is the difference between an adult with the mental capacity of a six-year-old, and a six-year-old with the mental capacity of a six-year-old? [para. 52]

In my view, the difference is that a six-year-old with the mental capacity of a six-year-old does not suffer from a mental disability. The fact that psychiatrists speak of persons with mental disabilities calibrated in terms of mental ages is a useful way of describing the relative extent and severity of a person's disability, but it does not mean that a 22-year-old woman with a severe mental disability is on the same footing as a six-year-old child with no mental disability whatsoever, and of course the empirical evidence before Parliament in 2005 did not suggest otherwise.

promets de dire la vérité », c'est-à-dire qu'ils comprennent ce serment. [Je souligne; p. 19.]

(Sénat, *Délibérations du Comité sénatorial permanent des Affaires juridiques et constitutionnelles*, nº 17, 1re sess., 38e lég., 23 juin 2005)

Aucune étude empirique de ce genre n'a été effectuée relativement aux adultes ayant une déficience intellectuelle. Dans le cas de ces adultes, aucune règle interdisant de poser des questions, équivalente à la règle du par. 16.1(7), n'a même été proposée, et encore moins adoptée. Comme l'a souligné la Juge en chef, les modifications de 2005 avaient « exclusivement trait aux enfants » (par. 41).

[127] Le ministère public nous invite, en réalité, à appliquer aux adultes dont la capacité mentale est mise en question la règle interdisant de poser des questions aux enfants et ce, en dépit de la preuve de l'intention du législateur au contraire. Il fait valoir qu'il s'agit dans les deux cas de membres d'un [TRADUCTION] « groupe vulnérable » (m.a., par. 58) qui doivent être traités de manière équivalente. Il s'agit d'un argument de politique générale à l'intention du législateur et non d'une modification introduite par voie judiciaire.

[128] La Juge en chef se prononce en faveur d'une version de cet argument d'équivalence en posant une question d'ordre rhétorique :

. . . en ce qui concerne l'habilité à témoigner, on peut se demander quelle est la différence, précisément, entre un adulte ayant la capacité mentale d'un enfant de six ans et un enfant de six ans ayant la capacité mentale d'un enfant de six ans. [par. 52]

Selon moi, la différence est qu'un enfant de six ans ayant la capacité mentale d'un enfant de six ans n'a pas une déficience intellectuelle. Le fait pour les psychiatres de classer en fonction de l'âge mental les personnes ayant une déficience intellectuelle se veut une manière utile de décrire l'ampleur et la gravité relatives de la déficience d'une personne, mais cela ne signifie pas qu'une femme âgée de 22 ans ayant une déficience intellectuelle grave est sur un pied d'égalité avec un enfant âgé de six ans n'ayant aucune déficience intellectuelle et, bien sûr, la preuve empirique soumise au législateur en 2005 ne donnait pas à penser autrement.

[129] The rhetorical question posed by the Chief Justice seeks to reverse the onus of proof. It *presumes* without proof the fact of equivalence and demands a rebuttal, but it was for the government to persuade Parliament, if it could, that there is no relevant difference between an adult with a severe mental disability and a child with no mental disability. It made no effort to do so because there was no evidence on which such an argument *could* have been made.

[130] No evidence was led in these proceedings to suggest equivalence and we cannot take judicial notice of alleged "facts" that are neither notorious nor easily verifiable from undisputed sources: *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 53. While greater latitude is allowed in the judicial notice of legislative facts (as opposed to adjudicative facts), it would still be necessary for the Crown to show that its assertion of equivalence of children and adults with a mental disability in this respect "would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the 'fact' to the disposition of the controversy" (*ibid*., at para. 65 (emphasis deleted)). The Crown's assertion of equivalence is pure assertion on a key issue, and mere assertion does not meet the *Spence* standard.

[131] Section 16(3) *does not* require an inquiry into the proposed witness's understanding of the abstract "nature of the obligation to tell the truth". The argument about abstract concepts was rejected in *Khan* and by McLachlin J. in *Rockey*, and there is no need for the majority to resurrect it at this point for the sole purpose of rejecting it yet again. That is not a point of disagreement between us

[129] La question d'ordre rhétorique posée par la Juge en chef vise à inverser le fardeau de la preuve. La question *suppose* sans aucune preuve à l'appui le fait de l'équivalence et exige que l'on réfute ce fait, mais il appartenait au gouvernement de convaincre le législateur, s'il le pouvait, qu'il n'existe aucune différence palpable entre un adulte ayant une déficience intellectuelle grave et un enfant n'ayant aucune déficience intellectuelle. Le gouvernement n'a déployé aucun effort en ce sens puisqu'il n'existait aucune preuve *susceptible* d'appuyer un tel argument.

[130] Aucun élément de preuve laissant croire que cette équivalence existe n'a été soumis en l'espèce et nous ne pouvons pas prendre connaissance d'office de « faits » allégués qui ne sont ni notoires, ni facilement vérifiables en ayant recours aux sources incontestées : *R. c. Find*, 2001 CSC 32, [2001] 1 R.C.S. 863, par. 48; *R. c. Spence*, 2005 CSC 71, [2005] 3 R.C.S. 458, par. 53. Si les juges ont plus de latitude pour prendre connaissance d'office des faits législatifs qu'ils n'en ont à l'égard des faits en litige, le ministère public devrait tout de même démontrer, relativement à l'équivalence qu'il invoque entre les enfants et les adultes ayant une déficience intellectuelle, qu'« une personne raisonnable ayant pris la peine de s'informer sur le sujet considérerait que ce "fait" échappe à toute contestation raisonnable quant à la fin à laquelle il sera invoqué, sans oublier que les exigences en matière de crédibilité et de fiabilité s'accroissent directement en fonction de la pertinence du "fait" pour le règlement de la question en litige » (*ibid*., par. 65 (italiques omis)). La prétention du ministère public relative à l'équivalence n'est que pure prétention relativement à une question clé, et une simple prétention ne satisfait pas au critère établi dans l'arrêt *Spence*.

[131] Le paragraphe 16(3) *n*'exige *pas* que l'on vérifie si le témoin éventuel comprend, dans l'abstrait, la « nature de l'obligation de dire la vérité ». L'argument au sujet des concepts abstraits a été rejeté dans *Khan* et par la juge McLachlin dans *Rockey*, et point n'est besoin que les juges majoritaires reviennent avec cet argument à ce moment-ci à seule fin de le rejeter de nouveau. Nous ne

and should not be portrayed as such. Section 16(3) requires only the "ability to promise to tell the truth" (quoting *Rockey*) in terms of ordinary, everyday social conduct.

[132] It is the majority, not the minority here, that must resort to extraneous language not found in s. 16(3) to achieve the result it seeks. As stated, I agree with the Chief Justice that the words "on promising to tell the truth" in s. 16(3) must bear the same meaning as "to promise to tell the truth" in s. 16.1(6). That being the case, the majority must read the s. 16.1(7) "don't ask" rule applicable only to children into s. 16(3) applicable only to mentally challenged adults in order to read down the words "promising to tell the truth" in s. 16(3), and thus rob the words of s. 16(3) of their ordinary meaning, in my opinion.

[133] The Chief Justice refers to s. 45 of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, for the proposition that no inference as to the meaning of s. 16(3) flows from the adoption of s. 16.1(7) with respect to children (para. 46). Professor P.-A. Côté puts the point somewhat differently:

> The provisions [s. 45] do not, for example, prevent interpreting the act of amendment as an expression of the legislature's opinion; they simply eliminate an *a priori* presumption ("shall not be deemed"). The context, or even the formulation (in the form of a preamble, for example), of an amendment is quite capable of marking a clear desire to change the state of the law.
>
> (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 569)

In any event, this is not the foundation of the respondent's argument. He relies on s. 16(3) as it was enacted in 1987. He does not rely, nor does he need to rely, on the 2005 amendments which, as the majority concedes, apply only to children.

sommes pas en désaccord sur ce point et il ne faudrait pas laisser croire que tel est le cas. Le paragraphe 16(3) exige uniquement la « capacité [. . .] de dire la vérité » (citant *Rockey*) au sens de la conduite sociale ordinaire de la vie quotidienne.

[132] Ce sont les juges de la majorité, non les juges dissidents, qui doivent, pour obtenir le résultat qu'ils souhaitent, avoir recours à des termes extrinsèques qu'on ne trouve pas au par. 16(3). Je le répète, je suis d'accord avec la Juge en chef pour dire que les mots « en promettant de dire la vérité » au par. 16(3) doivent avoir le même sens que les mots « promettre [. . .] de dire la vérité » au par. 16.1(6). Cela étant, les juges majoritaires doivent incorporer, au par. 16(3) applicable uniquement aux adultes ayant une déficience intellectuelle, la règle du par. 16.1(7) interdisant de poser des questions, qui s'applique uniquement aux enfants, afin d'atténuer l'expression « en promettant de dire la vérité » au par. 16(3) et, à mon avis, de priver ce paragraphe de son sens ordinaire.

[133] La Juge en chef cite l'art. 45 de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, comme fondement de l'affirmation suivant laquelle aucune inférence quant au sens du par. 16(3) ne découle de l'adoption du par. 16.1(7) relativement aux enfants (par. 46). Le professeur P.-A. Côté exprime ce point de vue un peu différemment :

> . . . les textes [l'art. 45] n'interdisent pas de voir dans une modification une manifestation d'opinion du Parlement : ils ne font qu'écarter toute présomption à ce sujet (« *shall not be deemed* »). Il pourrait très bien arriver que le contexte d'une modification, ou même la formulation de la loi modificative, le préambule par exemple, fasse voir une volonté de changer le droit.
>
> (P.-A. Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), p. 617)

Quoi qu'il en soit, il ne s'agit pas là du fondement de l'argument de l'intimé. Ce dernier se fonde sur le par. 16(3) tel qu'il a été adopté en 1987. Il ne se fonde pas, et n'a pas besoin de se fonder, sur les modifications apportées en 2005 qui, les juges de la majorité le concèdent, s'appliquent uniquement aux enfants.

D. *Was the Section 16(3) Test Misapplied in This Case?*

[134] The Crown contends that, even if the *Khan* test is affirmed, it was not applied properly in this case. Firstly, the trial judge should have sought assistance from individuals apart from Dr. K., a forensic psychiatrist called by the defence, whose evidence was, in any event, put aside by the trial judge as unnecessary. The trial judge did not hear from K.B.'s teacher or other support workers who were familiar with K.B.'s strengths and weaknesses for purposes of the s. 16 inquiry. The Crown argues that they could have assisted the court to pose questions in a way that K.B. was capable of dealing with. To do so could have disclosed K.B.'s true capacity to deal with concrete facts without the distraction of conceptual issues, which, as the *voir dire* confirmed, K.B. could not handle. Secondly, the Crown says that the trial judge, having chosen to proceed without such assistance, misdirected his questions to metaphysical issues which could not and did not provide the basis for a fair determination of K.B.'s mental capacity.

[135] I approach the trial judge's assessment of K.B. on the basis of "the ability to communicate the evidence and the ability to promise to tell the truth" (*Rockey*, at para. 25).

(1) The Ability to Communicate the Evidence

[136] The trial judge clearly had serious concerns about this first branch of the test. He reminded K.B.'s teacher, Ms. W., of testimony she had given at the preliminary inquiry, in which Ms. W. had said the following:

If the purpose of her testifying is to determine the truth of what happened, her capacity to express her recollections could be severely limited. So the court may be asking her to do something that she can't do, and her failure to do that may skew her knowledge of what happened. In other words, the outcome — there's a

D. *Le critère du par. 16(3) a-t-il été mal appliqué en l'espèce?*

[134] Le ministère public prétend que, même si le critère de l'arrêt *Khan* est confirmé, il n'a pas été appliqué correctement en l'espèce. Premièrement, le juge du procès aurait dû demander l'aide de personnes autres que le D^r^ K., un psychiatre légiste cité par la défense, dont le témoignage a été de toute façon écarté par le juge du procès au motif qu'il n'était pas nécessaire. Le juge n'a pas entendu, pour les besoins de l'enquête prévue à l'art. 16, l'enseignante de K.B. ni les autres personnes de soutien qui connaissaient les forces et faiblesses de K.B. Le ministère public prétend que ces personnes auraient pu aider la cour à poser des questions de façon à ce que K.B. soit capable de les comprendre et d'y répondre. Ainsi, il aurait été possible de voir la véritable capacité de K.B. d'examiner des faits concrets sans être distraite par des notions conceptuelles que K.B., comme le voir-dire l'a confirmé, n'était pas en mesure de saisir. Deuxièmement, le ministère public affirme que le juge du procès, ayant choisi de procéder sans demander d'aide, a posé par erreur des questions d'ordre métaphysique qui ne permettaient pas de rendre une décision équitable sur la capacité mentale de K.B.

[135] J'aborde l'appréciation que le juge du procès a faite de K.B. en fonction de « sa capacité de communiquer les faits dans son témoignage et celle de promettre de dire la vérité » (*Rockey*, par. 25).

(1) La capacité de communiquer les faits dans son témoignage

[136] Le juge du procès avait manifestement de sérieuses réserves quant à ce premier volet du critère. Il a rappelé à l'enseignante de K.B., M^me^ W., la déposition qu'elle avait faite à l'enquête préliminaire, dans laquelle M^me^ W. avait déclaré ce qui suit :

[TRADUCTION] Si son témoignage doit servir à déterminer ce qui s'est réellement produit, sa capacité d'exprimer ses souvenirs pourrait être très limitée. La cour pourrait lui demander de faire quelque chose qu'elle ne peut pas faire, et le fait qu'elle ne puisse pas le faire peut fausser sa connaissance de ce qui est arrivé. Autrement

potential for the outcome to not get at the truth, because of . . . her incapacity to express that. [Emphasis added; hearsay decision, at para. 4.]

This evidence, given earlier at the preliminary inquiry, was properly considered by the trial judge at the subsequent competency hearing.

[137] Moreover, during the competency *voir dire* itself, Dr. K., observing K.B.'s low tolerance for frustration, testified, "I don't think she has the ability to think what you're asking and come up with an answer" (A.R., vol. I, at p. 161). The expert also stated, as noted by the trial judge, and echoing the words in *Rockey*, that K.B. "had serious problems relating to her ability to communicate and to recollect" (hearsay decision, at para. 7 (emphasis added)). She could not adequately communicate evidence because, by reason of her mental disability, she was simply unable to "compute" what she was being asked.

[138] The accuracy of the trial judge's assessment of the extent of K.B.'s mental disability was corroborated and confirmed at subsequent stages of the trial. In the course of her testimony at the hearsay *voir dire*, for example, Ms. W., K.B.'s teacher, referred to a statement K.B. had made to an educational assistant, claiming that she, K.B., had spent the weekend at the respondent's house (which was not true). Ms. W. said that if K.B. were asked what she had done that weekend, and replied "[D.A.I.]'s place", this might have meant that she had been *thinking about* D.A.I. and *wanted* to go to his place, not that she had gone there at all (A.R., vol. II, at pp. 25 and 27; see also p. 7). Communication of wishful thinking is not communication of evidence.

[139] Further, the trial judge, in rejecting K.B.'s out-of-court statements, adverted to the earlier observations that K.B. had "serious problems in communicating her evidence, her incapacity to

dit, en fin de compte — il est possible en fin de compte de ne pas apprendre la vérité, en raison de [. . .] son incapacité de l'exprimer. [Je souligne; décision relative au ouï-dire, par. 4.]

Cette déposition, qui avait été faite lors de l'enquête préliminaire, a été prise en compte comme il se doit par le juge du procès au cours de l'audition ultérieure relative à l'habilité à témoigner.

[137] En outre, au cours même du voir-dire relatif à l'habilité à témoigner, le D^r^ K., constatant la faible tolérance de K.B. face à la frustration, a affirmé ce qui suit : [TRADUCTION] « Je ne crois pas qu'elle ait la capacité de penser à vos questions et de donner une réponse » (d.a., vol. I, p. 161). Le juge du procès a souligné que l'expert, répétant les propos tenus dans *Rockey*, a déclaré aussi que K.B. [TRADUCTION] « avait de sérieux problèmes liés à sa capacité de communiquer et de se souvenir » (décision relative au ouï-dire, par. 7 (je souligne)). Elle ne pouvait pas communiquer adéquatement les faits dans son témoignage parce que, du fait de sa déficience intellectuelle, elle était tout simplement incapable de « computer » ce qu'on lui demandait.

[138] Les étapes subséquentes du procès ont corroboré et confirmé la justesse de l'appréciation, par le juge du procès, de la gravité de la déficience intellectuelle de K.B. Au cours de son témoignage lors du voir-dire relatif au ouï-dire, par exemple, M^me^ W., l'enseignante de K.B., a fait part d'une déclaration dans laquelle K.B. avait dit à une aide-éducatrice avoir passé la fin de semaine chez l'intimé (ce qui n'était pas vrai). M^me^ W. a dit que si l'on demandait à K.B. ce qu'elle avait fait pendant la fin de semaine et qu'elle répondait [TRADUCTION] « chez [D.A.I.] », cela pouvait signifier qu'elle avait *pensé à* D.A.I. et qu'elle *voulait* aller chez lui, et non qu'elle y était allée (d.a., vol. II, p. 25 et 27; voir aussi p. 7). La communication de ses rêveries n'est pas une communication des faits dans un témoignage.

[139] De plus, en rejetant les déclarations extrajudiciaires de K.B., le juge du procès a fait allusion à ses observations antérieures à propos de K.B., à savoir [TRADUCTION] « [ses] sérieuses difficultés à

answer relatively simple questions surrounding the allegations, her confusion with respect to whether or not she spoke to her mother" (hearsay decision, at para. 53 (emphasis added)).

[140] While it is true that the trial judge emphasized the second branch of the test (the ability to promise to tell the truth), his concerns about K.B.'s ability to communicate the evidence are plain and obvious and were in themselves sufficient to conclude that she lacked the capacity to testify by reason of her severe mental disability.

(2) The Ability to Promise to Tell the Truth

[141] As noted by the Chief Justice, this was the principal ground for the rejection of K.B.'s evidence. However, I believe, as did Doherty and MacPherson JJ.A., for a unanimous Court of Appeal, that this conclusion was certainly open to the trial judge on the evidence.

[142] At the competency hearing, Dr. K. counselled the trial judge that "when you ask about truth, honesty, lie, these are difficult concepts for anybody" (A.R., vol. I, at p. 137). The inquiry, he said, could better be pursued by asking K.B. what she had for breakfast or "other areas in her life, day to day events, and see whether she can understand what is true and what is lie" (p. 140). Such questions would yield an answer that could be verified one way or another (p. 145) and, according to Dr. K., could assist to "see whether she has any ability to discriminate between what is real or just come up with an answer kind of thing" (p. 137).

[143] Armed with this guidance, the trial judge embarked on a second round of questions to ascertain K.B.'s capacity. He asked K.B. a series of simple and concrete questions about her family, school, breakfast routine, and so on. He then posed

communiquer les faits dans son témoignage, [. . .] son incapacité à répondre à des questions relativement simples portant sur ses allégations, [. . .] sa confusion quant à savoir si elle avait ou non parlé à sa mère » (décision relative au ouï-dire, par. 53 (je souligne)).

[140] Le juge du procès a effectivement mis l'accent sur le deuxième volet du critère (la capacité de promettre de dire la vérité), mais les réserves qu'il a exprimées quant à la capacité de K.B. de communiquer les faits dans son témoignage sont claires et évidentes et lui suffisaient pour conclure qu'elle n'avait pas la capacité de témoigner du fait de sa grave déficience intellectuelle.

(2) La capacité de promettre de dire la vérité

[141] Comme l'a souligné la Juge en chef, il s'agissait du principal motif justifiant le rejet du témoignage de K.B. Toutefois, tout comme les juges Doherty et MacPherson qui s'exprimaient au nom d'une Cour d'appel unanime, j'estime qu'il était certainement loisible au juge du procès de conclure comme il l'a fait en se fondant sur la preuve.

[142] À l'audience relative à l'habilité à témoigner, le D^r^ K. a dit au juge du procès que [TRADUCTION] « les questions au sujet de la vérité, l'honnêteté et le mensonge portent sur des notions difficiles à saisir pour tous » (d.a., vol. I, p. 137). Selon lui, l'enquête serait facilitée si l'on demandait à K.B. ce qu'elle a mangé au petit-déjeuner ou en lui posant des questions à propos « d'autres aspects de sa vie, sa routine quotidienne, et voir si elle peut comprendre ce qu'est la vérité et ce qu'est le mensonge » (p. 140). De telles questions apporteraient des réponses vérifiables d'une façon ou d'une autre (p. 145) et, selon le D^r^ K., aideraient à « savoir si elle est capable de distinguer ce qui est réel ou si elle répond ce qui lui passe par la tête » (p. 137).

[143] Fort de ces conseils, le juge du procès a entrepris de poser une seconde série de questions en vue de vérifier la capacité de K.B. Il a posé à cette dernière une série de questions simples et concrètes à propos de sa famille, de son école, de

the following questions to K.B. and received the following responses (*ibid.*, at pp. 155-56):

[THE COURT:]

Q. You don't know. Do you know why you're here today?

A. I don't know. To talk about [D.A.I.].

Q. Yes, and do you think that's really important?

A. Maybe yeah.

Q. Maybe yeah? Remember earlier I was asking you about a promise?

A. No.

Q. Have you ever made a promise to anybody?

A. I don't know.

Q. That you promised you'll be good, did you ever say that? Have you ever heard that expression "I promise to be good, mommy"?

A. Okay.

Q. All right. So do you know what a promise is, that you're going to do something the right way? Do you understand that?

A. Okay.

Q. Can you tell me whether you understand that, [K.B.]?

A. I don't know.

Q. Does anything happen if you break a promise?

A. I don't know.

Q. You told me you don't go to church, right?

A. Right.

Q. And no one has ever told you about God; is that correct? No one has ever told you about God?

A. No.

Q. Has anyone ever told you that if you tell big lies you'll go to jail?

A. Right.

la routine du déjeuner, et ainsi de suite. Il a ensuite posé les questions suivantes à K.B. qui a répondu comme suit (*ibid.*, p. 155-156) :

[TRADUCTION]

[LA COUR :]

Q. Tu ne sais pas. Sais-tu pourquoi tu es ici aujourd'hui?

R. Je ne sais pas. Pour parler de [D.A.I.].

Q. Oui, et penses-tu que ce soit vraiment important?

R. Peut-être, oui.

Q. Peut-être oui? Te souviens-tu, plus tôt, quand je t'ai posé des questions à propos d'une promesse?

R. Non.

Q. As-tu déjà fait une promesse à quelqu'un?

R. Je ne sais pas.

Q. As-tu déjà promis d'être gentille, as-tu déjà dit cela? As-tu déjà entendu l'expression « je promets d'être gentille, maman »?

R. D'accord.

Q. Très bien. Alors, sais-tu ce qu'est une promesse, que tu vas agir de la bonne façon? Comprends-tu?

R. D'accord.

Q. Peux-tu me dire si tu comprends ça, [K.B.]?

R. Je ne sais pas.

Q. Est-ce qu'il arrive quelque chose si tu ne tiens pas une promesse?

R. Je ne sais pas.

Q. Tu m'as dit que tu ne vas pas à l'église, n'est-ce pas?

R. Exact.

Q. Et personne ne t'a jamais parlé de Dieu; est-ce exact? Personne ne t'a jamais parlé de Dieu?

R. Non.

Q. Est-ce qu'on t'a jamais dit que si tu dis de gros mensonges, tu vas aller en prison?

R. Exact.

Q. If you tell big lies will you go to jail?

A. No.

Q. No?

THE COURT: Those are all the questions I'm going to pursue at this point.

The Crown also posed a second set of questions (*ibid.*, at pp. 156-58):

Q. We asked you the last time if you knew the difference between a truth and a lie, do you remember that, [K.B.]?

A. Yeah.

Q. Okay. We talked about the room and the colour of the room?

A. Sometimes.

Q. Okay. Do you think it's important to tell the truth or do you think it matter (*sic*)?

A. Does it matter?

Q. It matters?

A. Does it matter?

Q. Does it matter. Do you understand when I say "matter", do you understand what that means?

A. I don't know.

. . .

Q. Okay. We talked about the room. If I were to say to you that you had eggs for breakfast would that be a truth or a lie?

A. I don't know.

Q. You don't know? How about lunch, if I said you had eggs for lunch, ---

A. Yuk.

Q. --- would that be a truth or a lie?

A. I don't know.

Q. You don't know? Okay.

A. It's getting hard.

Q. It's getting hard?

A. Yeah.

Q. Si tu dis de gros mensonges, tu vas aller en prison?

R. Non.

Q. Non?

LA COUR : Ce sont là toutes mes questions pour l'instant.

Le ministère public a lui aussi posé une seconde série de questions (*ibid.*, p. 156-158) :

Q. Nous t'avons demandé la dernière fois si tu savais la différence entre la vérité et le mensonge, tu t'en souviens, [K.B.]?

R. Oui.

Q. D'accord. Nous avons parlé de la pièce et de la couleur de la pièce?

R. Des fois.

Q. D'accord. Penses-tu qu'il est important de dire la vérité ou penses-tu que cela ait de l'importance?

R. Est-ce que c'est important?

Q. C'est important?

R. Est-ce que c'est important?

Q. Est-ce important. Comprends-tu quand je dis « important », comprends-tu ce que cela signifie?

R. Je ne sais pas.

. . .

Q. D'accord. Nous avons parlé de la pièce. Si je disais que tu as mangé des œufs au petit-déjeuner, est-ce que ce serait la vérité ou un mensonge?

R. Je ne sais pas.

Q. Tu ne sais pas? Et pour le dîner, si je disais que tu as mangé des œufs au dîner, ---

R. Eurk.

Q. --- ce serait la vérité ou un mensonge?

R. Je ne sais pas.

Q. Tu ne sais pas? D'accord.

R. Ça commence à être difficile.

Q. Ça commence à être difficile?

R. Oui.

Q. Why is it getting hard?

A. I don't know why.

Q. You don't know. Okay.

MR. SEMENOFF: Thank you.

At the conclusion of K.B.'s testimony, the trial judge ruled her unsworn testimony to be inadmissible. He explained:

> What I'm saying is I wouldn't have to hear from [Dr. K.]. I've heard from him but it doesn't in any way add or detract or anything from the opinion I've come to, having watched and questioned this witness, which is my obligation.
>
> In other words, I suppose what I'm saying to you is I'm fully satisfied that this witness does not understand what a promise to tell the truth involves, has no concept of that. None. Zero. Then that's what this inquiry is about. [*Ibid*., at p. 165]

Contrary to the majority opinion, I do not read the trial judge's assessment as based on K.B.'s inability to articulate concepts. It was based on her inability — by virtue of her mental disability — to "understand what a promise to tell the truth involves". The trial judge made the sort of practical inquiry in everyday terms that *Khan* required.

[144] This was a borderline case. The Crown complains that some of the questions were too abstract, while the question about going to church was beside the point once it became clear that K.B. would give testimony unsworn or not at all. The trial judge could certainly have proceeded further with pointed and concrete factual questions to get at the degree of K.B.'s disability but he saw and heard K.B. and clearly he believed that he had heard enough. Sitting on appeal with nothing but a bare transcript in front of us, in my opinion, we are not in a position to say that his appreciation of K.B.'s capacity was wrong.

Q. Pourquoi c'est difficile?

R. Je ne sais pas pourquoi.

Q. Tu ne sais pas. D'accord.

M. SEMENOFF : Merci.

À la fin du témoignage de K.B., le juge du procès a décidé que son témoignage non assermenté était inadmissible. Voici son explication :

> [TRADUCTION] Ce que je dis, c'est que je n'aurais pas eu à entendre le [Dr K.]. J'ai entendu ce qu'il avait à dire, mais ça n'ajoute ni n'enlève quoi que ce soit à la conclusion à laquelle je suis arrivé, après avoir regardé et interrogé ce témoin, ce que je suis obligé de faire.
>
> Autrement dit, je suppose que ce que je vous dis, c'est que je suis entièrement convaincu que ce témoin ne comprend pas ce que la promesse de dire la vérité signifie, n'en a aucune idée. Aucune. Zéro. Alors, voilà ce en quoi consiste cette enquête. [*Ibid*., p. 165]

Contrairement à l'opinion des juges majoritaires, j'estime que le juge du procès n'a pas fondé son appréciation sur l'incapacité de K.B. d'articuler des concepts. Il s'est fondé sur son incapacité — attribuable à sa déficience intellectuelle — à « comprend[re] [. . .] ce que la promesse de dire la vérité signifie ». Le juge du procès a mené, en utilisant des termes concrets et ordinaires, une enquête conforme aux prescriptions de l'arrêt *Khan*.

[144] Il s'agissait d'un cas limite. Le ministère public allègue que certaines questions étaient trop abstraites et que la question à propos de l'église n'était aucunement pertinente lorsqu'il est devenu évident que K.B. témoignerait sans prêter serment ou ne témoignerait pas du tout. Le juge du procès aurait certainement pu continuer à poser des questions factuelles précises et concrètes afin de déterminer l'importance de la déficience intellectuelle de K.B., mais, il a vu et entendu K.B. et, de toute évidence, il estimait en avoir assez entendu. Comme nous siégeons en appel et que nous disposons seulement d'une transcription de l'instance, nous ne sommes pas en mesure de dire, selon moi, que son appréciation de l'habilité de K.B. à témoigner était erronée.

(3) Conclusion on the Competency Issue

[145] Much of the dispute in this case turned on the significance of K.B.'s "I don't know" answers. Clearly, it was an important advantage for the trial judge to watch the questions and answers unfold and to assess whether K.B. was actually able to "compute" her responses to what she was being asked — a condition precedent, surely, to any ability to test her evidence by cross-examination. The trial judge observed K.B.'s demeanour as she struggled with the attempted dialogue. The trial judge was responsible for protecting the fair trial interests of the accused, as well as society's interest in the prosecution of crimes. The inability of K.B. to deal with simple questions would mean that her evidence — however erroneous it might be, and however much (to pick up on her teacher's observation) it might be the product of K.B.'s wishful thinking — would be effectively immune to challenge by the defence, thereby prejudicing the interest of society as well as the accused in a fair trial.

[146] The teacher, Ms. W., thought that a skilled questioner who possessed direct personal knowledge of K.B. might be able to help K.B. overcome these limitations. On this view, a judge would need to rely on the teacher's guidance not only to formulate the questions, but also to interpret K.B.'s responses. Generally speaking, of course, only an expert witness can put opinions before the court and, even then, only when the trial judge would be unable to determine the issue in question properly without expert assistance: *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Parrott*, 2001 SCC 3, [2001] 1 S.C.R. 178. At the end of the day, it has to be the judge or jury — not the lay witness — to assess the witness's testimony.

[147] In *Parrott*, the complainant was a mature woman who was said to possess the mental development equivalent in some respects to that of a three- or four-year-old child. The Crown declined

(3) Conclusion relative à la question de l'habilité à témoigner

[145] Une grande partie du litige en l'espèce reposait sur l'importance des réponses de K.B. lorsqu'elle disait [TRADUCTION] « je ne sais pas ». De toute évidence, il s'agissait d'un avantage important pour le juge du procès d'être témoin de l'enchaînement des questions et des réponses et de déterminer si K.B. était réellement capable de « computer » les questions posées et d'y répondre — une condition essentielle, certes, à toute possibilité de vérifier sa déposition lors d'un contre-interrogatoire. Le juge du procès a observé le comportement de K.B. alors qu'elle avait des difficultés à suivre le dialogue. Il incombait au juge du procès d'assurer la protection du droit de l'accusé à un procès équitable ainsi que de l'intérêt de la société à ce que les criminels soient poursuivis. L'incapacité pour K.B. de comprendre des questions simples et d'y répondre signifiait que son témoignage — si erroné soit-il, surtout s'il devait résulter (pour reprendre le propos de l'institutrice de K.B.) des rêveries de K.B. — ne pourrait effectivement être attaqué par la défense, ce qui porterait atteinte à l'intérêt de la société et au droit de l'accusé à un procès équitable.

[146] L'enseignante, M^me^ W., était d'avis qu'un interrogateur qualifié qui connaissait bien K.B. pouvait être en mesure de l'aider à surmonter ces limites. Dans cette optique, un juge devrait se fier aux conseils de l'enseignante non seulement pour formuler les questions, mais aussi pour interpréter les réponses de K.B. Bien entendu, de façon générale, seul un témoin expert peut exprimer ses opinions devant la cour et, même alors, seulement dans le cas où le juge du procès n'est pas en mesure de trancher comme il se doit une question donnée sans l'aide d'un expert : *R. c. Mohan*, [1994] 2 R.C.S. 9; *R. c. Parrott*, 2001 CSC 3, [2001] 1 R.C.S. 178. En bout de ligne, c'est au juge ou au jury — non au témoin profane — qu'il appartient d'apprécier la déposition du témoin.

[147] Dans *Parrott*, la plaignante était une femme adulte dont le développement mental pouvait équivaloir à certains égards à celui d'un enfant de trois ou quatre ans. Le ministère public a refusé

to call the complainant herself on the basis that a court appearance might cause her trauma or other adverse effects, and instead called expert witnesses to lay the foundation for the admission of her earlier out-of-court statements. In this context, we held that the experts could not be substituted for calling the complainant herself, but that

> [i]f she had been called and it became evident that the trial judge required expert assistance to draw appropriate inferences from what he had heard her say (or not say), or if either the defence or the Crown had wished to pursue the issue of requiring an oath or solemn affirmation, expert evidence might then have become admissible to assist the judge. [para. 52]

[148] I think we should go further in this case and hold that on a competency *voir dire* where the mental capacity of an adult is challenged and the adult is herself called as a proposed witness, the court may also admit evidence from *fact* witnesses personally familiar with the proposed witness's verbal and cognitive abilities and limitations to help the court gain a better understanding of the person's capacity. These witnesses, unlike Dr. K., would not be in a position to express an opinion, but could testify about their direct personal observations of the proposed witness. Such evidence might, if the trial judge considered it helpful, better enable the judge or jury to appreciate her responses (or non-responses) in the witness box.

[149] Ultimately, however, it is the judge who must reach his or her own considered opinion about the level of mental capacity of the proposed witness. Where, as in this case, the judge, after hearing from the proposed witness, considers the calling of additional fact witnesses to be unnecessary, I do not think we are in a position to second-guess that procedural conclusion.

[150] Accordingly, I would reject the Crown's appeal with respect to the trial judge's ruling that

d'assigner la plaignante à témoigner au motif que sa comparution devant le tribunal risquait de la traumatiser ou de lui porter préjudice. Il a plutôt assigné des experts afin de justifier l'admission de ses déclarations extrajudiciaires antérieures. Dans ce contexte, nous avons conclu que les experts ne pouvaient pas être appelés à témoigner en remplacement de la plaignante elle-même, mais que

> [s]i elle avait été assignée à témoigner et qu'il était devenu évident que le juge du procès avait besoin de l'aide d'experts pour tirer les inférences appropriées de ce qu'il l'a entendue dire (ou ne pas dire), ou si la défense ou le ministère public avait souhaité soulever la question de l'opportunité d'exiger un serment ou une affirmation solennelle, la preuve d'expert aurait alors pu devenir admissible comme aide apportée au juge. [par. 52]

[148] Je crois que nous devrions aller plus loin en l'espèce et conclure que, dans le cadre d'un voir-dire relatif à l'habilité à témoigner, où la capacité mentale d'une personne adulte est mise en question et la personne adulte est assignée à témoigner, le tribunal peut également admettre les dépositions de témoins des *faits* qui connaissent bien les habilités du témoin éventuel à s'exprimer et à comprendre, ainsi que ses limites, et ce, afin d'aider le tribunal à mieux saisir les capacités de la personne. Ces témoins, contrairement au D^{r} K., ne seraient pas en mesure d'exprimer une opinion, mais ils pourraient témoigner à propos de ce qu'ils ont eux-mêmes directement observé chez le témoin éventuel. La preuve pourrait, si le juge du procès l'estime utile, aider le juge ou le jury à apprécier les réponses (ou l'absence de réponse) que lui donne la personne qui témoigne.

[149] Cependant, c'est le juge qui, en fin de compte, doit former sa propre opinion éclairée au sujet de la capacité mentale du témoin éventuel. Lorsque, comme en l'espèce, le juge estime qu'il n'est pas nécessaire de citer d'autres témoins de faits après avoir entendu le témoin éventuel, je ne crois pas que nous soyons en mesure de remettre en question cette conclusion de nature procédurale.

[150] Par conséquent, je suis d'avis de rejeter le pourvoi interjeté par le ministère public

the unsworn evidence of K.B. is inadmissible. In his view, the quality of the proposed evidence did not meet the s. 16(3) threshold. Sitting on appeal from this determination, and not having had the advantage of observing and questioning K.B., I see no valid basis for reversing that evidentiary ruling.

E. *Admissibility of Out-of-Court Statements*

[151] The Crown contends that the trial judge erred by effectively deciding that K.B.'s testimonial incompetence predetermined the unreliability of her hearsay statements. The admissibility analysis in a hearsay *voir dire* is to be focused on whether the hearsay dangers have been overcome: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 71. These hearsay dangers include the inability to inquire into the declarant's perception, memory and credibility. The trial judge's conclusion in the competency hearing that K.B. lacked the ability to perceive, recall and communicate events and to understand the difference between truth and falsehood set up, but did not predetermine, the trial judge's conclusion that K.B.'s testimony lacked sufficient reliability. I agree with Doherty and MacPherson JJ.A., that "it is not surprising, and it is not an error, that the trial judge's reasoning on the issue of the threshold reliability in his hearsay ruling was quite similar to his reasoning on the *CEA* s. 16 voir dire" (para. 48). I would therefore not give effect to this ground of appeal.

III. Disposition

[152] I would dismiss the appeal.

APPENDIX A

Until 1987, s. 16 of the *Canada Evidence Act* provided:

16. (1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in

relativement à la décision du juge du procès selon laquelle le témoignage non assermenté de K.B. est inadmissible. Selon ce dernier, le témoignage envisagé n'avait pas la qualité nécessaire pour satisfaire au critère énoncé au par. 16(3). Siégeant en appel de cette décision, et n'ayant pas eu l'avantage d'observer et d'interroger K.B., je ne vois aucune raison valable d'annuler cette décision sur l'admissibilité de la preuve.

E. *Admissibilité des déclarations extrajudiciaires*

[151] Le ministère public prétend que le juge du procès a commis une erreur en décidant en fait que l'inhabilité à témoigner de K.B. a entraîné automatiquement la non-fiabilité de ses déclarations relatées. L'analyse relative à l'admissibilité lors d'un voir-dire doit être axée sur la question de savoir si les dangers associés au ouï-dire ont été surmontés : *R. c. Khelawon*, 2006 CSC 57, [2006] 2 R.C.S. 787, par. 71. Ces dangers incluent l'incapacité d'examiner la perception, la mémoire et la crédibilité du déclarant. Le fait que le juge du procès ait conclu, lors de l'audience visant à déterminer l'habilité à témoigner, que K.B. n'avait pas la capacité de percevoir, de se souvenir et de raconter ce qui s'est passé et de comprendre la différence entre la vérité et la fausseté l'a amené, mais pas de façon automatique, à conclure que le témoignage de K.B. n'était pas suffisamment fiable. Je suis d'accord avec les juges Doherty et MacPherson pour dire que [TRADUCTION] « ce n'est pas surprenant, et ce n'est pas une erreur, que le raisonnement du juge du procès sur la question du seuil de fiabilité dans sa décision relative au ouï-dire était très semblable à son raisonnement sur le voir-dire prévu à l'art. 16 de la *LPC* » (par. 48). Je suis donc d'avis de rejeter ce motif d'appel.

III. Dispositif

[152] Je suis d'avis de rejeter le pourvoi.

ANNEXE A

Jusqu'en 1987, l'art. 16 de la *Loi sur la preuve au Canada* prévoyait ce qui suit :

16. (1) Dans toute procédure judiciaire où l'on présente comme témoin un enfant en bas âge qui, de l'avis

the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.

The origin of this provision, at stake in *Khan*, can be traced back to s. 25 of the *Canada Evidence Act, 1893*, S.C. 1893, c. 31. This was the first instance in Canadian history that Parliament legislated on the testimonial competence of children. At the time however, and until 1987, no statutory provision addressed the capacity to testify of adults with mental disabilities. Section 25 of the 1893 *Canada Evidence Act* provided:

25. In any legal proceeding where a child of tender years is tendered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

2. But no case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.

On October 29, 1986, Minister of Justice Ramon Hnatyshyn presented the House of Commons with Bill C-15, *An Act to amend the Criminal Code and the Canada Evidence Act*. During the first reading of Bill C-15, cl. 17 proposed to repeal s. 16 of the *Canada Evidence Act* and to replace it with a new provision:

17. Section 16 of the said Act is repealed and the following substituted therefor:

"**16.** (1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

du juge, juge de paix ou autre fonctionnaire présidant, ne comprend pas la nature d'un serment, le témoignage de cet enfant peut être reçu, bien qu'il ne soit pas rendu sous serment, si, de l'avis du juge, juge de paix ou autre fonctionnaire présidant, selon le cas, cet enfant est doué d'une intelligence suffisante pour justifier la réception de son témoignage, et s'il comprend le devoir de dire la vérité.

(2) Aucune cause ne peut être décidée sur ce seul témoignage, et il doit être corroboré par quelque autre témoignage essentiel.

L'origine de cette disposition, en cause dans l'arrêt *Khan*, remonte à l'art. 25 de l'*Acte de la preuve en Canada, 1893*, S.C. 1893, ch. 31. Pour la première fois dans l'histoire du Canada, le Parlement légiférait sur l'habilité des enfants à témoigner. À l'époque, toutefois, et ce jusqu'en 1987, aucune disposition législative ne traitait de l'habilité à témoigner des adultes ayant une déficience intellectuelle. L'article 25 de cette loi prévoyait ce qui suit :

25. Dans toute procédure légale où l'on offrira un jeune enfant comme témoin, et si cet enfant, de l'avis du juge, juge de paix ou autre fonctionnaire présidant, ne comprend pas la nature d'un serment, le témoignage de cet enfant pourra être reçu, bien qu'il ne soit pas rendu sous serment, si, de l'avis du juge, juge de paix ou autre fonctionnaire présidant, selon le cas, cet enfant est doué d'une intelligence suffisante pour justifier la réception de son témoignage, et s'il comprend le devoir de dire la vérité.

2. Mais aucune cause ne sera décidée sur ce témoignage seul, et il devra être corroboré par quelque autre témoignage essentiel.

Le 29 octobre 1986, le ministre de la Justice Ramon Hnatyshyn a déposé à la Chambre des communes le projet de loi C-15, *Loi modifiant le Code criminel et la Loi sur la preuve au Canada*. En première lecture, l'art. 17 du projet de loi C-15 proposait l'abrogation de l'art. 16 de la *Loi sur la preuve au Canada* et son remplacement par une nouvelle disposition :

17. L'article 16 de la même loi est abrogé et remplacé par ce qui suit :

« **16.** (1) Avant de permettre à une personne âgée de moins de quatorze ans ou dont la capacité mentale est mise en question de témoigner, le tribunal procède à une enquête visant à déterminer si :

(*a*) whether the person understands the nature of an oath or a solemn affirmation; and

(*b*) whether the person is sufficiently intelligent that the reception of the evidence is justified.

(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is sufficiently intelligent that the reception of the evidence is justified shall testify under oath or solemn affirmation.

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is sufficiently intelligent that the reception of the evidence is justified may testify on promising to tell the truth.

(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is sufficiently intelligent that the reception of the evidence is justified shall not testify.

(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation."

A crucial amendment, for present purposes, was made to the original text of Bill C-15 by the *ad hoc* Legislative Committee on Bill C-15. This amendment replaced the requirement to be "sufficiently intelligent" initially provided in Mr. Hnatyshyn's proposal with the criterion that the proposed witness be "able to communicate the evidence".

What is striking from the lengthy works of the Legislative Committee on Bill C-15 is the focus on the "ability to communicate the evidence" as the sole qualitative requirement for the competence of children or adults with mental disabilities who do not understand the nature of an oath. There is nothing in the record of the Committee which suggests that a "promise to tell the truth" also imposed an understanding of the nature of such a promise.

a) d'une part, celle-ci comprend la nature du serment ou de l'affirmation solennelle;

b) d'autre part, celle-ci est suffisamment intelligente pour que le recueil de son témoignage soit justifié.

(2) La personne visée au paragraphe (1) qui comprend la nature du serment ou de l'affirmation solennelle et qui est suffisamment intelligente pour que le recueil de son témoignage soit justifié témoigne sous serment ou affirmation solennelle.

(3) La personne visée au paragraphe (1) qui, sans comprendre la nature du serment ou de l'affirmation solennelle, est suffisamment intelligente pour que le recueil de son témoignage soit justifié peut témoigner sur promesse de dire la vérité.

(4) La personne visée au paragraphe (1) qui ne comprend pas la nature du serment ou de l'affirmation solennelle et qui n'est pas suffisamment intelligente pour que le recueil de son témoignage soit justifié ne peut témoigner.

(5) La partie qui met en question la capacité mentale d'un éventuel témoin âgé d'au moins quatorze ans doit convaincre le tribunal qu'il existe des motifs de douter de la capacité de ce témoin de comprendre la nature du serment ou de l'affirmation solennelle. »

Un amendement important, pour les besoins de l'espèce, a été apporté au libellé original du projet de loi C-15 par le Comité législatif sur le projet de loi C-15 (un comité *ad hoc*). Par cet amendement, on a remplacé la condition selon laquelle la personne devait être « suffisamment intelligente », qui figurait à l'origine dans la proposition de M. Hnatyshyn, par la condition voulant que le témoin éventuel soit « capable de communiquer les faits dans son témoignage ».

Ce qui retient l'attention dans les longs travaux du Comité législatif sur le projet de loi C-15, c'est l'importance que le Comité a attachée à la « capacité de communiquer les faits dans le témoignage » comme seule condition de nature qualitative relative à l'habilité à témoigner des enfants ou des adultes ayant une déficience intellectuelle qui ne comprennent pas la nature du serment. Les procès-verbaux du Comité n'indiquent aucunement que la « promesse de dire la vérité » exigeait aussi que la personne comprenne la nature de cette promesse.

In fact, the requirement to be "sufficiently intelligent" in the original draft was understood by the Committee as requiring an understanding of the moral difference between telling the truth and lying. On December 4, 1986, the Committee held a discussion on the meaning of "sufficient intelligence". It came to the conclusion that all that was needed for a witness to be sufficiently intelligent was to understand the moral difference between telling the truth and lying:

Mr. Nicholson: Well, that is the first test. I think the section Mrs. Collins referred to, proposed subsection 16(3) of our proposed section 16, says that if the person does not understand the nature of an oath, well it is fine, because it often happens that the children may not know the concept of God and hell and all that sort of thing. I have seen it happen in a trial, but if the person testifies on the promise of telling the truth then let the judge after that just decide how much weight he or she will place on that evidence without making the other determination of "sufficient intelligence".

Mr. Pink: Under section 16 of the Canada Evidence Act it says:

. . .

Now, it has been my experience in determining the so-called "sufficient intelligence" — that is, when the judge goes through the series of questions he normally does about how far is he in school, how is he doing in school, and things of that sort, and he knows where he lives, he knows the difference between speaking the truth and speaking a falsity and things of that sort, then the judge concludes he is of sufficient intelligence, we will accept his evidence, but because he does not understand the nature of an oath, it will be unsworn evidence, that is all.

Mr. Nicholson: Do you think that is still a necessary element?

Mr. Pink: Absolutely.

Mr. Nicholson: Do you think it is important to have this, that we cannot just eliminate it and have the judge decide the weight that he gives to the evidence, which is basically what we do with adults?

Mr. Pink: I personally feel that before a child's evidence is received, he must understand the difference

En fait, pour les membres du Comité, les mots « suffisamment intelligente » figurant dans le projet initial sous-entendaient que la personne comprenne la différence morale entre dire la vérité et mentir. Le 4 décembre 1986, le Comité a discuté de la signification de ces termes. Il est arrivé à la conclusion que tout ce qui était exigé pour qu'un témoin soit suffisamment intelligent était qu'il comprenne la différence morale entre dire la vérité et mentir :

M. Nicholson : Eh bien, il s'agit d'un premier test. À ce sujet, je crois que M^me^ Collins a mentionné le paragraphe 3 de l'article 16, et elle disait que si l'enfant ne comprend pas la nature d'un serment, eh bien il n'y a rien de mal à cela étant donné qu'il arrive souvent que les enfants ne comprennent pas des idées comme Dieu, l'enfer et tout ce genre de choses. Je l'ai d'ailleurs observé moi-même lors d'un procès. Toutefois, si quelqu'un comparaît après avoir promis de dire la vérité, alors laissons au juge le soin d'établir quel poids il accordera aux preuves ainsi fournies sans nous occuper de vérifier s'il y a « intelligence suffisante ».

M. Pink : En vertu de l'article 16 de la Loi sur la preuve au Canada, il est dit ce qui suit, et je cite :

. . .

Or d'après mon expérience lorsqu'il s'agit d'établir cette « intelligence suffisante », c'est-à-dire lorsque le juge pose toute une série de questions, il demande d'habitude à l'enfant où il en est dans ses études, quels sont [ses] résultats scolaires et des choses de ce genre. Il vérifie en outre où habite l'enfant, s'il connaît la différence entre dire la vérité et dire un mensonge et des choses de ce genre. Ensuite, il peut établir qu'il est d'intelligence suffisante et que son témoignage sera donc recevable, mais que son témoignage ne sera pas reçu sous serment, étant donné qu'il ne comprend pas la nature d'un serment, c'est tout.

M. Nicholson : Croyez-vous que cela reste nécessaire?

M. Pink : Tout à fait.

M. Nicholson : Est-il important de conserver cela; ne pouvons-nous pas l'éliminer et tout simplement nous en remettre au juge pour décider de l'importance à accorder aux preuves fournies, c'est-à-dire de procéder comme on le fait avec les adultes?

M. Pink : Personnellement, j'estime qu'avant d'entendre le témoignage d'un enfant, il faut vérifier si

between telling the truth and a falsity; he has to know that before his evidence can be received.

. . .

Mrs. Collins: How do you deal with the problem of a mentally retarded child? We know that sometimes those children are the victims or are easily the victims of sexual abuse. Also, how do you deal then with children of very, very tender years, who we also know can be victimized by sexual abuse, three-year-olds?

Mr. Pink: First of all, I do not think you will ever see a three-year-old giving evidence. I have seen cases where mentally retarded children have in fact given evidence, because the judge was satisfied, after querying him, that he knew the difference between telling the truth or a falsehood. He knew it was right to tell the truth, he knew it was wrong to tell a lie. He did not understand the nature of an oath and all that, so his evidence was not sworn.

Mrs. Collins: Yes. However, if we leave in the "sufficient intelligence", and with the interpretation that has been given, I still feel that is going to be a potential barrier.

Mr. Pink: It may be that the committee is going to have to decide on words other than "sufficient intelligence". What is the purpose of the query in the first place? Does it not really boil down to determining truth or falsehood? Is that not what it is all about?

Mrs. Collins: I would think so. Yes. So if the child understands the difference between telling the truth and lying, that would seem to me to be all you would really need to find out.

Mr. Pink: I agree. [Emphasis added; pp. 26-27.]

(House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15*, No. 2, 2nd Sess., 33rd Parl., December 4, 1986)

One week later, on December 11, 1986, the Legislative Committee on Bill C-15 heard evidence from Professor Nicholas Bala, then Director of the Canadian Council on Children and Youth. Professor Bala expressed his fears about the

celui-ci comprend la différence entre dire la vérité et dire un mensonge; il doit savoir cela avant qu'on entende son témoignage.

. . .

Mme Collins : Qu'avez-vous prévu dans le cas d'un enfant souffrant d'arriération mentale? Nous savons en effet que ces enfants peuvent parfois être assez facilement les victimes d'agression sexuelle. En outre, qu'avez-vous prévu dans le cas d'enfants en très bas âge, qui sont eux aussi l'objet d'agressions sexuelles? Je pense à des enfants de trois ans, par exemple.

M. Pink : D'abord, je crois qu'on ne verra jamais le jour où l'on fera comparaître un enfant de trois ans. J'ai observé certaines causes où on avait fait témoigner des enfants souffrant d'arriération mentale, mais c'était parce que le juge les avait interrogés et savait donc qu'ils connaissaient la différence entre dire la vérité et dire un mensonge. Les enfants savaient qu'il était bien de dire la vérité et mal de dire un mensonge. Ils ne comprenaient cependant pas la nature d'un serment, et leur témoignage n'avait donc pas été reçu sous serment.

Mme Collins : Oui. Cependant, si nous conservons le concept de « l'intelligence suffisante », et si on l'interprète de la même façon que précédemment, j'ai quand même l'impression que cela constituera peut-être un obstacle.

M. Pink : Il faudra peut-être que le Comité choisisse alors d'autres termes que « intelligence suffisante ». De toute façon, pourquoi pose-t-on d'abord toutes ces questions? S'agit-il vraiment de savoir si le témoin sait distinguer entre le vrai et le faux? Est-ce que tout ne revient pas à cela?

Mme Collins : Je le pense. Oui. En conséquence, si l'enfant comprend la différence entre dire la vérité et dire un mensonge, il me semble que l'on disposerait là de tout ce dont on a vraiment besoin.

M. Pink : J'abonde en ce sens. [Je souligne; p. 26-27.]

(Chambre des communes, *Procès-verbaux et témoignages du Comité législatif sur le projet de loi C-15*, n^{o} 2, 2^{e} sess., 33^{e} lég., 4 décembre 1986)

Une semaine plus tard, le 11 décembre 1986, le Comité législatif sur le projet de loi C-15 a entendu le professeur Nicholas Bala, qui était alors directeur du Conseil canadien de l'enfance et de la jeunesse. Le professeur Bala a fait part de ses craintes

"sufficient intelligence" requirement for testimonial capacity as understood by the Committee, and he proposed replacing it with the ability to communicate criterion:

Dr. Nick Bala . . .

Our concern is that standard of sufficient intelligence. A layperson or indeed even a lawyer not familiar with the case law might think well, of course, you are not going to want to hear from a child not sufficiently intelligent enough to testify. But when one starts looking at the case law and when one realizes that the concept of "sufficient intelligence" is one which appears in the present section 16 of the Canada Evidence Act, one realizes it therefore will be brought to the courts with all the precedents decided and all the traditions decided. That will make it very difficult for children to testify; in particular children under 10 may well be considered, for example, to be of average intelligence, but not of sufficient intelligence to testify.

Therefore we would submit that there should be another test, and the test we have suggested in our brief is a test of ability to communicate; that is to say the judge should be satisfied the child is able to communicate, and if the child seems able to communicate the case should be left to the trier of the fact, the jury or the judge. Obviously a prosecutor who is calling a child as a witness is not going to do that unless the prosecutor is satisfied the child has something to say of value and some recollection of the events, and is not going to be wasting everybody's time.

(*Ibid.*, No. 3, 2nd Sess., 33rd Parl., December 11, 1986, at p. 7)

The debates that followed in the Committee supported the view that it was not prudent to condition testimonial capacity on sufficiency of intelligence, which was conceived as including an understanding of the difference between truth and falsity. As a result, the Committee modified the proposed amendment to s. 16 of the *Canada Evidence Act* in order to replace the requirement of sufficient intelligence for ability to communicate the evidence, as was originally suggested by Professor Bala.

concernant la compréhension qu'avait le Comité de la condition selon laquelle la personne devait être « suffisamment intelligente » relativement à l'habilité à témoigner, et il a proposé de la remplacer par le critère de la capacité de communiquer les faits dans son témoignage :

M. Nick Bala . . .

Nous nous demandons comment on entend déterminer qu'un enfant est suffisamment intelligent. En effet, un non-initié ou même un avocat qui ne connaît pas bien la jurisprudence, pourrait très bien penser que, de toute manière, on ne voudrait pas entendre le témoignage d'un enfant qui n'est pas suffisamment intelligent. Mais qu'est-ce que cette notion figure dans ce projet de l'article 16 de la Loi sur la preuve, cela veut dire qu'il y aura des précédents et des traditions. Nous craignons donc que cette disposition fasse obstacle aux témoignages des enfants, surtout des enfants âgés de moins de 10 ans qui, même s'ils sont d'intelligence moyenne, pourraient être considér[és] comme pas suffisamment intelligents pour témoigner.

Nous préconisons par conséquent l'adoption d'un autre critère qui est la capacité de communiquer. C'est-à-dire que dans les cas où l'enfant semble capable de communiquer, c'est le jury ou le juge qui devrait décider de l'admissibilité du témoignage. Il nous semble assez évident qu'un procureur qui cite un enfant comme témoin ne le fera que s'il est persuadé que l'enfant se souvient assez bien des évènements, qu'il ne fera pas perdre le temps de tout le monde et que son témoignage sera utile.

(*Ibid.*, n^{o} 3, 2^{e} sess., 33^{e} lég., 11 décembre 1986, p. 7)

Dans les débats qui ont suivi, le Comité a souscrit à l'opinion selon laquelle il n'était pas prudent de faire dépendre l'habilité à témoigner de la condition selon laquelle une personne devait être suffisamment intelligente, laquelle condition était censée sous-entendre que la personne comprenait la différence entre la vérité et la fausseté. Par conséquent, le Comité a amendé la modification envisagée à l'art. 16 de la *Loi sur la preuve au Canada* afin de remplacer la condition selon laquelle la personne devait être suffisamment intelligente par la condition qu'elle devait être capable de communiquer les faits dans son témoignage, comme le professeur Bala l'avait initialement proposé.

As such, s. 18 of the *Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c. 24, provided the following:

18. Section 16 of the said Act is repealed and the following substituted therefor:

"**16.** (1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

(*a*) whether the person understands the nature of an oath or a solemn affirmation; and

(*b*) whether the person is able to communicate the evidence.

(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may testify on promising to tell the truth.

(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation."

The amendment to Bill C-15 shows that Parliament did not intend children and adults with mental disabilities to be questioned on their understanding of the difference between truth and falsehood in order to testify.

Additionally, the fact that the legislative debates emphasized that ability to communicate was the qualitative condition for testimonial capacity under s. 16(3), and that no mention was made that promising to tell the truth required understanding of a promise to tell the truth, demonstrate the intent of Parliament that a mere promise would suffice.

Ainsi, l'art. 18 de la *Loi modifiant le Code criminel et la Loi sur la preuve au Canada,* L.C. 1987, ch. 24, prévoyait ce qui suit :

18. L'article 16 de la même loi est abrogé et remplacé par ce qui suit :

« **16.** (1) Avant de permettre à une personne âgée de moins de quatorze ans ou dont la capacité mentale est mise en question de témoigner, le tribunal procède à une enquête visant à déterminer si :

a) d'une part, celle-ci comprend la nature du serment ou de l'affirmation solennelle;

b) d'autre part, celle-ci est capable de communiquer les faits dans son témoignage.

(2) La personne visée au paragraphe (1) qui comprend la nature du serment ou de l'affirmation solennelle et qui est capable de communiquer les faits dans son témoignage sous serment ou affirmation solennelle.

(3) La personne visée au paragraphe (1) qui, sans comprendre la nature du serment ou de l'affirmation solennelle, est capable de communiquer les faits dans son témoignage peut témoigner sur promesse de dire la vérité.

(4) La personne visée au paragraphe (1) qui ne comprend pas la nature du serment ou de l'affirmation solennelle et qui n'est pas capable de communiquer les faits dans son témoignage ne peut témoigner.

(5) La partie qui met en question la capacité mentale d'un éventuel témoin âgé d'au moins quatorze ans doit convaincre le tribunal qu'il existe des motifs de douter de la capacité de ce témoin de comprendre la nature du serment ou de l'affirmation solennelle. »

L'amendement apporté au projet de loi C-15 démontre que le législateur ne voulait pas que les enfants et les adultes ayant une déficience intellectuelle soient interrogés sur leur compréhension de la différence entre la vérité et le mensonge afin de pouvoir témoigner.

De plus, le fait que, dans les débats législatifs, il ait été souligné que la capacité de communiquer les faits dans le témoignage était la condition de nature qualitative relative à l'habilité à témoigner prévue au par. 16(3), et que l'on n'ait pas mentionné que la promesse de dire la vérité sous-entendait une compréhension de la promesse de dire la vérité, démontre que le législateur voulait qu'une simple promesse de dire la vérité soit suffisante.

APPENDIX B

The second important amendment to s. 16 of the *Canada Evidence Act* began in 2004, when Minister of Justice Irwin Cotler presented the House of Commons with Bill C-2. In 2005, Parliament adopted the *Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32. Sections 26 and 27 provided:

26. The portion of subsection 16(1) of the *Canada Evidence Act* before paragraph (*a*) is replaced by the following:

16. (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

27. The Act is amended by adding the following after section 16:

16.1 (1) A person under fourteen years of age is presumed to have the capacity to testify.

(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

(3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

(4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

(5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

(6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

(7) No proposed witness under fourteen years of age shall be asked any questions regarding their

ANNEXE B

La deuxième modification importante apportée à l'art. 16 de la *Loi sur la preuve au Canada* a été introduite en 2004, lorsque le ministre de la Justice Irwin Cotler a déposé le projet de loi C-2 à la Chambre des communes. En 2005, le législateur a adopté la *Loi modifiant le Code criminel (protection des enfants et d'autres personnes vulnérables) et la Loi sur la preuve au Canada*, L.C. 2005, ch. 32. Les articles 26 et 27 de cette Loi prévoyaient ce qui suit :

26. Le passage du paragraphe 16(1) de la *Loi sur la preuve au Canada* précédant l'alinéa *a*) est remplacé par ce qui suit :

16. (1) Avant de permettre le témoignage d'une personne âgée d'au moins quatorze ans dont la capacité mentale est mise en question, le tribunal procède à une enquête visant à décider si :

27. La même loi est modifiée par adjonction, après l'article 16, de ce qui suit :

16.1 (1) Toute personne âgée de moins de quatorze ans est présumée habile à témoigner.

(2) Malgré toute disposition d'une loi exigeant le serment ou l'affirmation solennelle, une telle personne ne peut être assermentée ni faire d'affirmation solennelle.

(3) Son témoignage ne peut toutefois être reçu que si elle a la capacité de comprendre les questions et d'y répondre.

(4) La partie qui met cette capacité en question doit convaincre le tribunal qu'il existe des motifs d'en douter.

(5) Le tribunal qui estime que de tels motifs existent procède, avant de permettre le témoignage, à une enquête pour vérifier si le témoin a la capacité de comprendre les questions et d'y répondre.

(6) Avant de recevoir le témoignage, le tribunal fait promettre au témoin de dire la vérité.

(7) Aucune question sur la compréhension de la nature de la promesse ne peut être posée au témoin en

understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

(8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

A reading of the works of the two standing committees which studied Bill C-2 shows that Parliament did not intend the prohibition of questions to children on whether they understand the duty to tell the truth under s. 16.1(7) to change the law. On the contrary, s. 16.1(7) was seen as reaffirming the requirement of s. 16(3) that the ability to communicate the evidence was the sole qualitative condition for capacity and that a mere promise to tell the truth would suffice.

During a debate on the phrasing of s. 16.1(7), held in the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, a discussion between Joe Comartin and Professor Nicholas Bala revealed the perception that s. 16(3) had been misinterpreted by courts. The original intent of the provision was to allow challenged witnesses to testify by merely promising to tell the truth, once they were held to be able to communicate the evidence. This discussion, which occurred on March 24, 2005, shows that s. 16.1(7) was aimed at clarifying the state of the law:

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Professor Bala, to start, I read your material in the paper around the changes you want to proposed subsection 16.1(7), but I don't understand, quite frankly, how you would change it. Proposed subsection 16.1(6) provides, as you're promoting strongly, that no oath be issued, that they simply be required to promise to tell the truth.

So I don't know exactly how you want (7) amended, from its current proposal.

Prof. Nicholas Bala: The concern I have about proposed subsection 16.1(7) is that it says no child shall be

vue de vérifier si son témoignage peut être reçu par le tribunal.

(8) Il est entendu que le témoignage reçu a le même effet que si le témoin avait prêté serment.

Les procès-verbaux des deux comités permanents qui ont étudié le projet de loi C-2 indiquent que le législateur ne voulait pas modifier l'état du droit en interdisant, au par. 16.1(7), que des questions soient posées aux enfants quant à savoir s'ils comprennent le devoir de dire la vérité. Au contraire, on considérait que le par. 16.1(7) réitérait l'exigence prévue au par. 16(3) selon laquelle la capacité de communiquer les faits dans le témoignage constituait la seule condition de nature qualitative relative à l'habilité à témoigner et qu'une simple promesse de dire la vérité suffisait.

Au cours d'une séance du Comité permanent de la justice, des droits de la personne, de la sécurité publique et de la protection civile, de la Chambre des communes, portant sur la formulation du par. 16.1(7), une discussion entre Joe Comartin et le professeur Nicholas Bala a révélé que l'on estimait que le par. 16(3) avait été mal interprété par les tribunaux. À l'origine, le législateur voulait, par cette disposition, permettre aux personnes dont la capacité mentale est mise en question de témoigner en ne faisant que promettre de dire la vérité, et ce, dès qu'ils avaient été jugés aptes à communiquer les faits dans leur témoignage. Cette discussion, tenue le 24 mars 2005, révèle que le par. 16.1(7) visait à préciser l'état du droit :

M. Joe Comartin (Windsor—Tecumseh, NPD) : Monsieur Bala, pour commencer, j'ai pris connaissance de votre mémoire et des changements que vous suggérez à l'égard du paragraphe 16.1(7) proposé, mais, en toute franchise, je ne comprends pas comment vous le changeriez. Le paragraphe 16.1(6) proposé prévoit que les enfants ne prêteront pas serment, qu'ils seront simplement tenus de promettre de dire la vérité, et cela correspond à ce que vous préconisez avec tant de vigueur.

Je ne comprends pas exactement de quelle façon vous voulez modifier le paragraphe (7), dans sa forme actuelle.

M. Nicholas Bala : Ce qui me préoccupe du paragraphe 16.1(7) proposé, c'est qu'il prévoit qu'aucune

asked any questions regarding their understanding of the nature "of the promise" for the purpose of determining whether their evidence shall be received by the court, and I would submit to you that it should be "of the promise to tell the truth".

It's a relatively small change, but again, the concern I have arises out of the fact that the present legislation has been interpreted very narrowly by judges. When you actually go back through the transcripts — I was actually a witness in 1988, when the provisions came into effect — I think it was thought by people, well, we don't have to be very explicit here, because the judges will get this right.

Obviously, on many issues we do have to trust our judiciary, but on certain issues I think it's important to give them as much direction as possible. My concern is that some judge might read this — and we have quite a lot of case law about this — and say, okay, I can't ask you about your understanding of the nature of the promise, but what about asking you questions about truth-telling? Parliament specifically said in subsection 16.1(6) that you'll be required to promise to tell the truth. We can't ask about the nature of the promise, but can we ask you about "truth" and "lie"?

Some judges will continue to interpret it that way. In some ways, it's a very small amendment, but I assume it's consistent with your actual intent. My concern, as I say, has been based on how some of these previous provisions have been interpreted. [Emphasis added; p. 7.]

(House of Commons, *Evidence of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, No. 26, 1st Sess., 38th Parl., March 24, 2005)

This perception was also shared, at the time, by the Department of Justice. Ms. Catherine Kane, Director of the Policy Centre for Victim Issues of Justice Canada, testified that s. 16 was originally intended by Parliament to allow witnesses to give evidence without inquiring into their comprehension of the duty to tell the truth. During her opening statement before the Standing Senate Committee on Legal and Constitutional Affairs, on July 7,

question sur la compréhension de la nature de la « promesse » ne peut être posée à l'enfant en vue de vérifier si son témoignage peut être reçu par le tribunal, et j'avance qu'il faudrait reformuler afin qu'il s'agisse de « la promesse de dire la vérité ».

C'est un changement relativement modeste, mais, encore une fois, ma préoccupation découle du fait que la loi actuelle a été interprétée de façon très étroite par les juges. Quand on consulte les transcriptions — j'ai été témoin en 1988, quand les dispositions sont entrées en vigueur — je crois que les gens ont pensé : « Eh bien, nous n'avons pas besoin d'être explicites à cet endroit, car les juges comprendront. »

Évidemment, nous devons faire confiance à notre magistrature au sujet d'un grand nombre de questions, mais, pour certains enjeux, je crois qu'il est important de les orienter le plus possible. Je crains qu'un juge lise ceci — et nous avons une imposante jurisprudence qui reflète cela — et se dis[e] : « Bon, je ne peux t'interroger pour déterminer si tu comprends la nature de la promesse, mais est-ce que je peux te poser des questions sur le sens de la vérité? » Le Parlement prévoit explicitement, au paragraphe 16.1(6), qu'ils seront tenus de promettre de dire la vérité. On ne peut interroger les enfants sur la nature de la promesse, mais est-ce qu'on peut leur poser des questions sur le sens de « vérité » et de « mensonge »?

Certains juges continueront de l'interpréter de cette façon. Dans une certaine mesure, c'est une modification très modeste, mais je suppose que cela correspond au but de votre projet de loi. Ma préoccupation, comme je l'ai dit, concerne la façon dont certaines de ces dispositions antérieures ont été interprétées. [Je souligne; p. 7.]

(Chambre des communes, *Témoignages devant le Comité permanent de la justice, des droits de la personne, de la sécurité publique et de la protection civile*, n^{o} 26, 1re sess., 38^{e} lég., 24 mars 2005)

Cette perception était également partagée, à l'époque, par les juristes du ministère de la Justice. M^{me} Catherine Kane, directrice du Centre de la politique concernant les victimes, au ministère fédéral de la Justice, a affirmé que le législateur voulait, à l'origine, que l'art. 16 permette aux enfants de témoigner sans que l'on cherche à savoir s'ils comprennent le devoir de dire la vérité. Au cours de sa déclaration d'ouverture devant le Comité sénatorial

2005, Ms. Kane explained how the initial purpose of s. 16 had been misinterpreted by courts:

Ms. Catherine Kane . . .

The other part concerns the amendments to the Canada Evidence Act with respect to children. Under the current law, the Canada Evidence Act treats children under 14 in the same way as it treats other people whose mental capacity is challenged. There is a current section 16 that requires the judge to conduct a two-part inquiry whether they are dealing with a person who has some mental disabilities or whether they are dealing with a child under 14. The two-part inquiry requires the judge to first determine, in the case of a child, whether the child understands the nature of an oath or the nature of a solemn affirmation and, second, to determine if the child is able to communicate the evidence. These amendments were made in 1988 with the purpose of trying to more readily permit children's evidence to be received. However, as the cases have interpreted this provision, we have not seen that ready acceptance of children's evidence.

If these two criteria are met, the child gives evidence under an oath or an affirmation. However, if the child does not understand the nature of the oath or the affirmation but has the ability to communicate the evidence, the evidence is received on a promise to tell the truth. That is the current law. While it may appear quite sensible on its face, the interpretations and practise of these provisions do not reflect Parliament's intention in amending the [e]vidence in an effort to permit children's evidence to be admitted more readily.

As interpreted by the courts, section 16 requires that before the child is permitted to testify, the child be subjected to an inquiry as to his or her understanding of the obligation to tell the truth, the concept of a promise, and an ability to communicate. [Emphasis added; pp. 105-6.]

(Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 18, 1st Sess., 38th Parl., July 7, 2005)

Appeal allowed, BINNIE, LEBEL *and* FISH JJ. *dissenting.*

Solicitor for the appellant: Attorney General of Ontario, Toronto.

permanent des Affaires juridiques et constitutionnelles, le 7 juillet 2005, M^me^ Kane a expliqué en quoi l'objet initial visé par l'art. 16 avait été mal interprété par les tribunaux :

Mme Catherine Kane . . .

L'autre partie concerne les modifications à la Loi sur la preuve [au] Canada, relativement aux enfants. En vertu de la loi actuelle, la Loi sur la preuve au Canada traite les enfants de moins de 14 ans de la même manière qu'elle traite d'autres personnes dont la capacité mentale est mise en question. Il y a un article actuellement, l'article 16, qui oblige le juge à mener une enquête en deux parties, qu'il ait affaire à une personne qui a quelque incapacité mentale ou à un enfant de moins de 14 ans. L'enquête en deux parties exige du juge, d'abord, qu'il détermine, dans le cas d'un enfant, si celui-ci saisit la nature d'un serment ou d'une affirmation solennelle, et, deuxièmement, qu'il détermine si l'enfant est capable de communiquer la preuve. Ces modifications ont été apportées en 1988 pour rendre plus facilement acceptables les témoignages des enfants. Cependant, d'après la manière dont cette disposition a été interprétée dans certains procès, nous n'avons pas encore observé d'acceptation sans réserve de témoignages d'enfants.

Si ces deux critères sont respectés, un enfant témoigne sous serment ou sous affirmation solennelle. Cependant, si l'enfant ne comprend pas la nature du serment ou de l'affirmation mais est capable de communiquer la preuve, celle-ci est reçue sur promesse de dire la vérité. C'est la loi actuelle. Bien que cela puisse paraître logique à première vue, les interprétations et applications de ces dispositions ne reflètent pas l'intention du Parlement de modifier la Loi sur la preuve de manière à ce que les témoignages des enfants soient plus facilement acceptés.

Tel qu'il est interprété par les tribunaux, l'article 16 stipule qu'avant qu'un enfant soit autorisé à témoigner, il doit être assujetti à un interrogatoire pour déterminer son degré d'entendement de l'obligation de dire la vérité et du concept d'une promesse, et ses capacités de communiquer. [Je souligne; p. 105-106.]

(Sénat, *Délibérations du Comité sénatorial permanent des Affaires juridiques et constitutionnelles*, n^o^ 18, 1^re^ sess., 38^e^ lég., 7 juillet 2005)

Pourvoi accueilli, les juges BINNIE, LEBEL *et* FISH *sont dissidents.*

Procureur de l'appelante : Procureur général de l'Ontario, Toronto.

Solicitors for the respondent: Webber Schroeder Goldstein Abergel, Ottawa.

Solicitor for the interveners the Women's Legal Education and Action Fund and the DisAbled Women's Network Canada: Women's Legal Education and Action Fund, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Di Luca Copeland Davies, Toronto.

Solicitors for the intervener the Council of Canadians with Disabilities: Aikins, MacAulay & Thorvaldson, Winnipeg.

Procureurs de l'intimé : Webber Schroeder Goldstein Abergel, Ottawa.

Procureur des intervenants le Fonds d'action et d'éducation juridiques pour les femmes et le Réseau d'action des femmes handicapées du Canada : Fonds d'action et d'éducation juridiques pour les femmes, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Di Luca Copeland Davies, Toronto.

Procureurs de l'intervenant le Conseil des Canadiens avec déficiences : Aikins, MacAulay & Thorvaldson, Winnipeg.

Borrelli, in his Capacity as Trustee of the SFC Litigation Trust v. Chan [Indexed as: SFC Litigation Trust v. Chan]

Ontario Reports

See paras. 57-58

Court of Appeal for Ontario

Hoy A.C.J.O., D.M. Brown and Zarnett JJ.A.

June 24, 2019

147 O.R. (3d) 145 | 2019 ONCA 525

Case Summary

Corporations — Actions — Company's overstatement of its assets on its financial statements enabling it to raise billions of dollars in capital market — Company's stakeholders commencing class actions against company when overstatement came to light — Company ultimately obtaining protection under Companies' Creditors Arrangement Act ("CCAA") after defaulting on its debt obligations — Company's causes of action transferred to litigation trust under CCAA plan of compromise and reorganization — Trustee of litigation trust successfully suing chairman of company's board of directors for damages for fraud and breach of fiduciary duty to company — Defendant's appeal dismissed — Trial judge not erring in finding that claims advanced in action were causes of action that had been held by company and not those that had been advanced in class actions — Transfer of shares of company's subsidiaries to holding companies owned by company's creditors under plan not constituting election that barred trustee from suing for damages — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Damages — Double recovery — Company's overstatement of its assets on its financial statements enabling it to raise billions of dollars in capital market — Company's stakeholders commencing class actions against company when overstatement came to light — Company ultimately obtaining protection under Companies' Creditors Arrangement Act ("CCAA") after defaulting on its debt obligations — Company's causes of action transferred to litigation trust under CCAA plan of compromise and reorganization — Trustee of litigation trust successfully suing chairman of company's board of directors for damages for fraud and breach of fiduciary duty to company — Defendant's appeal dismissed — Award of damages against defendant not resulting in double recovery against him as company's causes of action against defendant were separate and distinct from those asserted in class actions — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Debtor and creditor — Companies' Creditors Arrangement Act — Deferential standard of appellate review applying to trial judge's interpretation of terms of plan of compromise

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

SFC's overstatement of its assets on its financial statements enabled it to raise billions of dollars in the debt and equity markets. When the overstatement came to light, SFC defaulted on its debt obligations and a number of class actions were commenced against SFC and its directors, auditors, underwriters and consultants. SFC obtained insolvency protection under the *Companies' Creditors Arrangement Act*. Under a *CCAA* plan of compromise and reorganization (the "plan"), SFC's interests in its subsidiaries were transferred to holding companies owned by SFC's creditors, and SFC's causes of action were transferred to the SFC litigation trust [page146] (the "litigation trust") constituted for the benefit of its creditors. In exchange, SFC's creditors released their claims for repayment of debts owed to them by SFC. The trustee of the litigation trust commenced an action against the defendant, who was SFC's CEO and the chairman of its board of directors, for damages for fraud and breach of fiduciary duty. The action was allowed. The trial judge found that the defendant had directed a massive fraud in breach of his fiduciary duties to SFC and that his conduct caused a loss to SFC. He awarded damages equal to what he found to be SFC's loss -- $2,627,478 -- as well as punitive damages in the amount of $5 million. The defendant appealed.

Held, the appeal should be dismissed.

A deferential standard of appellate review applies to a trial judge's interpretation of the terms of a *CCAA* plan of compromise and arrangement. Absent an extricable error of law, an interpretation that involves palpable and overriding errors of fact, or one that is clearly unreasonable, the trial judge's interpretation should not be interfered with.

The trial judge did not err in his conclusion that the claims advanced in this action were causes of action that had been held by SFC and that had been transferred to the litigation trust by SFC under the plan. He properly rejected the defendant's argument that the claims were not causes of action that were transferred to the litigation trust because they were the same as, or overlapped with, the claims made in the class actions. Shareholders and noteholders may have causes of action arising from misrepresentations made to them when acquiring securities, and may have rights to sue for damages they personally have suffered. But the existence of those causes of action does not detract from the existence of a separate and distinct cause of action of the corporation, based on wrongdoing against or breach of duties owed to it. The causes of action asserted by the litigation trust did not become indistinguishable from the personal rights of action of creditors of SFC because the credits were litigation trust beneficiaries.

The trial judge did not err in his causation analysis or assessment of damages. His conclusion and his assessment of damages were premised on five core factual findings: that SFC's raising of money in the debt and equity markets was something which was caused by the defendant's wrongdoing; that but for the defendant's deceit, SFC would never have undertaken obligations of that magnitude to lenders and shareholders; that but for the defendant's wrongdoing, SFC would not have entrusted the funds raised on the capital markets to the defendant and his management team; that the defendant, rather than directing SFC's spending on legitimate business operations, poured hundreds of millions of dollars into fictitious or over-valued lines of

business where he engaged in undisclosed related-party transactions and funneled funds to entities that he secretly controlled; and that SFC suffered losses as a result. Those findings were available to him on the record. He applied the appropriate legal principles to his causation analysis. He approached the "but for" causation test on the robust common sense approach the law contemplates. He was alive to the need to be satisfied that the loss was caused by the chain of events flowing from the wrongdoing after considering whether there were intervening causes that broke the chain of causation.

The trial judge's assessment of damages did not create the risk of double recovery from the defendant, as SFC's causes of action against the defendant were separate and distinct from those asserted in the class actions.

The transfer of the shares of SFC's subsidiaries to holding companies owned by SFC's creditors pursuant to the plan was not an election that barred the trustee from suing for damages arising from the defendant's conduct. [page147]

The defendant's complaints about the trial judge's approach to certain evidence did not justify any interference with the judgment the trial judge reached. The trial judge assiduously reviewed the evidence given in a lengthy trial, and his factual conclusions were supported by the evidence.

Livent Inc. (Special Receiver and Manager of) v. Deloitte & Touche, [2017] 2 S.C.R. 855, [2017] S.C.J. No. 63, 2017 SCC 63, 416 D.L.R. (4th) 32, 43 C.C.L.T. (4th) 1, 55 C.B.R. (6th) 1, 71 B.L.R. (5th) 175, 2017EXP-3529, EYB 2017-288419, 286 A.C.W.S. (3d) 374, varg (2016), 128 O.R. (3d) 225, [2016] O.J. No. 51, 2016 ONCA 11, 393 D.L.R. (4th) 1, 342 O.A.C. 201, 52 B.L.R. (5th) 225, 31 C.B.R. (6th) 205, 24 C.C.L.T. (4th) 177, 262 A.C.W.S. (3d) 54, 2016 CCSG para. 51,547, 2016 BCLG para. 79,110, 2016 OCLG para. 51,923, 2016 CCLR para. 201,267, 2016 ACLG para. 79,686 (C.A.), **apld**

Corporation Agencies Ltd. v. Home Bank of Canada, [1925] S.C.R. 706, [1925] S.C.J. No. 49, [1925] 4 D.L.R. 585, **distd**

Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, 85 D.L.R. (4th) 129, 131 N.R. 321, [1992] 1 W.W.R. 245, J.E. 92-271, 6 B.C.A.C. 1, 61 B.C.L.R. (2d) 1, 9 C.C.L.T. (2d) 1, 39 C.P.R. (3d) 449, 43 E.T.R. 201, [1992] I.L.R. para. 93-301, 30 A.C.W.S. (3d) 199; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, [1994] S.C.J. No. 84, 117 D.L.R. (4th) 161, 171 N.R. 245, [1994] 9 W.W.R. 609, J.E. 94-1560, 49 B.C.A.C. 1, 97 B.C.L.R. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1, 22 C.C.L.T. (2d) 1, 57 C.P.R. (3d) 1, 95 D.T.C. 5135, 5 E.T.R. (2d) 1, [1995] I.L.R. para. 93-694, 50 A.C.W.S. (3d) 469, **consd**

Other cases referred to

BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, 2008 SCC 69, 301 D.L.R. (4th) 80, 383 N.R. 119, J.E. 2009-43, 52 B.L.R. (4th) 1, 71 C.P.R. (4th) 303, EYB 2008-151755, 2008 SOACQ para. 10,147, 2008 CCAN para. 10,065, 2009 CCSG para. 51,112,

2009 BCLG para. 78,675, 2009 OCLG para. 51,488, 2009 CCLR para. 200,832, 2009 CSLR para. 900-288, 2009 ACLG para. 79,251, 172 A.C.W.S. (3d) 915; *Benhaim v. St-Germain*, [2016] 2 S.C.R. 352, [2016] S.C.J. No. 48, 2016 SCC 48, 2016EXP-3580, J.E. 2016-1957, EYB 2016-272525, 402 D.L.R. (4th) 579, 33 C.C.L.T. (4th) 1, 271 A.C.W.S. (3d) 664; *Bilta (U.K.) Ltd. v. Nazir (No. 2)*, 2015 UKSC 23, [2015] 2 All E.R. 1083, [2015] 2 W.L.R. 1168; *Canadian Red Cross Society (Re)*, [2003] O.J. No. 3727, 46 C.B.R. (4th) 239, 125 A.C.W.S. (3d) 758 (C.A.), affg [2002] O.J. No. 2567, [2002] O.T.C. 438, 35 C.B.R. (4th) 43, 114 A.C.W.S. (3d) 794 (S.C.J.) [Leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 539]; *Catalyst Capital Group Inc. v. VimpelCom Ltd*., [2019] O.J. No. 2286, 2019 ONCA 354, affg [2018] O.J. No. 2075, 2018 ONSC 2471 (S.C.J.); *Charter Building Co. v 1540957 Ontario Inc*. (2011), 107 O.R. (3d) 133, [2011] O.J. No. 3006, 2011 ONCA 487, 336 D.L.R. (4th) 471, 282 O.A.C. 126, 204 A.C.W.S. (3d) 47; *Clements v. Clements*, [2012] 2 S.C.R. 181, [2012] S.C.J. No. 32, 2012 SCC 32, 346 D.L.R. (4th) 577, 431 N.R. 198, [2012] 7 W.W.R. 217, J.E. 2012-1292, 331 B.C.A.C. 1, 31 B.C.L.R. (5th) 1, 93 C.C.L.T. (3d) 1, [2012] I.L.R. para. M-2610, 29 M.V.R. (6th) 1, 215 A.C.W.S. (3d) 1035, 2012EXP-2458; *Ediger v. Johnston*, [2013] 2 S.C.R. 98, [2013] S.C.J. No. 18, 2013 SCC 18, 356 D.L.R. (4th) 575, 442 N.R. 105, [2013] 4 W.W.R. 643, J.E. 2013-648, 333 B.C.A.C. 1, 41 B.C.L.R. (5th) 1, 100 C.C.L.T. (3d) 1, 226 A.C.W.S. (3d) 284, EYB 2013-220183, 2013EXP-1181; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, [1997] S.C.J. No. 51, 146 D.L.R. (4th) 577, 211 N.R. 352, [1997] 8 W.W.R. 80, J.E. 97-1151, 115 Man. R. (2d) 241, 31 B.L.R. (2d) 147, 35 C.C.L.T. (2d) 115, 71 A.C.W.S. (3d) 169; *Kin Tye Loong v. Seth* (1920), 1 C.B.R. 349 (P.C. Hong Kong); *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., [2016] 2 S.C.R. 23, [2016] S.C.J. No. 37, 2016 SCC 37, 404 D.L.R. (4th) 258, 487 N.R. 1, [2016] 10 W.W.R. 419, J.E. 2016-1579, 54 B.L.R. (5th) 1, 59 C.C.L.I. (5th) 173, 56 C.L.R. (4th) 1, [2016] I.L.R. para. I-5917, 269 A.C.W.S. (3d) 753, EYB 2016-270368, 2016EXP-2930, 19 Admin. L.R. (6th) 1; *Meditrust Healthcare Inc. [page148] v. Shoppers Drug Mart* (2002), 61 O.R. (3d) 786, [2002] O.J. No. 3891, 220 D.L.R. (4th) 611, 165 O.A.C. 147, 28 B.L.R. (3d) 163, 117 A.C.W.S. (3d) 713 (C.A.); *Midland Resources Holding Ltd. v. Shtaif* (2017), 135 O.R. (3d) 481, [2017] O.J. No. 1978, 2017 ONCA 320, 69 B.L.R. (5th) 1, 2017 CCSG para. 51,633, 2017 BCLG para. 79,196, 2017 OCLG para. 52,009, 2017 CCLR para. 201,353, 2017 ACLG para. 79,772, 278 A.C.W.S. (3d) 736 [Leave to appeal to S.C.C. refused [2018] S.C.C.A. No. 541]; *Naylor Group Inc. v. Ellis-Don Construction Ltd*., [2001] 2 S.C.R. 943, [2001] S.C.J. No. 56, 2001 SCC 58, 204 D.L.R. (4th) 513, 277 N.R. 1, J.E. 2001-1790, 153 O.A.C. 341, 17 B.L.R. (3d) 161, 10 C.L.R. (3d) 1, 108 A.C.W.S. (3d) 284, REJB 2001-25835; *Rainbow Industrial Caterers Ltd. v. Canadian National Railway*, [1991] 3 S.C.R. 3, [1991] S.C.J. No. 67, 1991 SCC 27, 84 D.L.R. (4th) 291, 126 N.R. 354, [1991] 6 W.W.R. 385, J.E. 91-1513, 3 B.C.A.C. 1, 59 B.C.L.R. (2d) 129, 8 C.C.L.T. (2d) 225, 29 A.C.W.S. (3d) 181, affg [1990] B.C.J. No. 3044, 67 D.L.R. (4th) 348, [1990] 3 W.W.R. 413, 43 B.C.L.R. (2d) 1, 19 A.C.W.S. (3d) 516 (C.A.); *Rougemount Capital Inc. v. Computer Associates International Inc*., [2016] O.J. No. 5786, 2016 ONCA 847, 410 D.L.R. (4th) 509, 272 A.C.W.S. (3d) 522; *Sattva Capital Corp. v. Creston Moly Corp*., [2014] 2 S.C.R. 633, [2014] S.C.J. No. 53, 2014 SCC 53, 2014EXP-2369, J.E. 2014-1345, 373 D.L.R. (4th) 393, [2014] 9 W.W.R. 427, 59 B.C.L.R. (5th) 1, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, 242 A.C.W.S. (3d) 266; *Sino-Forest Corp. (Re)*, [2012] O.J. No. 5958, 2012 ONSC 7050 (S.C.J.); *Sino-Forest Corp. (Re)* (2012), 114 O.R. (3d) 304, [2012] O.J. No. 5500, 2012 ONCA 816, 299 O.A.C. 107, 98 C.B.R. (5th) 20; *Snell v. Farrell*, [1990] 2 S.C.R. 311, [1990] S.C.J. No. 73, 72 D.L.R. (4th) 289, 110 N.R. 200, J.E. 90-1175, 107 N.B.R. (2d) 94, [1990]

R.R.A. 660, 4 C.C.L.T. (2d) 229, [1990] I.L.R. para. 93-144, 22 A.C.W.S. (3d) 493; *Treaty Group Inc. (c.o.b. Leather Treaty) v. Drake International Inc*. (2007), 86 O.R. (3d) 366, [2007] O.J. No. 2468, 2007 ONCA 450, 227 O.A.C. 72, 51 C.C.L.T. (3d) 5, [2007] CLLC para. 210-051, 159 A.C.W.S. (3d) 307; *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254, [2007] O.J. No. 1083, 2007 ONCA 205, 222 O.A.C. 102, 29 B.L.R. (4th) 312, 56 R.P.R. (4th) 163, 156 A.C.W.S. (3d) 95; *Whitefish Lake Band of Indians v. Canada (Attorney General)* (2007), 87 O.R (3d) 321, [2007] O.J. No. 4173, 2007 ONCA 744, 287 D.L.R. (4th) 480, [2008] 1 C.N.L.R. 383, 161 A.C.W.S. (3d) 512

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Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 6(1) [as am.], (8)

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 125(2)

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APPEAL from the judgment of Penny J., [2018] O.J. No. 1436, 2018 ONSC 1429 (S.C.J.) for the plaintiff in an action for damages for fraud and breach of fiduciary duty.

Robert Rueter, *Sara J. Erskine* and *Malik Martin*, for appellant.

Robert W. Staley, *Jonathan G. Bell*, *William A. Bortolin*, *Jason M. Berall* and *Preet Bell*, for respondent.

The judgment of the court was delivered by
ZARNETT J.A.: —

[page149]

I. *Introduction*

[1] The appellant, Allen Tak Yuen Chan, was the co-founder, chief executive officer and chairman of the board of directors of Sino-Forest Corporation ("SFC"), a corporation which had its head office in Ontario and whose shares traded on the Toronto Stock Exchange.

[2] SFC's subsidiaries carried on an integrated forest plantation and products business with assets located predominately in the People's Republic of China ("PRC").

[3] Between 2003 and the second quarter of 2011, SFC's consolidated financial statements reported rapid growth, including in assets and revenues. A significant portion of the reported assets in the second quarter of 2011 -- some $2.99[1] billion -- was "BVI standing timber", that is, standing timber held under what was known as the "BVI model". Sales of BVI standing timber accounted for $1.3 billion of SFC's reported consolidated revenue in 2010, and over 90 per cent of its reported consolidated income.

[4] Representing BVI standing timber as an asset with significant value on the SFC financial statements enabled SFC to raise money in the debt and equity markets -- approximately $3 billion up to 2010.

[5] In June 2011, a report was issued by a short seller's research company (the "Muddy Waters Report") which was, to say the least, highly critical of SFC. It alleged, among other things, that SFC did not hold anything close to the full amount of the timber assets reported on its financial statements and that it greatly overstated its revenues. SFC formed an Independent Committee to investigate. It was unable to rebut the allegations or confirm ownership of the BVI standing timber. SFC could not issue further financial statements and advised the public, following discussions with its external auditors, that prior years' financial statements should not be relied upon. The Ontario Securities Commission ("OSC") ordered that trading in SFC securities cease. SFC defaulted on its debt obligations. A number of class actions were commenced against SFC and its directors, auditors, underwriters and consultants.

[6] On March 30, 2012, SFC obtained insolvency protection under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("*CCAA*"). On December 10, 2012, the Superior Court sanctioned SFC's CCAA plan of compromise and reorganization (the "Plan"). Under the Plan, SFC's interests in its subsidiaries were transferred to holding companies owned by SFC's creditors [page150] and its causes of action were transferred to the SFC Litigation Trust (the "Litigation Trust") constituted for the benefit of its creditors. In exchange, SFC's creditors released their claims for repayment of debts owed to them by the company.

[7] In 2014, the respondent, as trustee of the Litigation Trust, commenced this action alleging that the appellant had committed fraud against, and breached his fiduciary duty to, SFC.

[8] After a 48-day trial, the trial judge found that the appellant had directed a "massive fraud" in breach of his fiduciary duties to SFC, causing SFC to misrepresent its assets and their value. This enabled SFC to raise significant funds in the capital markets. SFC would not have undertaken obligations of this magnitude to lenders or shareholders, or entrusted the funds raised to the appellant and his management team, but for the appellant's fraud. The trial judge found that the appellant's conduct caused a loss to SFC. The funds raised were either directed by the appellant into fictitious or over-valued lines of business which dealt with third parties secretly related to and entities secretly controlled by the appellant, or were largely consumed by the necessity of dealing with the consequences of the discovery of the appellant's fraud and the collapse of SFC that followed. The trial judge awarded damages equal to what he found to be SFC's loss -- $2,627,478 -- as well as punitive damages of $5 million Canadian.

[9] The appellant asks us to reverse the trial judgment, making the following principal arguments:

(a) The respondent is only entitled to advance claims that were transferred to the Litigation Trust under the Plan. Properly interpreted, the Plan did not transfer the claims advanced in this action to the Litigation Trust.

(b) The trial judge's award of damages is flawed because he did not conduct a proper causation analysis and awarded compensation for losses not of SFC, but of its stakeholders (its noteholders and shareholders). In doing so, he improperly exposed the appellant to duplicate claims and created risks of double recovery.

(c) The respondent's claim ought to have been rejected under the doctrine of election. When SFC transferred the assets, contracts and businesses of its subsidiaries as contemplated by the Plan (by transferring its subsidiaries' shares), there was an election to treat them as valid. Yet the respondent's claim is premised on those same assets, contracts and businesses being fraudulent and invalid. [page151]

(d) The trial judge made various errors in his acceptance of evidence, including evidence based on documents that had not been translated into English and on opinions from a non-expert, which make his factual conclusions unsafe to rely upon.

[10] For the reasons which follow, I would dismiss the appeal. As I explain below:

(a) The trial judge did not err in his conclusion that the claims advanced in the action were causes of action that had been held by SFC, had been transferred to the Litigation Trust by SFC under the Plan, and could be pursued by the respondent against the appellant.

(b) The trial judge did not err in his causation analysis or assessment of damages. His determinations in that regard were not the product of legal errors and there is no basis to interfere with his factual determinations, which are subject to deference from this court.

(c) There is no merit to the argument that the transfer of the shares of SFC's subsidiaries pursuant to the Plan was an election that barred the respondent from suing for damages arising from the appellant's conduct.

(d) The complaints of the appellant about the trial judge's approach to certain evidence do not justify any interference with the judgment the trial judge reached. The trial judge assiduously reviewed the evidence given in a lengthy trial and his factual conclusions were supported by the record.

II. *The Facts and the Trial Judge's Award*

[11] In addition to the facts outlined above, the following facts are important to appreciation of the issues on the appeal. I set them out based on the trial judge's findings, since on the first three issues that the appellant raises, he contends the trial judgment cannot stand even on those findings. I then deal separately, as the parties did, with the appellant's complaints about the trial judge's fact-finding.

(1) *The appellant's role and the nature of the wrongdoing*

[12] The trial judge found that the appellant had ultimate control over nearly all aspects of SFC's and its subsidiaries' operations, directly and through a small group of individuals he

directed on his management team (the trial judge referred to them collectively as "inside management"). [page152]

[13] The trial judge identified four different, but related, frauds for which the appellant was responsible and one other transaction in which there was a breach by the appellant of his fiduciary duties. I summarize these below.

(a) *The BVI model fraud*

[14] The most significant fraud found by the trial judge had to do with the reporting, on SFC's consolidated financial statements, of assets held and revenue and income generated under the BVI model.

[15] The BVI model involved SFC subsidiaries incorporated in the British Virgin Islands ("BVIs"). It was designed in light of restrictions at one time imposed by the PRC under which foreign entities were not permitted to have PRC bank accounts, operate or sell timber plantations, or own land use rights in the PRC.

[16] To circumvent these restrictions, the BVI model contemplated that SFC's BVI subsidiaries would acquire standing timber from third parties known as "Suppliers", who in turn would acquire it from others, typically rural or business collectives. The BVIs would sell standing timber indirectly, through authorized intermediaries ("AIs") that acted as their customers. The BVIs would not pay the Suppliers or receive payment from the AIs. Instead, the AIs and Suppliers would be directed to set off payments so that payment from an AI for the sale of standing timber rights would be rolled forward into the purchase of new BVI standing timber rights from a Supplier. Consequently, no cash would flow through the BVIs' or SFC's bank accounts in connection with the BVI standing timber and money associated with the BVI standing timber would be locked up in the PRC to be rolled forward into further BVI standing timber purchases.

[17] Under the BVI model, the BVIs would not acquire actual land use rights in the PRC. Instead, they ostensibly would acquire a contractual right to the standing timber itself.

[18] As noted above, significant valuable assets were reported by SFC as held, and revenue and profit-generating activity was reported as occurring, under the BVI model. By the second quarter of 2011, SFC's consolidated financial statements showed BVI standing timber assets valued at $2.99 billion. Trading under that model was the biggest contributor to the revenues and profits shown on the statements.

[19] After the Muddy Waters Report, the Independent Committee was, however, unable to locate key documents to confirm valid title to the BVI standing timber or to even determine its location. Collections of accounts receivable from AI's, which had been represented to take place with 100 per cent success, dropped to close to 0 per cent. Consultants retained by SFC's creditors were also [page153] unable to locate or verify the BVI standing timber assets. When the monitor for SFC appointed under the *CCAA* made unannounced site visits to Suppliers and AIs at their registered addresses, it found, with only one exception, little to no evidence of any operations. Those entities were later established to have undisclosed connections to the appellant and his management team.

[20] The inability to locate or verify the BVI standing timber assets continued after the Plan was sanctioned by the Superior Court. Under the Plan, the rights to any such assets were

transferred to entities owned by former SFC creditors; they were subsequently sold to a third-party purchaser, New Plantations. The transferees had strong economic motivations to locate the standing timber assets. None of the transferees could do so.

[21] The trial judge considered, among other things, expert and other evidence about the type of documents that would be required to validly show title to the reported BVI standing timber assets and evidence of the efforts taken to locate and establish ownership or valid title to the standing timber assets that had been represented on the SFC consolidated financial statements as having a value of $2.99 billion. He found that:

(a) Proper documentation to establish valid title to the assets did not exist. For example, maps, essential to establish the locations of the alleged standing timber assets, were produced by the appellant and his management team for only 1 per cent of the claimed assets.

(b) Despite efforts by persons with significant motivation to locate those assets so they could be monetized, they had not been located even up to the time of trial in 2017.

[22] The trial judge concluded that the BVI standing timber model was a fraud perpetrated by the appellant, that the assets reported simply did not exist, and that the transactions reported as resulting in revenue and income were paper transactions without substance. He stated [at paras. 551-553]:

> The former assets of [SFC] have now been in the hands of New Plantations for more than a year. Even with Mr. Chan's assistance, New Plantations has not produced any evidence that it has been able to find, prove title to or monetize any purported interest in the BVI standing timber assets. It has not paid anything to EPHL [the former-creditor-owned company] under the RAPA arising out of the sale of any BVI assets. The best [the appellant] can offer in this regard is revealed in the evidence of Alvin Lim, who testified that New Plantations is "still in the process of investigation."
>
> Six years have passed since the Muddy Waters Report was released and nobody, despite enormous financial incentives to do so, (incentives motivating [SFC], the bondholders, the purchaser Emerald [the former-creditor-owned company], the purchaser New Plantations and [the appellant] himself), has been able to [page154] locate, confirm ownership of, or monetize the BVI assets. When considered in the context of all the evidence, the inescapable conclusion is that [SFC] did not own the BVI assets that it claimed to own.
>
> All of the evidence considered as a whole, leads to the inescapable conclusion that the BVI standing timber model was a fraud. The logical and reasonable inferences to be drawn from the totality of the evidence, based on a preponderance of probabilities, are that:
>
> i) the defendant and others inside and outside [SFC] management operated an elaborate system of nominee companies ultimately controlled by [the appellant] or persons acting under his direction;
>
> ii) many of these nominees companies were major Suppliers of BVI standing timber;

iii) the Suppliers and AIs were not *bona fide* arm's length sellers and purchasers of BVI standing timber;

iv) the BVI standing timber transactions were paper transactions. [SFC] employees under the direction of [the appellant] and his cadre of Inside Management created the contracts, the supporting documents and the so-called evidence of directed payments made between the AIs and Suppliers. No consideration in fact passed between these entities;

v) [SFC] subsidiaries did not hold title to BVI standing timber plantations;

vi) the value of [SFC's] BVI standing timber, represented at $2.99 billion in 2011, did not exist. Because [SFC] did not own these assets, this value was nil; and

vii) the defendant and members of Inside Management exploited weaknesses and ambiguities in the PRC forestry regulatory regime to perpetrate this fraud and to conceal it from scrutiny by [SFC], external auditors, other professional advisors, independent members of the Board and the public.

(b) *The WFOE standing timber fraud*

[23] A second fraud found by the trial judge arose within a method of doing business referred to as the WFOE standing timber model. That model was used because in 2004 the PRC gave permission for foreign investors to invest in PRC-incorporated trading companies, known as wholly foreign owned enterprises ("WFOEs"), which could acquire actual plantation land use rights, harvest timber, sell logs and standing timber directly to end users, and open PRC bank accounts. WFOEs were also permitted to plant standing timber plantations due to their land use rights.

[24] Assets were acquired and activities undertaken by SFC subsidiaries which were WFOEs. These included planting forests and holding them until harvest ("planted plantations") and, in addition, ostensibly acquiring and trading in existing standing timber ("purchased plantations").

[25] The trial judge found that the hallmarks of the BVI standing timber fraud were present in the purchased plantations aspect of [page155] the WFOE standing timber model. Many of the WFOE purchased plantation transactions were conducted through Suppliers controlled by the appellant and his management team. Plantation rights certificates were lacking for most of the purchased plantations. The trial judge concluded that "like the BVI standing timber, the majority of the WFOE purchased plantations were never actually owned by [SFC] and had no value": at para. 562.

(c) *The wood log trading cash gap fraud*

[26] The third fraud found by the trial judge was in wood log trading activities. From 2005 to 2010, revenue from wood log trading ranged from 15 per cent to 25 per cent of SFC's total consolidated revenues, and a smaller percentage of SFC's consolidated profits. Under SFC's wood log trading model, an SFC BVI subsidiary would purchase logs from a Supplier outside of the PRC and pay for the logs using a letter of credit guaranteed by SFC. It would then resell the logs to a customer. However, typically only about 70 per cent of the wood log sales accounts receivable were paid in cash by the customer. The remaining 30 per cent was directed to BVI

standing timber Suppliers, which had the effect of diverting "new" money into the BVI standing timber model.

[27] The diversion of 30 per cent of the wood-log-trading receivables to BVI standing timber Suppliers, for assets the trial judge determined did not really exist, created a "cash gap" -- $239.8 million more was paid out to purchase wood logs than was received on their sale. And, after the Muddy Waters Report, substantial amounts of accounts receivable associated with the wood log trading business were not paid -- the customers vanished. Many of SFC's wood log customers were found not to have been at arm's-length from the appellant.

[28] The trial judge found "the preponderance of probabilities, having regard to all of the evidence, is that the wood log cash gap was a fraud orchestrated by [the appellant] with the assistance of [his management team] at [the appellant's] direction": at para. 633.

(d) *The wood log deposit fraud*

[29] The fourth fraud found by the trial judge arose from the practice of placing deposits for the purchase of the logs. The appellant caused SFC subsidiaries to enter into wood log trading agreements requiring payment of substantial unsecured "deposits" and "advance payments" for the purchase of logs, which exceeded the value of any logs actually delivered. After the Muddy Waters Report, log deliveries ceased and, with one exception, none of the deposits or advance payments were repaid, resulting in a loss of [page156] $167.4 million. The appellant's relationship with many of the wood log suppliers was not at arm's-length.

[30] The trial judge found the preponderance of evidence established that the wood log deposit transactions were a fraudulent mechanism for diversion of funds out of SFC to entities controlled by the appellant or acting under his direction.

(e) *The Greenheart transaction*

[31] The further transaction in which the trial judge found a breach of fiduciary duty by the appellant was referred to as the Greenheart transaction. Between July 2007 and July 2010, the appellant caused SFC to acquire a majority interest in Greenheart Resources Holdings Limited and its majority shareholder, Greenheart Group Limited (collectively, "Greenheart"), by purchasing shares from shareholders of Greenheart, including several in which the appellant had undisclosed interests. At the time of the acquisitions, the appellant knew but did not disclose that Greenheart was in serious financial difficulties. SFC ultimately invested $202.2 million, which was more than the amount realized when the Greenheart interest was later sold.

[32] The trial judge found that the appellant had committed a clear violation of his fiduciary duties through his nondisclosure. In addition to causing a loss to SFC, he made an undisclosed personal profit of approximately $38 million on the transaction.

(2) *The collapse of SFC, the fate of the funds raised, the CCAA process and realizations on assets*

[33] The events following the Muddy Waters Report and the inability of SFC to rebut its allegations had a profound impact on the company.

[34] In August 2011, the OSC issued a cease-trading order over SFC's securities, alleging that SFC had engaged in significant non-arm's-length transactions, its assets and revenues had been exaggerated, and that the appellant and others appeared to be involved in the fraud.

[35] SFC became unable to issue further financial statements. In December 2011, it advised it could give no assurance it would ever be able to do so. In January 2012, SFC issued a press release which stated that its "historic financial statements and related audit reports should not be relied upon".

[36] By early 2012 SFC, the appellant and others had been named in at least four class actions alleging that SFC's financial statements were materially false and misleading and claiming, on behalf of classes of debt and equity holders, damages for amounts [page157] that they overpaid when they purchased securities in reliance on the false financial statements, among other relief.

[37] SFC defaulted on its debt obligations. In March of 2012, it entered into a restructuring support agreement with its noteholders, who held first priority security interests over the shares of SFC's subsidiaries, which contemplated the transfer of SFC's business to those noteholders unless a sales process revealed that the value of SFC's assets exceeded its debt. The sales process revealed that potential purchasers were only willing to pay a fraction of the quantum of the debt for the company's assets. Consequently, the sales process terminated in June 2012.

[38] SFC filed for insolvency protection under the *CCAA* on March 30, 2012, and the Superior Court sanctioned its Plan on December 10, 2012. Under the Plan, SFC's assets were transferred to creditor-controlled entities and SFC's causes of action were transferred to the Litigation Trust. The Plan provided for releases of SFC and specified others. The precise terms of the Plan bearing on the issues in this appeal are more fully described in the "Analysis" section below.

[39] The trial judge found that by the time the fraud was uncovered and "the dust settled", more than half of the almost $3 billion that had been raised by SFC on the capital markets was gone. He also found that what was left in cash by June of 2011 was largely consumed in propping up and managing the enterprise during the extended crisis brought on by the disclosure of the fraud and its investigation (including dealing with ongoing concealment by the appellant and his management team). He found that, to the extent that the funds raised on the capital markets had actually been invested in assets, the value of those assets was represented by the amounts realized on their sales, effected under and after implementation of the Plan.

[40] Under the Plan, effective January 30, 2013, all of SFC's assets, including its interests in wholly owned subsidiaries, were transferred to Emerald Plantation Holdings Limited ("EPHL") and then by EPHL to Emerald Plantation Group Limited ("EPGL"), a wholly owned subsidiary of EPHL. These entities were formed for the purpose of holding SFC's assets and realizing on them to achieve recoveries for SFC's creditors, who became EPHL's shareholders.

[41] Commencing in October 2014, EPGL caused the sale of the Greenheart business and then of miscellaneous assets to third parties. In 2016, EPGL caused the sale of the remaining assets to New Plantations, a third-party purchaser. The sale to New Plantations had special provisions for further payments if New Plantations was able to make any recovery on assets that were [page158] ascribed zero value in the sale, including the BVI standing timber, the BVI standing timber receivables, the wood log receivables and the wood log deposits. The trial judge

found that, at the time of trial, there had been no recoveries on, or any further payments in respect of, those assets: at paras. 89-96.

[42] The total net recoveries from the sale of assets of SFC's subsidiaries was $438.5 million.

(3) *The trial judge's damages award*

(a) *Causation*

[43] The trial judge approached causation on the basis that the "but for" causation test was to be applied in a common sense, robust fashion; that causation could be inferred from evidence that connected the wrongdoing to the injury; and that inferences could be drawn against a defendant found liable for fraud or breach of fiduciary duty who did not provide credible alternative causes for the loss.

[44] The trial judge's factual findings about causation can be summarized as follows. Between 2004 and 2010, SFC raised in excess of $2.9 billion in Canada's debt and equity markets, based on the appellant's fraudulent misrepresentations of the existence and value of assets. But for the appellant's deceit, SFC would never have undertaken obligations of this magnitude to lenders and shareholders, nor would it have entrusted the money it raised to the appellant and his management team. The appellant directed much of the money raised towards fictitious or over-valued lines of business, engaged in undisclosed related-party transactions and funneled funds into entities he secretly controlled. This conduct, and the consequences of its discovery, ultimately caused the collapse of SFC. The trial judge found that SFC had suffered losses directly related to the appellant's fraud and breach of fiduciary duty.

(b) *Measurement of damages*

[45] The trial judge referred to the measure of tort damages for deceit and to the principles of equitable compensation. He accepted that the proper approach to measuring SFC's loss was the primary approach put forward by the respondent's expert, Peter Steger.

[46] Steger's primary approach began with the $2.9 billion SFC raised in the debt and equity markets between 2004 and 2010. Subtracting the share and debt issue costs and principal debt repayments made by SFC, he calculated the net cash available to SFC from these capital raises as $2.588 billion. To this, Steger added a proxy for the minimum return that SFC should have [page159] made by investing the cash. This led to an available cash figure of $3.065 billion.

[47] On the basis that SFC would have had $3.065 billion in cash available for investment in profit-generating assets, Steger considered the effect of the appellant's conduct, which saw those funds invested in subsidiaries engaged in largely fraudulent businesses. To the extent there was value in the businesses that were invested in, it was represented by the $438.5 million amount that was actually recovered by EPGL from the sales of the assets acquired from SFC under the Plan. The difference between these two figures -- $2.627 billion -- represented SFC's loss attributable to appellant's conduct.

[48] The trial judge rejected the appellant's argument that damages could only be calculated on a "transaction by transaction" basis, both as a matter of law and because the appellant's damages expert, who criticized Steger for not conducting that analysis, did not do it himself or "hint at a methodology" to do so.

[49] The trial judge considered two other damages calculations, in case Steger's primary approach was found to be incorrect. The first was an alternative approach set out by Steger, which calculated damages of $3.2 billion based on a write-down of assets methodology. He then considered a specific loss approach, based on calculating the losses resulting from specific proven acts of fraud or breach of fiduciary duty, including the wood log cash gap fraud, the wood log deposit fraud, the Greenheart transaction, the appellant's profits on the Greenheart transaction, the cost of SFC's investigation following the Muddy Waters Report and the appellant's remuneration. These amounts totalled $812.43 million. Deducting the net realization of $438.5 million from post-Plan sales produced an alternative specific loss compensation award of $373.9 million. However, the trial judge concluded that the primary Steger approach, rather than either of these other approaches, should be accepted.

[50] The trial judge awarded punitive damages of $5 million Canadian on the basis of his finding that the appellant had abused his fiduciary position to orchestrate a large and complex fraud, resulting in billions of dollars of losses.

(4) *The trial judge's rejection of specific defences*

(a) *Duplication with class actions*

[51] The trial judge rejected the argument that the respondent could not recover any amounts because there was duplication between the claims made in this action and claims made in certain class actions (the "Class Actions", as defined in the Plan) that had named both SFC and the appellant, among others, as defendants. [page160] He noted that the Class Actions alleged some of the same facts as were alleged in this action and that those Class Actions had been brought on behalf of persons who acquired SFC securities (defined as common shares, notes and other securities) from 2007 to 2011.

[52] The trial judge held that the claims advanced in this action were transferred to the Litigation Trust and properly advanced by the respondent because they were claims against the appellant that, prior to their transfer, could have been asserted by SFC; were not released by the Plan (under which the appellant received no release); and were not "Excluded Litigation Trust Claims" as defined in the Plan, which were not transferred to the Litigation Trust. He noted the Plan's language that claims advanced in the Class Actions were not transferred to the Litigation Trust, but held that the claims in the Class Actions were different than those in this action. The claims in the Class Actions were not for wrongs done to SFC but were claims for wrongs done to individual noteholders or shareholders; thus, they were different causes of action held by different persons. Nor was there a risk of double recovery. The courts in the Class Actions could prevent that from occurring when those actions reached judgment (the Class Actions were still at the pleadings stage).

(b) *No affirmation*

[53] The trial judge also rejected the argument that SFC had elected to affirm the validity of all of the assets, contracts and transactions that the respondent complained of when it transferred the shares of its subsidiaries to EPGL under the Plan, such that the respondent could not sue and recover damages for them on the basis that they were fraudulent. He found the principle of affirmation had no application to the case.

III. *Analysis*

(1) *Is the respondent precluded by the Plan from advancing the claims in this action?*

(a) *Introduction*

[54] The appellant makes three arguments that the Plan did not transfer, to the Litigation Trust, the causes of action that are asserted against him by the respondent and that therefore the Plan precludes those claims from being advanced: (1) the claims are the same as, or overlap with, the claims asserted in the "Class Actions" which were not transferred to the Litigation Trust; (2) the claims constitute "Excluded Litigation Trust Claims" which were excepted from the transfer of claims to the Litigation Trust; [page161] and (3) the claims constitute "SFC Intercompany Claims" that were assigned under the Plan by SFC to EPGL and not to the Litigation Trust. (Each of the quoted terms is a defined term in the Plan.)

[55] The appellant's argument that the claims advanced in this action were not transferred to the Litigation Trust is an argument about the meaning of the Plan. It was common ground before the trial judge and in this court that the respondent's ability to bring these claims had to derive from the provisions of the Plan, the Litigation Trust Agreement made thereunder and the terms of the sanction order which approved the Plan. These defined what causes of action were transferred to the Litigation Trust and which were not. It was not suggested that the terms or effect of these three documents differed on the issues material here, and accordingly argument was chiefly directed to the terms of the Plan itself.

[56] I first address the principles of interpretation to be applied to the Plan and the standard of review to be applied by this court in assessing the interpretation arrived at by the trial judge. I then address the factors bearing on the interpretation of the Plan and the precise terms of the Plan. Finally, I consider whether the appellant's arguments disclose any reversible errors in the trial judge's interpretation of the Plan.

(b) *The principles of interpretation*

[57] A *CCAA* plan of compromise and arrangement has been held to be "in substance a contract, sanctioned by the Court", to be interpreted in light of the purposes of the *CCAA*, the overall purpose and intention of the plan in question, and the principles of contractual interpretation: *Canadian Red Cross Society (Re),* [2002] O.J. No. 2567, 35 C.B.R. (4th) 43 (S.C.J.), at paras. 12-13, affd [2003] O.J. No. 3727, 46 C.B.R. (4th) 239 (C.A.), leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 539; see, also, *Catalyst Capital Group Inc. v. VimpelCom Ltd.*, [2018] O.J. No. 2075, 2018 ONSC 2471 (S.C.J.), at para. 109, affd on other grounds [2019] O.J. No. 2286, 2019 ONCA 354, applying these principles to a corporate plan of arrangement.

[58] The principles of contractual interpretation include reading the words of the document as a whole, giving meaning to all its terms; determining the parties' intentions in accordance with the words used; considering the factual matrix (the objective facts known at the time of contracting) to aid in understanding the words used; and adopting an interpretation which avoids commercial absurdity: *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254, [2007] O.J. No. 1083, 2007 ONCA 205, at para. 24; *Sattva Capital Corp. v. Creston [page162] Molly Corp.*, [2014] 2 S.C.R. 633, [2014] S.C.J. No. 53, 2014 SCC

53, at paras. 47-48, 57-58.

(c) *The standard of review*

[59] This court has given deference to the interpretation of a plan by a judge who had familiarity with the plan's development through supervision of the debtor's restructuring: *Red Cross* (Ont. C.A.), at para. 2. The respondent argues that the same approach of deference should apply here as the trial judge, an experienced Commercial List judge, had the opportunity to consider the Plan in light of its purpose, terms and the factual matrix explored in a lengthy trial. This deferential approach would be consistent with viewing the Plan as "in substance a contract": *Red Cross* (Ont. S.C.J.), at para. 13. A trial judge's contractual interpretation is, absent extricable legal error, generally subject to appellate deference: *Sattva*, at paras. 52-55.

[60] The appellant asks this court to replace the trial judge's interpretation of the Plan with its own, arguing that a correctness standard should apply. A correctness standard of appellate review applies to contractual interpretation where consistency of meaning is a primary concern and where there is no meaningful factual matrix to consider. Certain standard form contracts of adhesion are examples: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., [2016] 2 S.C.R. 23, [2016] S.C.J. No. 37, 2016 SCC 37.

[61] Although a *CCAA* plan is not a standard form contract, plans often use language borrowed from other plans, giving rise to consistency concerns. Moreover, a plan is different from an ordinary contract in that it takes its force not only from the consent of parties who have been involved in its negotiation, but also from the provisions of the *CCAA* which render a plan binding on those who have not agreed to or voted for it, if the requisite majorities of creditors have done so and court approval has been obtained: *CCAA*, s. 6(1). In this respect, a plan has aspects of a contract of adhesion.

[62] Nonetheless, in my view a deferential standard of review should apply. *CCAA* plans are developed to fit the unique circumstances of each restructuring. The overall purpose and intention of the individual plan are important determinants of its interpretation, to be considered against the backdrop of the factual aspects of the restructuring and the events that led up to it. The types of considerations that will go into a plan's interpretation will usually be fact and context-specific and the factual matrix will accordingly be important. The questions which arise in the interpretation of a plan will almost always be mixed questions of law and fact. All of this supports a deferential standard of appellate [page163] review, one that accords with the standard applicable generally to a trial judge's interpretation of a contract.

[63] Accordingly, absent an extricable error of law, an interpretation that involves palpable and overriding errors of fact, or one that is clearly unreasonable, the trial judge's interpretation should not be interfered with.

(d) *The factual matrix*

[64] The trial judge did not expressly identify which facts he considered to be the factual matrix relevant to the Plan's interpretation. But he did make significant findings about how and why the Plan came about. It is the "facts giving rise to the plan" that are important to determine its scope and meaning: *Catalyst* (Ont. S.C.J.), at para. 110. Here, those facts include that SFC had been forced to file for *CCAA* protection because of the fraud and the consequences of its

discovery; the appellant had been identified, including by the OSC, as allegedly having been involved in that fraud; it had already been determined that the assets SFC offered in the sales process were worth substantially less than the amount of its debt so that additional sources of recovery by SFC, including recoveries through litigation, would be important; and class actions by SFC stakeholders were already pending against the appellant, amongst others, in which SFC stakeholders, but not SFC itself, were advancing claims.

(e) *The purposes of the CCAA and of the Plan*

[65] The full title of the *CCAA* states that it is "An Act to facilitate compromises and arrangements between companies and their creditors". "The *CCAA* has the simultaneous objectives of *maximizing creditor recovery, preservation of going-concern value where possible*, preservation of jobs and communities affected by the firm's financial distress, rehabilitation of honest but unfortunate debtors, and enhancement of the credit system generally" (emphasis added): Janis P. Sarra, *Rescue!: The Companies Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013), at p. 14.

[66] Creditors are a key constituency under the *CCAA*, as the approval of specified majorities of creditors is required for a plan of compromise and arrangement to be effective: *CCAA*, s. 6(1). Given the objectives of the *CCAA* and the need for creditor approval, it is reasonable to expect that the goal of a plan will be to maximize the value to be obtained from the insolvent corporation's assets, including its intangible rights such as litigation claims, so as to enhance ultimate distributions to creditors. A key barometer of a plan's acceptability is how it proposes to achieve [page164] that goal compared to what would be available through alternative insolvency processes, such as liquidation or bankruptcy.

[67] The SFC Plan addressed those objectives. It provided in s. 2.1 that it was "put forward with the expectation that the Persons with an economic interest in SFC . . . will derive greater benefit from the implementation of the Plan and the continuation of the SFC Business as a going concern than would result from a bankruptcy or liquidation of SFC".

[68] And in keeping with this expectation, the Plan described its purpose: to release SFC from the claims of "Affected Creditors";[2] to transfer ownership of the business of SFC to creditor-controlled entities free and clear of all claims against SFC and its subsidiaries, so as to enable the business to continue on a going-concern basis; and "to allow Affected Creditors and Noteholder Class Action Claimants[3] to benefit from contingent value that may be derived from litigation claims to be advanced by the Litigation Trustee": s. 2.1.

[69] The Superior Court sanctioned the Plan, finding this purpose and its implementation in the Plan to be in compliance with the *CCAA* and its objectives: *Sino-Forest Corp. (Re)*, [2012] O.J. No. 5958, 2012 ONSC 7050 (S.C.J.), at para. 79.

(f) *The Plan's operative terms*

[70] The Plan provided two avenues for assets of SFC to be realized upon and the proceeds distributed to creditors: (1) by the transfer of SFC causes of action to the Litigation Trust; and (2) by the transfer of the shares of SFC's subsidiaries to creditor-controlled entities, EPHL and EPGL: s. 6.4(h). The provisions of the Plan implementing these transfers, as well as the release provisions of the Plan, are key to assessing the appellant's arguments.

[71] The Plan provided, in s. 6.4(o), that SFC would establish the Litigation Trust. SFC and the trustees for SFC's noteholders would then convey to it the "Litigation Trust Claims", defined by the Plan as [page165]

> [A]ny Causes of Action that have been or may be asserted by or on behalf of: (a) SFC against any and all third parties; or (b) the Trustees (on behalf of the Noteholders) against any and all Persons in connection with the Notes issued by SFC; provided, however, that in no event shall the Litigation Trust Claims include any (i) claim, right or cause of action against any Person that is released pursuant to Article 7 hereof or (ii) any Excluded Litigation Trust Claim. For greater certainty: (x) the claims being advanced or that are subsequently advanced in the Class Actions are not being transferred to the Litigation Trust; and (y) the claims transferred to the Litigation Trust shall not be advanced in the Class Actions.

[72] "Causes of Action", used in the definition of Litigation Trust Claims, was given a very broad meaning, which included any claims or entitlements in law, equity or otherwise for damages or other relief.

[73] However, the definition of "Litigation Trust Claims" narrowed the transfer of claims to the Litigation Trust (i) by excepting claims against certain individuals and entities who were released by the Plan, and (ii) by excepting "Excluded Litigation Trust Claims" from the claims that would otherwise have been transferred to the Litigation Trust: art. 7. "Excluded Litigation Trust Claims" were defined as Causes of Action agreed, as between SFC and a subgroup of Noteholders, to be excluded from the Litigation Trust Claims: s. 4.12. Section 4.12(b) of the Plan specified that certain claims against SFC's underwriters fell within this category, except if they were claims for fraud or criminal conduct.

[74] The definition of "Litigation Trust Claims" contained "greater certainty" language specifying that claims in the "Class Actions" were not transferred to the Litigation Trust. The "Class Actions" referred to in the "greater certainty" clause were defined to mean four specific actions in Ontario, Quebec, Saskatchewan and New York, brought on behalf of persons who, during defined class periods, had purchased SFC notes or shares. The Class Actions include claims against the appellant based on allegations that he made false representations that SFC's financial statements were accurate when they in fact were materially misleading and grossly overstated SFC's assets; that the appellant's misrepresentations induced class members to buy equity or debt at inflated prices; and that he thus caused them losses. The plaintiff classes seek damages, among other things, to recover the amounts they paid or overpaid to acquire those securities.

[75] Section 4.11 of the Plan set out who would benefit from any recoveries on claims transferred to the Litigation Trust. Beneficial interests in the Litigation Trust were to be held [page166] 75 per cent by Affected Creditors[4] and 25 per cent by Noteholder Class Action Claimants.[5]

[76] In addition to their interests in the Litigation Trust, Affected Creditors also received interests in EPHL, a holding company which held the shares of EPGL, to which SFC transferred the shares of its subsidiaries (and indirectly the assets they held and businesses they carried on): ss. 4.1, 6.4 and 6.6. Included among the assets transferred to EPGL were "SFC Intercompany Claims" defined to include amounts owing to SFC by any of its subsidiaries: s.

4.10. The Plan provides that all obligations and agreements to which EPHL or EPGL became parties as a result of the transfer to them "shall be and remain in full force and effect, unamended": s. 8.2(j).

[77] All equity holders in SFC released their claims against SFC: s. 4.5. Noteholder Class Action claims against SFC were released: s. 4.4. Affected Creditors -- comprised mainly of SFC's noteholders, whose claims had been secured by first-priority security interests over the shares of SFC's subsidiaries -- released SFC from their claims for payment of principal and interest on the notes: s. 4.1. Article 7 specified individuals and entities also released by the Plan. The appellant was not one of the specified individuals.

(g) *Analysis of the appellant's Plan preclusion arguments*

[78] In light of the principles of interpretation, the factual matrix, the purposes of the *CCAA* and the Plan, and the Plan's language, I turn now to the analysis of the appellant's plan preclusion arguments.

(i) *No right to advance claims advanced in the class actions*

[79] The appellant argues that the claims made in the action are not Causes of Action that were transferred to the Litigation Trust because they are the same as, or overlap with, the claims made in the Class Actions. He asserts that the claims in this action on the one hand, and those in the Class Actions on the other, rely on the same or similar allegations of wrongdoing by the appellant and claim the same or similar amounts, based on the amounts that SFC raised, as debt or equity, in the capital markets. He also argues that there is an overlap in who will benefit from the claims, in that certain creditors are beneficiaries of [page167] the Litigation Trust and class members in the Class Actions.[6] The "greater certainty" language of the Plan makes it clear, he maintains, that these claims were not transferred.

[80] I would not give effect to this argument.

[81] The Plan, by the combination of s. 6.4(o) and the definition of Litigation Trust Claims, transferred to the Litigation Trust two types of Causes of Action held by two different persons. First, it transferred Causes of Action of SFC against any and all third parties. Second, it transferred Causes of Action of the Trustees on behalf of Noteholders against any and all persons for certain matters. The respondent relies upon the first transfer only, that is, the transfer of Causes of Action that SFC had against the appellant. The trial judge did not err in concluding that the causes of action the respondent advanced in this action are Causes of Action that SFC had against the appellant. This differentiates them from causes of action of SFC stakeholders, which are being advanced in the Class Actions.

[82] A wrong (such as a tort) done to a corporation is actionable by the corporation, which is entitled to recover the loss it suffered. The shareholders and creditors of a corporation cannot sue for damage to the corporation, even though they are indirectly affected by it: *Hercules Managements Ltd. v. Ernst and Young*, [1997] 2 S.C.R. 165, [1997] S.C.J. No. 51, at para. 59; *Meditrust Healthcare Inc. v. Shoppers Drug Mart* (2002), 61 O.R. (3d) 786, [2002] O.J. No. 3891 (C.A.), at paras. 11-16. Similarly, an action for breach of a corporate director's or officer's fiduciary duty is an action of the corporation, whether it seeks damages or an accounting of profits: *BCE Inc. v. 1976 Debentureholder*s, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, 2008

SCC 69, at para. 41; *Midland Resources Holding Ltd. v. Shtaif* (2017), 135 O.R. (3d) 481, [2017] O.J. No. 1978, 2017 ONCA 320, at paras. 148-149 and 156, leave to appeal to S.C.C. refused [2018] S.C.C.A. No. 541.

[83] On the trial judge's findings, the appellant was a fiduciary of SFC and he breached his fiduciary duty to it. SFC was the victim of the appellant's tort -- his fraud -- in that it was SFC that was caused to record fictitious or overstated assets and revenues on its financial statements, SFC that was caused to raise [page168] money from the public and incur obligations to lenders and others that it would not otherwise have incurred, and SFC's funds, received through these activities, that were invested and lost in illegitimate businesses or consumed by the consequence of the discovery of the fraud. Leaving aside the question of how damages for these matters are assessed, the causes of action to sue for them were Causes of Action of SFC.

[84] The Plan transferred to the Litigation Trust Causes of Action "that have been or may be asserted by or on behalf of . . . SFC against any and all third parties . . .", a term which would include the appellant: s. 1.1. The appellant's contention could only be correct if there were something in the Plan that restricted the meaning that would otherwise be given to that transfer language. The provision of the Plan relied upon by the appellant for this effect is the "greater certainty" clause in the definition of Litigation Trust Claims, which reads as follows: "For greater certainty: (x) the claims being advanced or that are subsequently advanced in the Class Actions are not being transferred to the Litigation Trust; and (y) the claims being transferred to the Litigation Trust shall not be advanced in the Class Actions." Like the trial judge, I do not read that phrase to have the meaning for which the appellant argues.

[85] First, as the trial judge correctly noted, the claims made in the Class Actions are claims made on behalf of noteholders and equity holders for their causes of action arising from damages they suffered. SFC did not make claims in the Class Actions asserting SFC Causes of Action or seeking damages SFC suffered. The distinction is important and is not undermined by either the factual overlap in the claims or the fact that certain creditors are or may be both beneficiaries of the Litigation Trust and members of the plaintiff classes.

[86] On the point of factual overlap, the same or similar facts may give rise to a cause of action by a shareholder and one by the corporation. The law recognizes that ". . . where a shareholder has been directly and individually harmed, that shareholder may have a personal cause of action *even though the corporation may also have a separate and distinct cause of action*" (emphasis added): *Hercules*, at para. 62. Shareholders and noteholders may have causes of action arising from misrepresentations made to them when acquiring securities, based on common law doctrines or under securities legislation. And where they do, they may have rights to sue for damages they personally have suffered. But the existence of those causes of action does not detract from the existence of a *separate and distinct cause of action* of the corporation, based on wrongdoing against or breach of duties owed to it, to sue for damages it has suffered. [page169]

[87] As for the argument that, because creditors of SFC are Litigation Trust beneficiaries, the causes of action asserted by the Litigation Trust are or become indistinguishable from their personal rights of action, in my view this court's decision in *Livent Inc. (Special Receiver and Manager of) v. Deloitte & Touche* (2016), 128 O.R. (3d) 225, [2016] O.J. No. 51, 2016 ONCA

11, revd in part on other grounds [2017] 2 S.C.R. 855, [2017] S.C.J. No. 63, 2017 SCC 63, stands as a complete answer to that proposition.

[88] In *Livent*, it was held that the distinction between the corporation's cause of action arising from wrongs done to it to recover damages it has suffered and the separate cause of action of a corporate stakeholder to assert a personal cause of action for a wrong done to her for damages she has suffered, does not cease to apply when the corporation is insolvent and intends to distribute any recovery to its stakeholders. In other words, the separate and distinct cause of action of the corporation does not become one and the same as the stakeholders' cause of action even if the corporation's intention is to benefit its stakeholders with any recovery. Blair J.A. explained why an argument to the contrary must be rejected, observing, at para. 57, that

> [i]t impermissibly conflates damages sustained by the corporation with the distribution of those damages, once recovered, to creditors and other stakeholders, as part of the assets of the corporation, in the course of the proceeding under the [*CCAA*] . . . To conflate them is to disregard the long-recognized principle of corporate law that a corporation is a legal entity separate apart from its shareholders and stakeholders, and that the corporation alone has the right to sue for wrongs done to it.

(Citations omitted)

[89] The Litigation Trust is the *CCAA* vehicle for the pursuit of SFC's corporate causes of action and the distribution of its damages, once recovered, to creditors. Thus, the statement from *Livent* is equally applicable here. The Plan's stated purpose of benefiting creditors by recoveries achieved by the Litigation Trust does not affect the distinction between SFC's causes of action (pursued through the Litigation Trust) and any personal causes of action that creditors or others may pursue, including in the Class Actions. That distinction continues.

[90] In addition to conflicting with well-established corporate law principles, the appellant's attempt to divorce the concept of a cause of action from the person or corporation that holds it conflicts with the language of the Plan. In defining the Litigation Trust Claims transferred to the Litigation Trust, the Plan refers to Causes of Action that have been or may be asserted on behalf of SFC and those that have been or may be asserted on behalf of the Trustees for the Noteholders. It links the Causes of Action [page170] transferred to the entity that held them. The "greater certainty" language in this definition must be read in the same way. The fact that the causes of action of shareholders' and noteholders' advanced in the Class Actions were not transferred to the Litigation Trust under the Plan has no bearing on the transfer of SFC's separate and distinct Causes of Action to the Litigation Trust, even if arising from the same or similar facts and even though creditors are beneficiaries of the Litigation Trust. SFC's Causes of Action were not being advanced in the Class Actions. The "greater certainty" language consequently does not have the effect for which the appellant contends.

[91] Stepping back from the precise wording of the Plan, the appellant argues more generally that it represented a bargain that his wrongs would be pursued in the Class Actions only. I do not accept this argument, which does not find support in the text of the Plan, read in light of the factual matrix and the purposes of the Plan and the *CCAA*.

[92] The Class Actions pre-dated the Plan. If they were intended to be the sole vehicle for recovery from the appellant, it is unclear why the appellant did not receive a release from SFC or the Litigation Trust under the Plan. Moreover, when the Plan was put forward and approved, the failed sales process had already established that recoveries from assets in SFC subsidiaries would be insufficient to allow SFC to satisfy creditor claims, making other sources of recovery, including enforcement of SFC's litigation rights, important. There is no reason why rights of action of SFC against the appellant, which would continue to exist in a bankruptcy or liquidation of SFC, would be given up in this *CCAA* Plan, where the object was to maximize recoveries in a manner more advantageous than bankruptcy or liquidation. Moreover, the stated purpose of the Plan includes allowing creditors to benefit from the pursuit of contingent claims by the Litigation Trust. Morawetz J., in granting the sanction order approving the Plan, noted that it provided the opportunity "through the Litigation Trust, to pursue (in litigation or settlement) those parties that are alleged to share some or all of the responsibility for the problems that led SFC to file for *CCAA* protection": *Sino-Forest Corp. (Re)*, at para. 64. When the Plan was approved, the appellant was already alleged to be one of those persons, but on the appellant's argument the opportunity Morawetz J. identified would not exist.

[93] The purposes of the *CCAA* and the Plan, and the Plan's precise provisions read in light of the factual matrix, all rebut the appellant's characterization of the Plan as preventing the Litigation Trust from pursuing a claim that SFC could have pursued against the appellant for his misconduct. [page171]

[94] Accordingly, the trial judge did not err in interpreting the Plan as allowing the respondent to advance the claims made in this action against the appellant notwithstanding the claims by noteholders and shareholders advanced in the Class Actions.

(ii) *Excluded litigation trust claims*

[95] The appellant's second argument is that the claims advanced in the action are Excluded Litigation Trust Claims. As noted above, that exclusion applies where there is an agreement between SFC and a category of its creditors that a particular claim is excluded from those transferred to the Litigation Trust. The Plan specifies one category of excluded claim, encompassing certain claims against SFC's underwriters. There is no similar particularization of claim(s) of SFC against the appellant which are excluded.

[96] The only agreement to exclude a claim of SFC against the appellant that the appellant points to is the "greater certainty" language providing that claims advanced in the Class Actions are not transferred to the Litigation Trust. The argument is therefore just a repackaging of the appellant's first argument, as it depends for its validity on the Plan having exempted claims arising from facts asserted in the Class Actions from those Causes of Action of SFC transferred to the Litigation Trust. As previously discussed, the Plan does not have that effect.

[97] I would therefore not give effect to this argument.

(iii) *SFC intercompany claims*

[98] The appellant's third argument is that the claims for which he was found liable are SFC Intercompany Claims. He argues that these were assigned under the Plan by SFC to EPHL and EPGL, rather than to the Litigation Trust.

[99] I agree with the appellant that SFC Intercompany Claims were not assigned to the Litigation Trust, but I disagree that the claims for which the appellant was found liable in this action are SFC Intercompany Claims.

[100] SFC Intercompany Claim is defined in the Plan as "any amount owing to SFC by any Subsidiary or Greenheart and any claim by SFC against any Subsidiary or Greenheart". SFC's shares in each Subsidiary and in Greenheart were transferred under the Plan to EPHL and by EPHL to EPGL. The SFC Intercompany Claims followed the same route: s. 4.10.

[101] Essentially, the appellant's argument is that the respondent is claiming money raised by SFC in the capital markets that was invested in its subsidiaries and lost. In his submission, a claim about [page172] funds invested in SFC's subsidiaries and not returned is an SFC Intercompany Claim, regardless of against whom it is made.

[102] I disagree. In my view, reading the Plan in accordance with the interpretive principles noted above yields the conclusion that what was transferred to EPHL and then to EPGL were the debt obligations of *subsidiaries* or *Greenheart* to SFC and the rights SFC had to claim against *those entities*. This makes commercial sense in light of the words used in the definition of SFC Intercompany Claim -- "any amount owing to SFC by any Subsidiary or Greenheart and any claim by SFC against [them]". It also makes sense in light of the fact that the shares of the Subsidiaries and Greenheart were being similarly transferred. It would not make commercial sense for EPHL and EPGL to acquire the shares in SFC's subsidiaries but to leave the subsidiaries exposed to SFC's claims against them. The concluding words of s. 4.10 of the Plan make this clear: "[T]he applicable Subsidiaries and Greenheart shall be liable to [EPGL] for such SFC Intercompany Claims from and after the Plan Implementation Date."

[103] SFC Intercompany Claims does not refer to claims against the appellant arising from his conduct, even though that conduct involved investing SFC's funds in the company's subsidiaries. The transfer to EPGL of SFC's claims against its subsidiaries and Greenheart did not include the transfer of SFC's causes of action against the appellant.

[104] I would accordingly reject this argument.

(iv) *Conclusion on appellant's Plan preclusion arguments*

[105] I would not give effect to the appellant's arguments that the trial judge erred in concluding that the Plan transferred the claims advanced in this action to the Litigation Trust and did not preclude them from being advanced against the appellant by the respondent.

(2) *Causation and damages*

(a) *The appellant's arguments*

[106] The appellant argues that, even if the claims made in the action were SFC's Causes of Action, that only takes the respondent so far. As transferee of Causes of Action of SFC, the respondent can only claim amounts that would have been properly claimable by SFC. Thus, the only damages that could be claimed were damages of SFC proved to have been caused by the appellant's wrongdoing. In interrelated arguments, the appellant submits that the damages that were awarded by the trial judge are not damages of SFC, nor [page173] was it appropriate to consider them as caused by the appellant's wrongdoing.

[107] The appellant submits that the core of the claim is for losses incurred by debt and equity holders and that the amounts raised from them, if acquired by fraud as the respondent alleges, never belonged to SFC and therefore could not form part of SFC's loss. He argues that allowing such a claim improperly creates the risk of double recovery.

[108] The appellant goes on to submit that the trial judge simply presumed the appellant to have caused everything that led to SFC's ultimate collapse. He argues that the trial judge should have: required proof that each transaction that occurred would not have occurred without the appellant's deceit; calculated, for each transaction so found, the loss resulting from it and; accounted for transactions on which there was no loss.

[109] Finally, he argues that the trial judge applied incorrect principles of damages assessment. The Steger primary approach should have been completely rejected in favour of a transaction-by-transaction analysis. Even the specific loss analysis that the trial judge performed is flawed as it would, in part, award SFC damages which could only have been suffered by its subsidiaries.

[110] For the reasons that follow, I would not give effect to the appellant's principal causation and damages arguments or disturb the trial judge's award of damages. Accordingly, it is unnecessary to address the appellant's arguments about whether and how the trial judge's alternative damages calculation should be adjusted.

(b) *The standard of review*

[111] Causation is a question of fact, and is reviewed on a deferential standard. Absent palpable and overriding error, appellate intervention is not warranted: *Ediger v. Johnston*, [2013] 2 S.C.R. 98, [2013] S.C.J. No. 18, 2013 SCC 18, at para. 29.

[112] A trial judge's assessment of damages attracts considerable deference. It will not be interfered with absent an error of principle or law, a misapprehension of evidence, a showing that there was no evidence on which the trial judge could have reached his or her conclusion, a failure to consider relevant factors or consideration of irrelevant factors, or a palpably incorrect or wholly erroneous assessment of damages: *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, [2001] 2 S.C.R. 943, [2001] S.C.J. No. 56, 2001 SCC 58, at para. 80; *Rougemount Capital Inc. v. Computer Associates International Inc.*, [2016] O.J. No. 5786, 2016 ONCA 847, 410 D.L.R. (4th) 509, at para. 41. [page174]

(c) *Analysis of the appellant's causation and damages arguments*

(i) *The trial judge's factual findings appropriately underpin his causation conclusion and damages assessment*

[113] The trial judge's causation conclusion and his assessment of damages are conceptually linked. They both are premised on five core factual findings that he made.

[114] The first was that SFC's raising of money in the debt and equity markets was something which was caused by the appellant's wrongdoing, including his misrepresentation of BVI standing timber as a valuable asset. The second was that "but for Mr. Chan's deceit, [SFC] would never have undertaken obligations of this magnitude to lenders and shareholders". The third was that but for the appellant's wrongdoing, SFC would not have "entrusted this money [the

funds raised on the capital markets] to [the appellant] and Inside Management". Fourth was his finding that the appellant, "rather than directing [SFC's] spending on legitimate business operations, poured hundreds of millions of dollars into fictitious or over-valued lines of business where he engaged in undisclosed related-party transactions and funnelled funds to entities that he secretly controlled": at para. 1022. Fifth was the finding, at para. 1020, regarding the impact of the fraud and its discovery:

> When the fraud was uncovered, and the dust settled, more than half of the money was gone. To the extent those funds went into the acquisition of assets, the value of those assets was realized through the EPHL sales process. What was left in cash on June 2, 2011 was largely consumed in propping up and managing the enterprise during the extended crisis brought on by the disclosure of the fraud and its ongoing investigation (including the ongoing concealment by [the appellant] and Inside Management).

[115] These five findings underlie the trial judge's conclusion that what occurred was a chain of events all flowing from the appellant's fraud and breach of duty, which resulted in the loss of the funds that had been raised. As he put it, "[t]he loss of these funds to [SFC] was directly related to Mr. Chan's fraud and breach of fiduciary duty": at para. 1022.

[116] In my view, these findings were available to the trial judge on the record. The argument that the trial judge simply presumed the appellant to be responsible for everything that led up to SFC's ultimate collapse is without foundation. [page175]

(ii) *There is no legal error in the trial judge's causation analysis*

[117] The trial judge applied the appropriate legal principles to his causation analysis. He approached the "but for" causation test on the robust common sense approach the law contemplates: *Clements v. Clements*, [2012] 2 S.C.R. 181, [2012] S.C.J. No. 32, 2012 SCC 32, at para. 46; *Snell v. Farell*, [1990] 2 S.C.R. 311, [1990] S.C.J. No. 73, at para. 34. Moreover, he was alive to the need to be satisfied that the loss was caused by the chain of events flowing from the wrongdoing after considering whether there were intervening causes that broke the chain of causation: *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, at paras. 9, 47, 52 and 54-57.

[118] The appellant argues that the trial judge did not take into account other causes for the discrepancy between the value of SFC's assets, held by its subsidiaries and the value of the funds invested in them. Not all of the subsidiaries activities were found by the trial judge to be fictitious. Therefore, external factors, such as climate, industry pricing, etc., may have caused the losses, rather than the appellant's fraud.

[119] In my view, the trial judge was entitled to reject this argument. He did not ignore the fact that not all of the businesses were fictitious. He found that a loss was caused by the appellant notwithstanding that finding. His approach credited the value actually existing in the subsidiaries. And, since once a loss arising from a fraud or breach of duty is established, it is the defendant who bears the onus of showing that the plaintiff would have suffered the same loss absent the defendant's wrongdoing, the trial judge was not required to give effect to unproven alternative causes: *Rainbow Industrial Caterers Ltd. v. Canadian National Railway*, [1991] 3 S.C.R. 3, [1991] S.C.J. No. 67, 1991 SCC 27, at pp. 15-16 S.C.R.: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, [1994] S.C.J. No. 84, at pp. 441-42 S.C.R.

(iii) *The trial judge did not award compensation for amounts that could not be legally considered losses of SFC*

[120] The appellant submits that the trial judge's analysis contains a fundamental flaw because the trial judge proceeded as though the money that SFC raised on the debt and equity markets "belong[ed] to the corporation" and its loss was a loss to SFC. This could not be, the appellant argues, since if the funds were raised [at para. 1020] "[b]ased on fraudulent misrepresentations about the nature and value of the BVI standing timber [page176] assets", as the trial judge found, the funds would have been impressed with a trust in favour of the shareholders and noteholders who advanced the funds. Only they, not SFC, would have a right to claim for the loss of these funds. Moreover, allowing a claim for these funds would involve SFC in inconsistent positions -- complaining that funds were obtained on its behalf through fraud while trying to obtain the benefit of those very funds.

[121] In making the latter argument, the appellant relies on the Supreme Court of Canada's decision in *Corporation Agencies Ltd. v. Home Bank of Canada*, [1925] S.C.R. 706, [1925] S.C.J. No. 49. In that case, an individual engaged in a fraudulent cheque kiting scheme, making unauthorized deposits into Corporation Agencies' bank account followed by equally unauthorized withdrawals. Corporation Agencies sued the bank alleging it should not have honoured the unauthorized withdrawals. Success on that claim would have given it the benefit of the unauthorized deposits.

[122] In rejecting the claim, the majority of Supreme Court held, at p. 726 S.C.R., that the plaintiff could not accept part of the fraudulent scheme -- the part that saw money deposited to its account -- while relying on the fraud to dispute withdrawals that had been made pursuant to the same fraudulent scheme.

[123] In my view, this case does not assist the appellant because it is distinguishable on two fundamental points. Corporation Agencies was suing a party who was not the perpetrator of the fraud and was seeking to benefit from part of the fraud at that party's expense. Here, the claim is not against an innocent party, but against the perpetrator, for damages caused by the fraudulent scheme. Nothing in the Supreme Court's decision precludes that type of claim. Moreover, in *Corporation Agencies*, the plaintiff did not establish that the moneys deposited into its account were funds for which it would have to account to others: at p. 726 S.C.R. Here, SFC had obligations in respect of the funds raised on the capital markets, which the appellant's fraud deprived it of the ability to meet.

[124] I do not have to decide if the appellant's trust characterization is correct, as it does not support his position. The trial judge found that SFC had suffered damage because it raised money on the capital markets, incurred obligations to its shareholders and noteholders by doing so, and then lost the money raised, none of which would have occurred but for the appellant's misconduct. The result was to leave SFC with the obligations it took on when it raised the funds while depriving it of the means to honour those obligations.

[125] This analysis would not change if the moneys raised were, as the appellant argues, "impressed with a trust in favour [page177] of the shareholders and noteholders who advanced the funds". By reason of the appellant's fraud, SFC would still have been left with obligations to its shareholders and noteholders -- though trust obligations -- while having been deprived of the

means of honouring them. It would still have suffered damage, and accrued a cause of action to recover for that damage.

[126] The trial judge did not commit a legal error by considering the loss of the funds raised to have been a loss suffered by SFC in these circumstances. Where directors cause a corporation to incur liabilities and misapply money which should have been paid to answer those liabilities, leaving the company with large liabilities and no means of paying them, the directors cause the corporation to suffer a recognizable form of loss: *Bilta (U.K.) Ltd. v. Nazir (No. 2)*, 2015 UKSC 23, [2015] 2 W.L.R. 1168, at paras. 176-178. That proposition was accepted by this court in *Livent* (C.A.): at para. 349.

[127] Nor is the result changed because, as the appellant argues, SFC was ultimately released by the Plan from its obligations to equity holders and creditors. The appellant submits that the release undercuts the argument that SFC was left with obligations it could not honour by reason of the appellant's conduct. I disagree. The fact that the Plan ultimately released SFC from its obligations to creditors and equity holders from whom funds were raised does not undermine the causation or damages conclusions of the trial judge.

[128] The release of SFC by creditors does not result in a windfall gain. Absent the Plan, if SFC had itself pursued its claims against the appellant, it could have used any damages it recovered towards satisfying its creditors. The Plan transferred the right to pursue SFC's claims to the Litigation Trust together with the obligation to distribute damages, once recovered, to the creditors who are the beneficiaries of the Litigation Trust. Effectively, the Litigation Trust assumes and replaces SFC's obligations to creditors through its obligation under the Plan to distribute damages it recovers to beneficiary creditors. Releasing SFC's obligations to creditors and requiring the Litigation Trust to distribute damages it recovers to beneficiary creditors ensures that the obligations to creditors rests with the person that will recover the damages.

[129] Similarly, the release of SFC by equity holders does not result in any windfall. Under s. 6(8) of the *CCAA*, unless all creditor claims are to be paid in full, a plan may not provide for payment of equity claims. "[I]n enacting s. 6(8) of the *CCAA*, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest *not* diminish the assets of the debtor available to general creditors in a restructuring": *Sino-Forest Corp. (Re)* (2012), 114 O.R. (3d) 304, [2012] O.J. No. 5500, 2012 ONCA 816, at para. 56 [emphasis [page178] in original]. The fact that the Plan does not provide for equity holders to benefit from the Litigation Trust thus follows the priorities set by the *CCAA* for the distribution of recoveries from the enforcement of an SFC asset.

[130] It would be contrary to the purpose of the Plan, and the Litigation Trust it provided for, to give the release of SFC under the Plan the effect for which the appellant contends. The Litigation Trust was a vehicle to allow recoveries from persons whose conduct caused damage to SFC. The appellant's argument would treat the Plan as effectively having released him from being pursued for causing that damage, something the Plan did not do.

(iv) *The double recovery doctrine does not apply*

[131] The appellant argues that the trial judge's assessment of damages creates the risk of double recovery from him. He argues that a judgment against him should not issue because "a defendant cannot be liable twice for the same alleged loss". Reduced to its bare essentials, the

appellant's position is that the funds raised by SFC on the debt and capital markets are at the core of both the claims in the Class Actions and the award of damages in this action. Even if separate causes of action and rights to damages exist, the damages award in this action will undoubtedly overlap with what may be awarded against him in the Class Actions.

[132] I would not give effect to this argument. Since SFC has a separate and distinct cause of action and suffered a recognizable form of loss, neither the cause of action nor recovery for it can be defeated by an argument that the appellant's conduct also gave rise to causes of action in others who may seek to claim their own damages from him, even if in similar amounts.

[133] The appellant invokes the rule against double recovery, but his position does not attract the rule, properly understood. The rule does not prevent a party with a claim from obtaining a judgment for 100 per cent of its losses. The rule only prevents a party who has made a recovery on a judgment from recovering, through other actions, more than 100 per cent of those losses. "It is not the *damage award* that amounts to satisfaction and bars a second action but the *recovery* by the plaintiff in the first action": *Treaty Group Inc. (c.o.b. Leather Treaty) v. Drake International Inc.* (2007), 86 O.R. (3d) 366, [2007] O.J. No. 2468, 2007 ONCA 450, at para. 13 (emphasis in original). The rule has no application here, where it is raised to avoid judgment against the [page179] appellant.[7] There is no suggestion that the Litigation Trust has already recovered 100 per cent of the losses it is entitled to claim.

[134] To the extent that the appellant raises the spectre of beneficiaries of the Litigation Trust achieving double recovery in the future if they receive benefits from the Litigation Trust's collection of the judgment against him and then are successful in the Class Actions against him, this is not an objection to the judgment in this action for the reasons set out above.

[135] As the trial judge noted, it is in the recovery stage of the Class Actions that any issue of double recovery would have to be raised to the extent that members of the class attempt to recover damages already recovered through the Litigation Trust. For that issue to even emerge, the appellant would first have to pay the judgment granted against him in this action and then the plaintiffs in the Class Actions would have to fail to appropriately credit any distributions they receive. Neither precondition has occurred. Speculating on whether they will is inappropriate here. The point is that the rule against double recovery does not assist the appellant in resisting the granting of the judgment under appeal.

[136] As an alternative basis to his finding that the prospect of double recovery did not stand as a bar to the respondent's action, the trial judge interpreted the Plan to limit Class Action recoveries against the appellant to $150 million; thus, the overlap of claims would only be to the extent of $150 million, and not to the entirety of the respondent's claim. The appellant argues that the trial judge misinterpreted the Plan, which does not limit the Class Action claims against him.

[137] Any error in the trial judge's interpretation of the Plan in this respect was immaterial. He advanced the point as an alternative only to the main point that the prospect of later recoveries in the Class Actions could not stand as a bar to the appellant's liability to pay damages in this action.

[138] I would therefore not give effect to this ground of appeal.

(v) *The trial judge applied the correct principles of damages assessment*

[139] Given that the trial judge properly found causation of a recognizable form of loss to SFC, the measurement of that loss fell squarely within the trial judge's broad powers to assess damages. [page180] I see no reason to interfere with that assessment, which was based on his findings of fact and acceptance of expert evidence consistent with the chain of causation he found to exist.

[140] The trial judge referred to the measure of damages for deceit. He correctly described it as the difference between the financial position of the plaintiff as a result of the fraud, including losses flowing from it even if not foreseeable at the time of its commission, and the financial position of the plaintiff as it would have been if the tort had not occurred: para. 928, citing *Rainbow Industrial Caterers Ltd. v. Canadian National Railway*, [1990] B.C.J. No. 3044, 67 D.L.R. (4th) 348 (C.A.), at p. 359 D.L.R., affd (S.C.C.), *supra*. Elsewhere in his reasons he referred to the principles of equitable compensation citing, among other authorities, this court's decision in *Whitefish Lake Band of Indians v. Canada (Attorney General)* (2007), 87 O.R. (3d) 321, [2007] O.J. No. 4173, 2007 ONCA 744. He noted that "[e] quity is concerned with restoration of the actual value of the thing lost through the breach of duty, in this case [SFC's] funds raised on the capital markets" and that compensation is assessed at the date of trial and with the presumption that trust funds will be invested in the most profitable way: at paras. 1007-1011.

[141] The appellant says the trial judge erred by awarding damages based on the full equitable measure of compensation, which is only appropriate where property is owned by a beneficiary but is controlled by the fiduciary as trustee. He relies on the distinction between cases of breach of trust and those of breach of a non-trust fiduciary duty made in *Whitefish Lake Band of Indians*, at para. 54; and *Canson Enterprises*, at p. 578 S.C.R. In *Canson Enterprises*, the Supreme Court stated that in cases of breach of trust, "the concern of equity is that [the trust property] be restored . . . or, where that cannot be done, to afford compensation for what the object would be worth", whereas in cases of breach of duty, "the concern of equity is to ascertain the loss resulting from the breach of the particular duty": at p. 578 S.C.R. The court went on to observe that, in determining the loss resulting from breach of a particular fiduciary duty, equity may borrow common law concepts like remoteness, intervening cause and mitigation to avoid undue harshness: at pp. 579-80, 585-86 and 588 S.C.R. The appellant argues that since the claim against him did not involve a breach of duty in respect of funds of SFC that he controlled, the trial judge should have assessed damages based on these common law principles.

[142] I would not give effect to that complaint for a number of reasons. First, on the trial judge's findings, the appellant had control over the funds raised by SFC, which the trial judge found to have been "entrusted" to the appellant and "directed" by him [page181] into various entities to which he was related or which he secretly controlled. The trial judge properly concluded on the basis of these findings that the appellant "owed fiduciary duties towards [SFC] akin to those of a trustee": at para. 923.

[143] Second, even if the principles of equitable compensation applicable where trust property is involved were not available, the trial judge's damage assessment can be justified based on the principles in *Canson Enterprises*. As I have discussed above, the trial judge properly considered causation and potential intervening acts in coming to his damages award, and remoteness does not appear to be an issue.

[144] In any event, in my view the trial judge's assessment of damages was in fact primarily based on the tort measure of damages. His reference to equitable compensation principles was made primarily in relation to a point the appellant's expert made, namely, that when credit was given for asset realizations, the Greenheart realization should have been adjusted to take into account what Greenheart was worth when SFC made its investment, not what it ultimately was sold for. The trial judge rejected that argument. He said: "The fact that the discovery of [the appellant's] fraud had a negative effect on the market value of the Greenheart asset is not a market risk [SFC] has to bear . . . It is sufficient that [SFC] suffered a loss in fact, provided the realization was not improvident": at para. 1101.

[145] The trial judge's treatment of the Greenheart transaction is fully justified under the equitable principles of compensation applicable to a case where trust property is not involved. In *Hodgkinson*, the Supreme Court clarified that its observations in *Canson Enterprises* did not "signal a retreat from the principle of full [equitable] restitution" in all cases of breach of duty, as the appellant contends: at p. 443 S.C.R. The majority rejected the defendant investment advisor's argument that the plaintiff's loss was caused by the market rather than his breach of duty, holding that it was appropriate to place the risk of market exigencies on the defaulting fiduciary: at pp. 442, 452-53 S.C.R. It observed that breach of fiduciary duty can take a variety of forms, and consequently different approaches may be appropriate to remedy the harm caused by different breaches: *Hodgkinson*, at pp. 443-44 S.C.R. Here, as in *Hodgkinson*, there was a strong nexus between the wrong complained of, the fiduciary relationship, and the risk of market volatility that contributed to SFC's loss. The appellant's wrongdoing involved abuse of his fiduciary role and breach of the duty of loyalty to the corporation that lay at its core: at pp. 445, 452-53 S.C.R. This is exactly the type of case that justifies placing the risk of market fluctuations on the appellant. [page182]

[146] The trial judge's reasons for rejecting the appellant's expert's proposed adjustment of the realization amount for Greenheart were also justified under a deceit measure of damages. As the trial judge found, the appellant knew or could be deemed to have known that the discovery of his fraud would send SFC "into a tailspin": at para. 1012. The effect that had on the timing and distressed circumstances in which assets were realized can be seen as part of the chain of events flowing from the appellant's fraud: *Rainbow* (C.A.), at p. 359 D.L.R.; *Canson Enterprises*, at p. 565 S.C.R.; Hodgkinson, at pp. 445-46 S.C.R. This conclusion reflects the reality that as courts strive to treat similar wrongs similarly, equitable and common law paths often produce the same result: *Hodgkinson*, at pp. 444-45 S.C.R.; *Canson Enterprises,* at pp. 585-86 S.C.R.

(3) *The doctrine of election*

[147] The appellant argues that the equitable doctrine of election, also known as the rule against approbation and reprobation, prohibits a party from asserting that a transaction is valid to obtain some advantage and then turning around to assert that it is invalid to secure some other advantage. The transfer, under the Plan, of SFC's assets to EPGL (and the subsequent transfers to third-party purchasers) constituted an election to treat the assets as valid and subsisting, since the Plan deemed obligations and agreements to which EPGL became a party "in full force". The equitable doctrine of election, which he contends the trial judge erred in failing

to consider, should prevent the respondent from making the inconsistent argument that the assets were fictitious, fraudulent, tainted or overvalued as a product of his fraud.

[148] I would not give effect to this argument. First, the cases relied upon by the appellant deal with markedly different situations to the one at bar. As one example, in *Kin Tye Loong v. Seth* (1920), 1 C.B.R. 349 (P.C. Hong Kong), the plaintiff filed a claim in the defendant's bankruptcy for the price of goods sold and delivered, received a dividend on that claim, and compromised and released it. This conduct -- consistent only with the position that a valid sale had taken place -- barred a subsequent action by the plaintiff claiming that no sale in fact had taken place, that property in the goods had never been transferred, and that damages should be paid for conversion of what the plaintiff alleged were still its goods. Nothing analogous is present here.

[149] Second, the language of the Plan cannot be read as elevating the nature or value of what was transferred under the Plan above what actually existed. For example, at the time of the Plan, the standing timber assets had not been located or verified and the trial judge found they were and had been fictitious. SFC's [page183] insolvency, which gave rise to the Plan, arose from, among other things, that very circumstance. In the sale to New Plantations effected by EPGL, the standing timber assets were ascribed no value unless recoveries on them were made, but none occurred. Nothing in the Plan or the steps taken under it can be read to treat the non-existent as existing, or the valueless as valuable, preventing the Litigation Trust from maintaining that the fraud alleged had occurred.

[150] This court has recently explained the doctrine of election in both its common law and equitable aspects. At common law, the doctrine addresses the consequences of a party choosing between inconsistent alternatives; the choice of one alternative, for example, to affirm a contract, forecloses later choice of an inconsistent alternative, for example, to rescind the same contract. The equitable doctrine of election precludes a party who has accepted benefits under a particular instrument, for example, a will, from refusing to accept the balance of the provisions of that instrument: see *Charter Building Co. v. 1540957 Ontario Inc.* (2011), 107 O.R. (3d) 133, [2011] O.J. No. 3006, 2011 ONCA 487, at paras. 18-22.

[151] The trial judge correctly held that there had been no election between inconsistent rights here. The transfer of SFC's assets to EPGL and the transfer of its claims against the appellant for fraud and breach of fiduciary duty to the Litigation Trust were not inconsistent. The Plan contemplated that the benefit of both would be preserved and pursued. This conclusion, reached by the trial judge upon consideration of the common law doctrine of election (the parties before us disagreed as to whether the equitable doctrine was argued before the trial judge), is equally applicable to the equitable doctrine. The Litigation Trust's acceptance of benefits under the Plan, namely, the transfer of SFC's Causes of Action for fraud and breach of fiduciary duty, are not accompanied by any refusal to accept the burden of giving effect to other dispositions under the Plan, such as the obligation to distribute damages, once recovered, to the creditors who are the beneficiaries of the Litigation Trust, and the transfers of SFC's assets to EPGL, enabling the sales to subsequent purchasers. Indeed, the damages awarded by the trial judge deducted the value implied by the recovery from those sales.

[152] As the trial judge noted, even where a party has elected to affirm a contract, its right to damages is not precluded. The same principle would apply here to the argument about the

equitable doctrine of election. Nothing suggests that a party is foreclosed from pursuing damages when, as a result of being defrauded, its loss is mitigated by the disposition of whatever property was acquired in transactions affected by the fraud. Indeed, the measure of damages available to a party induced by fraud to enter into [page184] a transaction involves the calculation of the loss the plaintiff suffered, which usually requires a credit to be given for the actual value of the property that was acquired: Lewis N. Klar and Cameron Jefferies, *Tort Law*, 6th ed. (Toronto: Carswell, 2017), at p. 815.

[153] In my view, the doctrine of election is of no assistance to the appellant.

(4) *Errors in factual findings*

[154] The appellant argues that the trial judge made two fundamental errors in his treatment of the evidence, which undermine his factual conclusions. First, the appellant argues that the trial judge drew the inference that the BVI standing timber model was a fraud based on one sample transaction for which the documentation had been translated into English. He goes on to argue that the inference that all of the 525 transactions conducted under the BVI standing timber model were the same as the sample transaction was impermissible for two reasons: first, fraud in numerous transactions cannot be proven by reference to one example; and, second, that proceeding as the trial judge did required the conclusion that the other transactions, comprised of documents which had not been translated into English, were substantially similar to the sample when those non-translated documents were inadmissible under the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 125(2).

[155] The trial judge considered the argument that one sample was not sufficient and rejected it. He stated that all of the purchase and sale contract documentation for all the transactions was in evidence and available to both parties and that trial and judicial economy dictated that unless absolutely necessary, time should not be devoted to the proof of every piece of documentation for all 525 transactions. Rather, if the defendant had wanted to quarrel with the assertion that the sample transaction was essentially the same as the rest of them, he had the raw material necessary to do that. He did not attempt to do so.

[156] For the reasons given by the trial judge, and the following additional reasons, I would not give effect to the appellant's argument:

(a) The requirement that fraud be proven by clear and cogent evidence does not mean, as a matter of law, that it can never be proven by inference drawn from a sample. It depends on the circumstances. Here, there was evidence from which the conclusion could be drawn that the sample was representative, beyond the evidence of the respondent himself. The appellant gave evidence that the content of certain documents was identical in each transaction and a defence witness testified [page185] as to how contracts and documents for each transaction were prepared from a "template". Additionally, the appellant did not assert that any fraud evident in the sample transaction was an isolated incident. His position was that there was no fraud, a position that appears consistent with evaluating the matter on the basis of the sample. Finally, the trial judge described the protocol the parties had followed whereby documents could be translated when required. The appellant and various experts and witnesses were fluent in the language of the

documents and it was open to them to require translations of any documents that they could use to show the non-representative nature of the sample. There was evidence about some other transactions and, to the extent that it was before the trial judge, it was for him to assess in terms of the sample's representativeness.

(b) The trial judge's finding of fraud was not solely based on an inference from the sample. The trial judge devoted over 200 paragraphs of his reasons to an analysis of the BVI standing timber model and why it was fraudulent, referring to evidence well beyond the sample. This included the lack of objective evidence to support the existence of cash flows between the AIs and the Suppliers; the drop in collection of accounts receivable owing by the AIs to nil after the Muddy Waters Report; the failure to locate the BVI standing timber after the Muddy Waters Report and even until trial; the expert evidence about critical documents that were missing or deficient such as plantation certificates, maps, Forestry Bureau confirmations, sales contracts and harvesting permits; the inability of the Independent Committee to confirm the existence and operations of Suppliers and AIs; and the appellant's control over supposedly arms-length counterparties. The trial judge made numerous findings of credibility in assessing all of that evidence, which he clearly viewed as a whole.

(c) A factual finding of fraud by a trial judge who has weighed large quantities of complex evidence is entitled to deference, absent palpable and overriding error. Such an error must go to the very outcome of the case: *Benhaim v. St-Germain*, [2016] 2 S.C.R. 352, [2016] S.C.J. No. 48, 2016 SCC 48, at paras. 36-38. In light of the findings of the trial judge on the record before him, the alleged errors concerning the sample would not, in any event, rise to the level that would warrant appellate interference. [page186]

[157] The appellant also argues that the trial judge erred in allowing the evidence of the respondent, given by affidavit, to remain in the record where it contained opinions that could only be given by an expert. The trial judge was alive to this issue; he ruled in a pre-trial admissibility motion that the respondent's affidavit, where it deposed to matters outside his personal knowledge and contained opinions, would not be relied on as evidence but simply as a description of positions that had to be proven by admissible evidence. The trial judge did not rely on any opinions of the respondent that could only be given by an expert. The appellant's objection that the trial judge should have gone on to "redline" out offending portions of the respondent's affidavit elevates form over substance in these circumstances.

[158] I would not give effect to the appellant's arguments about the trial judge's fact-finding.

IV. *Conclusion*

[159] I would dismiss the appeal. In accordance with the parties' agreement, I would award costs of the appeal to the respondent in the amount of $100,000, inclusive of disbursements and applicable taxes.

Appeal dismissed.

Notes

1 All references to currency are in USD, unless otherwise noted.

2 Affected Creditors were defined by the Plan as including persons with Noteholder Claims. A Noteholder Claim included a claim for principal and accrued interest under Notes (debt instruments issued by SFC when it raised financing on the public markets) by the owner or holder of such Note or their trustee.

3 Noteholder Class Action Claimants were persons with Noteholder Class Action Claims. These were defined as claims as Noteholders in class actions against SFC and its directors, officers, auditors or underwriters, relating to the purchase, sale or ownership of the Notes, but did not include Noteholder Claims, i.e., did not include claims for principal and accrued interest payable under the Note.

4 See note 2.

5 See note 3.

6 There is an overlap between this argument, and the appellant's argument that in assessing damages the trial judge awarded the respondent amounts that could only be claimed in the Class Actions or were duplicative of those amounts. However, I have addressed the points as distinct. One argument is essentially about the respondent's standing to assert certain claims. The other is about whether, even if he has standing, the damages actually awarded were appropriate.

7 The appellant clarified in oral argument that double recovery was raised to avoid judgment against the appellant, not to reduce any damage award made against him. Indeed, the appellant did not point to any recoveries that had been made against him.

CITATION: Sino-Forest Corporation (Re), 2012 ONSC 5011
COURT FILE NO.: CV-12-9667-00CL
DATE: 20120831

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

See para. 2

RE: **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 SINO-FOREST CORPORATION, Applicant

BEFORE: **MORAWETZ J.**

COUNSEL: **Jennifer Stam, for the Monitor**

HEARD: **AUGUST 31, 2012**

ENDORSEMENT

[1] The parties have reached agreement that the requested relief should focus on the issues relating to Plan Filing and a Meeting Order. This will result in a modified order from that originally contemplated.

[2] The Meeting Order is being made on the basis that there has been no determination of (a) the test for approval of the Plan, including (i) the jurisdiction to approve the Plan in its current form; (ii) whether the Plan complies with the CCAA; and (iii) whether any aspect or term of the Plan is fair and reasonable, (b) the validity or quantum of any claims; and (c) the classification of creditors for voting purposes.

[3] Further, nothing in the Order should be interpreted as preventing or restricting or otherwise limiting the ability of any party to oppose a motion for sanction of the Plan.

[4] Monitor's counsel to attend on Tuesday, September 4, 2012 with a form of Order for my review.

MORAWETZ J.

Date: August 31, 2012

Most Negative Treatment: Distinguished
Most Recent Distinguished: Hy Bloom inc. c. Banque Nationale du Canada | 2010 QCCS 737, 2010 CarswellQue 11740, 2010 CarswellQue 1714, EYB 2010-170433, J.E. 2010-604, 189 A.C.W.S. (3d) 25, 66 C.B.R. (5th) 294, [2010] R.J.Q. 912 | (C.S. Qué., Mar 3, 2010)

1993 CarswellQue 2055
Cour d'appel du Québec

See para. 84.

Steinberg Inc. c. Michaud

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42 C.B.R. (5th) 1, 55 Q.A.C. 298, J.E. 93-1227, EYB 1993-64299

Pierre Michaud et Philippe Michaud, Appelants-intimés, c. Steinberg Inc., Intimée-requérante, et Paul Bertrand, Intimé-mis en cause

Delisle J.C.A., Deschamps J.C.A., Vallerand J.C.A.

Heard: 12 mai 1993
Judgment: 16 juin 1993
Docket: C.A. Qué. Montréal 500-09-000668-939

Proceedings: Reversed in part *Steinberg Inc., Re* (1993), 1993 CarswellQue 39, EYB 1993-93940, 23 C.B.R. (3d) 243 (C.S. Que.)

Counsel: *Me James A. Wood, Me Christian Immer*, pour les appelants
Me Raynold Langlois, Me Guy Turner, pour l'intimée
Me Max R. Bernard, pour le Syndicat bancaire de Steinberg Inc.

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 Application of Act
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by court
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.c Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
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Cases considered by *Le juge Deschamps*:

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Statutes considered by *Le juge Vallerand*:

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

Generally — referred to

Statutes considered by *Le juge Deschamps*:

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

Generally — referred to

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

Compagnies, Loi sur les, L.R.Q., c. C-38

en général — referred to

art. 123. 83 [ad. 1980, c. 28, art. 14] — referred to

art. 123. 87 [ad. 1980, c. 28, art. 14] — considered

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

Generally — referred to

s. 4 — considered

s. 6 — considered

Statutes considered by *Le juge Delisle*:

Compagnies, Loi sur les, L.R.Q., c. C-38

art. 123. 87 [ad. 1980, c. 28, art. 14] — considered

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

Generally — referred to

s. 2 "unsecured creditor" — considered

s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 8 — considered

***Claude Vallerand, J.A.*:**

[UNOFFICIAL ENGLISH TRANSLATION]

[1] I have had the benefit of studying the opinion of my colleagues. Like them, I have nothing to say with regard to the composition of the classes, which is both equitable as stated by my colleague Delisle and respectful of the commonality of interest as judged by my colleague Deschamps with whom I also share the opinion that the determination of the commonality of interest sometimes goes beyond the simple review of the treatment proposed for each.

[2] Regarding clauses 5.3 and 12.6, I share the reservations and concerns that they provoke with my colleague. It would not be appropriate to swallow the ambiguities and invite litigation to which these clauses might give rise. I am therefore of the opinion that they should be dealt with as proposed by my colleague.

[3] Finally, regarding clause 12.9 - the waiver of all recourses against the company's directors and others - I subscribe to what has been written by my colleagues. However, like my colleague Deschamps and the case law to which she refers, I would go further than simply criticizing the overly broad wording of the clause in question as our colleague Delisle does.

[4] Admittedly, such a clause is not contrary to public order and its acceptance or refusal by the creditors comes within their will. Subject to the condition, however, that such will can be manifested with full respect for the rights of all, as required

by the Act. At the risk of repeating it, the classes of creditors must be made up in an equitable manner that takes into account the commonality of interest so as not to produce confiscation and injustice (*Sovereign Life Assurance Co. v. Dodd* [(1892), [1891-94] All E.R. Rep. 246 (Eng. C.A.)] , cited by Judge Deschamps). The Act provides for classes of creditors *of the debtor company* made up in accordance with their commonality of interest. Not isolating the interests particular to those who are creditors of both the company and its officers would carry a substantial risk of these interests being despoiled. If only because if the company is, in principle, insolvent, its officers and employees are not. The creditors of the company only will consider the arrangement proposed to them in light of the alternative: accept it and perhaps recover part of their claim; refuse it and lose everything. It is otherwise for those who also have a claim against the officers of the company. They will consider the proposed arrangement, each according to the relative benefit he derives from it with respect to each of his claims, which are very different in every respect.

[5] This being said, compliance with the principles governing the setting up of the classes of creditors would require that one establish a class of creditors of the company who also have a claim against its officers and sometimes, or even often, a distinct category for each of them since the interests of each may vary with regard to the respective qualities and amounts of his claim against the company and his claim against its officers.

[6] This is the price of avoiding the creditors of the officers and employees being despoiled, drowned in a sea of creditors of the company only, with whom they have hardly any, or even no, common interest. However, one will find oneself with one or several classes of "dual capacity" creditors who, often quite ready to accept the arrangement insofar as it concerns their claim against the company, will nevertheless reject it due to the release of their claim against the officers and will thus obstruct the will of the company's creditors, the only persons with whom the Act is concerned.

[7] In short, the Act will have become the *Companies' and Their Officers and Employees Creditors Arrangement Act* — an awful mess — and likely not attain its purpose, which is to enable the company to survive in the face of *its* creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

[8] I have taken cognizance of the opinion of Judge Delisle. I share his conclusion on the aspect of the classification of unsecured creditors used by the respondent for the purposes of voting on the arrangement proposed to the creditors under the *Companies' Creditors Arrangement Act* [1] [the "Act"], but by taking a different route. As regards the inclusion in this arrangement of clauses that the appellants claim are foreign to the spirit of the Act, I am of the opinion that clauses 5.3 and 12.6 could not be sanctioned as drafted and that clause 12.9 does not fit within the framework of an arrangement.

[9] 1- Classification of the creditors

[9] The Act provides, in section 6, that the votes of the creditors of a company, for the purposes of approval of an arrangement, must be counted by classes. This section provides as follows:

> 6. Where a majority in number representing three-quarters 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 . . .

[9] Section 4 specifically provides that the unsecured creditors may be summoned by classes:

> 4. Where a compromise or an 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 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.
>
> [underlining added]

[10] In this file, all the unsecured creditors voted together, in a single class, despite the fact that sub-classes had been created and that different offers had been made for each of the sub-classes.

[10] The unsecured claims total $275,116,000. The unsecured creditors are mainly the respondent's suppliers, the creditors having litigious claims and the Caisse de dépôt et de placement du Québec [the "Caisse"]. The respondent divided these creditors into six sub-classes and made a different offer to each of them:

> 1. claims of $1,000 or less: payment in full of their claim from a cash fund of $2,500,000 to be advanced by a banking syndicate if the arrangement is sanctioned [the "Fund"].
>
> 2. claims from $1,001 to $5,000: participation in the Fund.
>
> 3. claims from $5,001 to $40,000: participation in the Fund, but to a lesser extent than those of the preceding sub-class, in addition to a stake in the proceeds of realization from a portfolio of lawsuits commenced by the respondent.
>
> 4. claims of more than $40,000: a stake in the proceeds of realization from the portfolio of lawsuits.
>
> 5. litigious claims: same offer as to the creditors in the fourth sub-class.
>
> 6. the Caisse: a stake in the share capital.

[11] In addition, the creditors in sub-classes 2, 3, 4 and 5 are offered an additional stake by the issuance of shares in their favour in accordance with terms different from those offered to the Caisse.

[12] On January 12, 1993, the arrangement was proposed to the unsecured creditors. If all these creditors, in a proportion of 83% in number and of 91% in value, approved the arrangement, which constitutes a favourable vote for the purposes of the Act, that would not have been the result if the vote had been calculated in light of sub-classes. Had the calculation been made according to sub-classes, one notices that the votes of the third [$5,001 to $40,000] and fifth [litigious claims] sub-classes would not have attained the threshold opening the way to sanctioning by the Superior Court.

[13] According to the appellants, the examination of the classification of the creditors constitutes a prior step to the consideration of the fair and equitable character of the arrangement. At this stage, the judge must verify the strict application of the Act.

[14] The appellants argue that the class of unsecured creditors consists of creditors having distinct interests, which is illustrated by the fact that the offer varies dramatically from one sub-class to another. According to them, the differences are so important that there is no commonality of interest between the different creditors and that they should have been called upon to vote separately, as provided for by section 4 of the Act.

[14] The respondent replies that the examination of the classification does not constitute a prior condition, but is only one of the elements that the Superior Court judge must examine in the analysis of the arrangement as a whole. According to it, the first judge has discretion in this regard that must be respected by the Court of Appeal. The respondent states that the judge in first instance was justified in taking into account all the circumstances of the file and, in particular, the clear majority of creditors who voted in favour of the arrangement. It argues that the creditors must be classified according to their legal interests and the means of realization available to them and not according to the offer that was made to them. As the unsecured creditors have in common the fact that they have no security and that in the event of bankruptcy no dividend would be available, the respondent argues that it was within its rights to call upon all the sub-classes of unsecured creditors to vote together.

[15] The principles invoked by the parties in support of their positions have their source in the same cases but each party interprets them in his own way.

[16] One can extract from the case *Alabama, New Orleans, Texas & Pacific Junction Railway, Re*[2] the rules that should guide a judge called upon to sanction an arrangement. Lord Lindley stated them as follows:

> The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting **bona fide**, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it.[3]

[17] This dictum of Lord Lindley is frequently repeated by the courts[4] (4) and highlights the three distinct steps to follow when an arrangement is being sanctioned by the Superior Court:

1. Verification of the formalities provided for in the Act;

2. Verification of respect of the rights of the minority by the majority;

3. Assessment of the fair and reasonable character of the arrangement.

[18] The steps proposed by Lord Lindley clarify the discussion relating to the criterion for intervention by a court of appeal.

[19] In the analysis of the fair and reasonable character of an arrangement, the respondent is correct in asserting that the Superior Court judge has wide-ranging discretionary power because his very role is to assess all of the circumstances that may lead to an arrangement.

[20] However, it cannot be this way for the analysis of compliance with the Act. Indeed, the examination of the method followed to summon the creditors or of the percentage required for the purpose of approving the arrangement are elements that leave little room for discretion. For example, a judge could not rely on his discretion to modify the percentage levels set out in section 6 of the Act.

[21] Similarly, it is difficult to conceive that the examination of the making up of the classes, which is generally the subject of the contestation at the second step, can give rise to an assessment that takes into consideration the arrangement as a whole, as contended by the respondent. Before verifying whether it is acceptable, the making up of the classes must be examined.

[22] The first two steps mentioned by Lord Lindley must therefore be examined in a distinct way. They are elements which may be considered as prior conditions, as was done by Judge Middleton in *Dairy Corp. of Canada, Re*, one of the first reported Canadian disputes under the Act:[5]

> Upon this motion I think it is incumbent upon the Judge to ascertain if all statutory requirements that are in the nature of conditions precedent have been strictly complied with and I think the Judge also is called upon to determine whether anything has been done or purported to have been done which is not authorized by this statute. Beyond this there is, I think, the duty imposed upon the Court to criticize the scheme and ascertain whether it is in truth fair and reasonable.
>
> (Underlining added)

[23] The issue of the classification of the creditors has drawn the attention of the courts on numerous occasions. All the cases submitted by the parties are inspired by *Sovereign Life Assurance Co. v. Dodd* (1892), [1891-94] All E.R. Rep. 246 (Eng. C.A.) with, however, more or less coherent results.[6]

[24] In the *Sovereign Life* case, the Court of Appeal of England had to rule on the right of a creditor to set up compensation for a debt due by a company before the approval of a plan of arrangement by the creditors. The plan had been approved by the required majorities of the creditors consisting of insured persons whose indemnities were due and holders whose policies

had not yet expired. The comments of Lord Esher highlight the importance of the classification of creditors. Here is how he expressed himself:

> "The Act provides that the persons to be summoned to the meeting, all of whom, it is to be observed, are creditors, are persons who can be divided into different classes, classes which the Act recognizes, though it does not define. The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors composing the different classes have different interests, and, therefore, if a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes." [7]
>
> (underlining added)

[24] On the same subject, in the same matter, Lord Bowen wrote the following:

> "The word "class" used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a "class of creditors" to be summoned. It seems to me that we must give such a meaning to the term "class" as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. That being so, in considering the deed of arrangement made with the company which took over the business of the plaintiff company, we must so construe it as not to include in one class those persons whose policies had already ripened into debts and those whose policies might not ripen into debts for some years. The position of a person like the defendant, to whom an ascertained sum of $2,000 was due from the company, was quite different from the position of those policy-holders whose future was entirely uncertain. It was not, therefore, right to summon to a meeting, as members of one and the same class of creditors, those who had an absolute bar to a claim by the company against them and those who had not." [8]
>
> (underlining added)

[25] In establishing the classes of creditors, a company must therefore seek to group together the creditors having between them not identical or equal interests, but common interests. The criterion of identity of interests was specifically rejected by the Alberta Court of Queen's Bench in the case of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*. [9] The following comments of Judge Forsyth can be adopted without reserve:

> "These comments may be reduced to two cogent points. First, it is clear that the C.C.A.A. grants a court the authority to alter the legal rights of parties other than the debtor company without their consent. Second, the primary purpose of the Act is to facilitate reorganizations and this factor must be given due consideration at every stage of the process, including the classification of creditors made under a proposed plan. To accept the "identity of interest" proposition as a starting point in the classification of creditors necessarily results in a "multiplicity of discrete classes" which would make any reorganization difficult, if not impossible, to achieve." [10]

[26] The grouping may be made according to commercial interests, [11] security interests or priorities of which certain creditors have the benefit, [12] the offer made to different creditors [13] or according to any other commonality, provided that the interests of the minority creditors are not "confiscated". Judge Kingstone expressed himself in this way in the case of *Wellington Building Corp., Re*, [14] a judgement that closely follows the *Dairy* case and follows the same philosophy:

> It was never the intention under the Act, I am convinced, to deprive creditors in the position of these bondholders of their right to approve as a class by the necessary majority of a scheme propounded by the company which would permit the holders of junior securities to put through a scheme inimicable to this class and amounting to confiscation of the vested interest of the bondholders.

[27] The appellants argue that the arrangement proposed by the respondent does not permit the different creditors to consult each other because they have no commonality of interest. They point out that the creditors whose claims have been classified as litigious claims (including themselves for nearly $2 million), and who have been offered only a possible dividend coming from the realization of the litigation portfolio and the issuance of shares, have nothing in common with the creditors for less than $1,000 who will be paid at 100%. The creditors whose claims are litigious refused the arrangement in a proportion of 93%.

[28] The respondents reply that the unsecured creditors could legitimately be grouped in one class because they have the same legal interest in that their claims are not guaranteed and none of them would receive any dividend should the respondent be liquidated under the Bankruptcy Act. [15]

[29] The simple fact that the unsecured creditors have the same legal interest is not sufficient to include them in the same class since that would deny the meaning of the words "or any class of them" (unsecured creditors) in section 4 of the Act. This interpretation would also ignore all the case law outlined above. Nor is the Court satisfied with the argument to the effect that the arrangement brings more to the creditors than a forced liquidation. Indeed, it is obvious that any arrangement must theoretically bring more to the creditors than would a liquidation. That is not to say that any arrangement must be sanctioned; it still must comply with the conditions set out in the Act, not include any element oppressing the minority and be reasonable. [16]

[30] To note that two sub-classes do not meet the thresholds set out in section 6 of the Act is not in itself decisive because the classification must not be done according to the possible outcome of a vote, which would clearly be a manipulation of the classes.

[31] The study of the proposed arrangement reveals that if 1,200 creditors whose claims total approximately $416,000 [17] are paid in full, this constitutes only a small percentage of the $275,116,000 [18] representing the total of the unsecured claims, that is, 0.15%. Even if the different treatment given to the creditors for less than $1,000 presents an attractive argument, it is not wise to stop there.

[32] If the creditors for less than $1,000 are set aside because they are quantitatively marginal, there remain elements of the offer that are common to a large number of creditors.

[33] The creditors in the second and third sub-classes certainly have points in common since they are being offered both a participation in the Fund and shares. Those of the fourth and fifth sub-classes are all being offered a stake in the portfolio of lawsuits and shares.

[34] There is, in these groupings, a definite community of interests. The distinction is at the level of participation in the Fund as opposed to the portfolio of lawsuits. However, if the Fund theoretically could have been put at the disposal of all the unsecured creditors in the same proportion, the benefit would have been so diluted that it would have lost its practical interest. Therefore, participation in the Fund should not be used to conclude that there is a conflict between the interests of the creditors in sub-classes 2, 3, 4 and 5.

[35] The Caisse has little in common with the other creditors. It has not been argued that its vote could have been decisive and the results filed in the record do not seem to support such an argument. In addition, no one has claimed that the offer made to it should have been made to the other creditors.

[36] The case law did not impose on the respondent a grouping according to similarity of offer. It had to classify the creditors according to interests that were not so dissimilar that they prevent effective consultation or that they unduly oppress the minority interests. On one hand, the treatment offered to sub-class 3 is similar to that offered to sub-class 2 and, on the other, the offer made to sub-class 5 is the same as that made to sub-class 4. The fact that sub-classes 3 and 5 did not attain the minimum thresholds does not constitute oppression or a confiscation of their rights. They were not sufficiently different that they could not consult each other with a view to a vote with sub-classes 2 and 4.

[37] It was therefore not necessary to consider each sub-class independently for voting purposes, which, moreover, would have had the effect of unduly multiplying the classes. [19]

[38] 2. *Inclusion in the arrangement of clauses foreign to the spirit of the Act*

[38] Clauses 5.3 and 12.6 provide as follows:

> [translation] "5.3 The Plan of arrangement approved by the Creditors and sanctioned by the Court constitutes a contract binding the Company to each of the Creditors of each of the classes respectively and, except where it does not in any manner modify the already existing obligations of the Company, and except . . . "
>
> [translation] 12.6 "**Consents, renunciations and agreements**
>
> At the time of the Sanction, every Creditor shall be deemed to have consented to all the provisions contained in the Plan in its entirety. In particular, each of the Creditors shall be deemed
>
> a) to have executed, signed and delivered to the Company all consents, renunciations, releases and assignments, statutory or otherwise, required to put in place and carry out the Plan;
>
> b) to have renounced to any default of the Company mentioned in any provision, express or implied, provided for in any contract or agreement, written or verbal, existing between such Creditor and the Company, that occurred at any time before the date of the Sanction; and
>
> c) in the event that there is any conflict between any provision, express or implied, provided for in any contract or agreement, written or verbal, existing between such Creditor and the Company at the date of the Sanction (other than those concluded by the Company or taking effect at the date of the Sanction) and the provisions of the Plan, to have consented to the provisions of the Plan taking precedence over those of such contracts or agreements and the latter are amended accordingly."

[39] The appellants contest the inclusion in the arrangement of clauses 5.3, 12.6 and 12.9, considering them to be foreign to the spirit of the Act and arguing that they cannot be imposed on creditors within the framework of an arrangement proposed under the Act. The arguments relating to clauses 5.3 and 12.6 are somewhat different from those relating to clause 12.9 because the former concern the effect of the arrangement on the rights of the creditors whereas the latter deal with the impact of the arrangement on the obligations of third parties.

[40] The appellants argue that the legal foundation of the arrangement is the Act and not the general theory of obligations and that consequently, one can only include in an arrangement clauses that comply with the parameters of the Act.

[41] Upon reading the contested clauses, one notes that the respondent is trying to clarify the legal consequences of the acceptance of the arrangement by the creditors.

[42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.

[43] To include in an arrangement concepts like those of "contract" (clause 5.3) or of "consent", "renunciation" or "release" amounts to importing therein concepts that are not only foreign but that are contrary to the spirit of the Act.

[44] The text of section 6, reproduced above, provides that if the arrangement is approved by a numerical majority representing 75% in value of the claims of all classes and is sanctioned by the Court, the arrangement *binds* all the creditors, which means that those dissenting do not consent to the arrangement but see it imposed on them.

[45] If the arrangement is imposed on the dissenting creditors, it means that the rules of civil law founded on consent are set aside, at least with respect to them. One cannot impose on creditors, against their will, consequences that are attached to the rules of contracts that are freely agreed to, like releases and other notions to which clauses 5.3 and 12.6 refer. Consensus corresponds to a reality quite different from that of the majorities provided for in section 6 of the Act and cannot be attributed to dissenting creditors.

[46] It is not illegal or prohibited for a company to take advantage of a meeting summoned under the aegis of the Act to conclude, with its creditors, agreements that are parallel to the arrangement or superimposed on it. In this sense, a company may ask its creditors to consent to benefits for it that go beyond the framework of the Act such as being " . . . deemed . . . to have renounced to any default of the Company mentioned in any provision, express or implied, provided for in any contract or agreement, written or verbal, existing between such Creditor and the Company, that occurred at any time before the date of the Sanction". [20] This clause is very wide-ranging and may cover defaults that would not be related to the arrangement. These agreements may be valid under the Civil Code and can be set-up against the creditors who consent to them. However, they do not have to be sanctioned by the Superior Court to be enforceable and cannot be set-up against the creditors who do not consent to them. As a corollary, the Superior Court doe not have to affix its seal to them since the civil law does not require its intervention.

[47] Under the Act, the sanctioning judgment is required for the arrangement to bind all the creditors, including those who do not consent to it. The sanctioning cannot have as a consequence to extend the effect of the Act. As the clauses in the arrangement founded on the rules of the Civil Code are foreign to the Act, the sanctioning cannot have any effect on them.

[48] What should a judge faced with these clauses do? Should he refuse to sanction? I believe that he has no choice, because sanctioning would amount to undermining the effect of his judgment. The judgment of the Superior Court must have a final and uniform character. It cannot have a different effect in respect of certain clauses from that which it has in respect of other clauses without leading to confusion as much for the company as for the creditors. Such a judgment would not serve any of the parties involved. I therefore believe that the judge, called upon to sanction an arrangement, cannot give his approval to such clauses.

[48] The second aspect of the appellants' contestation concerns the release by the creditors in favour of the directors, officers, employees and advisors of the respondent. The contested clause states the following:

> [translation] "12.9 **Release**
>
> With effect from the Sanction, each Creditor shall be presumed to have definitively renounced to any lawsuit, to any action and to any recourse that he may have or may have had against the directors, officers, employees and advisors of the Company."

[49] The appellants argue that such a clause does not come within the framework of the Act and should not be included in the arrangement. According to them, the release in respect of the directors "is quite exorbitant and constitutes a serious infringement upon their rights".

[50] The respondent argues that the directors have dedicated all their energy to the respondent since the filing of the proceedings and that it would be unfair and inequitable to put responsibility for the current situation on their shoulders. It compares the planned reorganization to the sale of a business and argues that at the time of a sale it is neither unfair nor exorbitant to provide for a release.

[51] The respondent argues that the clause covers a potential liability that is personal to it because the beneficiaries of the clause are not third parties and that, moreover, it must indemnify its directors and officers both under an internal by-law and under section 123.87 of the Companies Act. [21]

[52] The respondent's position cannot be accepted. One notes that the release provided for in the arrangement covers more wide-ranging obligations than those provided for in the Companies Act or in respondent's internal by-law. Whereas the arrangement imputes a renunciation to any recourse against the directors, officers, employees and advisors, section 123.87 of

the *Companies Act* and the internal by-law only cover the fault of directors and officers sued by a third party for acts done in the performance of their duties.

[52] The judge in first instance opted in favour of the validity of the clause in the following terms:

> [translation] "It is obvious that Steinberg wishes to avoid a legal situation that would allow creditors to do through the back door what is prohibited through the front door. Steinberg's proposal is a proposal that involves the company and its directors. If the company found itself with judgments against its directors for which it had to assume responsibility, it is obvious that those judgments could have an important impact on the plan of arrangement. Once again, it is a global proposal that Steinberg is making to its creditors and it is that proposal which has been accepted under reserve of the restrictions contained in article 9.01 of rule 108 and under reserve of the comments that the Court will draw up in the case of the workers' union. The Michauds' argument is not accepted."

[53] It is difficult to approve the assertion to the effect that the arrangement is a proposal made by the respondent and its directors to respondent's creditors. Even though the Companies Act considers the directors as the agents of the respondent, [22] they are not its alter egos for the purposes of the Act.

[54] The Act offers the respondent a way to arrive at a compromise with its creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.

[55] The case of *Browne v. Southern Canada Power Co.*. [23] provides an example of a dispute arising between a creditor and two guarantors, in that instance the president and the secretary-treasurer of the debtor. They argued that their position had become more onerous due to the modification of the debt due by the debtor further to an arrangement made under the Act. The decision of our Court was unanimous.

[55] Judge Barclay wrote:

> The very special remedies authorized by law for the exclusive benefit of a debtor company are not available to third parties.

[55] Judge Walsh expressed himself more explicitly:

> The Companies' Creditors Arrangement Act, however, intervened in the case of the City Gas Company to grant the company favoured treatment; this Act does not extend its favours to others, who had guaranteed the debt. The appellants cannot claim the benefit of delay that the Act affords to their company, because they became immediately liable by the default of the debtor, with whom they had bound themselves jointly and severally; and they did not demand the benefit of discussion. The appellants cannot set up exceptions personal to their debtor, and The Companies' Creditors Arrangement Act is an exception that favours the company only; nothing was shown to extend its scope to the appellants.

[55] And finally Judge McDougall (ad hoc):

> Such arrangement enured to the benefit of the company not to that of its guarantors.

[56] The possibility of extending the effect of a stay requested under the Act to directors, officers, employees, agents and consultants was studied recently in the case of *Philip's Manufacturing Ltd., Re*. [24] In that case, the debtor did not claim that the Act allowed the directors and others to benefit from the stay, but relied on the Court's inherent powers. The stay was refused to all parties except the debtor.

[57] If an arrangement is imposed on a creditor that prevents him from recovering part of his claim by the effect of the Act, he does not necessarily lose the benefit of other statutes that he may wish to invoke. In this sense, if the Civil Code provides a recourse in civil liability against the directors or officers, this right of the creditor cannot be wiped out, against his will, by the inclusion of a release in an arrangement.

[58] The Act and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is.

[59] Moreover, it is doubtful that the sanctioning of the arrangement can be considered definitive regarding the release given to the directors, as another party, the Syndicat des travailleurs unis de l'alimentation et du commerce, also contested the validity of clause 12.9 of the arrangement. The judge in first instance referred the Syndicat's contestation to another judge of the Superior Court. It is difficult to conceive of the clause being valid as regards the appellants but possibly held invalid as regards the Syndicat.

[60] However, for the purposes of the present appeal, this clause is considered as departing from the Act. The file should be returned to the judge in first instance in order that he grant, if necessary, the orders allowing the respondent to amend its proposal.

[61] For these reasons, I would propose to grant the appeal in part, to declare that clauses 5.3 and 12.6 could not be sanctioned as drafted, to declare that the release contained in clause 12.9 does not fit the framework of an arrangement and to return the file to the judge in first instance to issue the appropriate orders, the whole with costs.

***Jacques Delisle, J.A.*:**

[62] The appellants, brothers Pierre and Philippe Michaud, appeal against a judgement rendered on March 24, 1993 by the Superior Court for the District of Montreal that, among other things, sanctioned the definitive arrangement proposed by the respondent to its creditors under the Companies' Creditors Arrangement Act (R.S.C., 1985, c. C-36) hereinafter referred to as the "CCAA".

[63] That arrangement had previously been approved by the respondent's creditors at a meeting held on January 12, 1993 after having undergone, on earlier dates, various amendments required by the creditors. The approval of the creditors, in accordance with their classification proposed in the arrangement, satisfied the requirements set out in section 6 of the CCAA: a numerical majority, representing three-quarters in value, of the creditors present and voting either in person or by proxy.

[64] The class grouping the unsecured creditors, as defined in section 2 of the CCAA, covered about 3,000 creditors, including the two appellants, having claims in excess of $400,000,000. Among the 1,591 of these creditors, having total claims of $375,715,931.13, who were present at the meeting of January 12, 1993 and who voted either in person or by proxy, 1,213 of these creditors, having claims for $325,677,341.20, accepted the arrangement proposed by the respondent (a.f. 7).

[64] The appellants argue that the judge in first instance committed an error by not declaring the nullity of the arrangement for the following reasons:

a) it did not provide for separate votes by sub-classes of the unsecured creditors; and

b) the illegality of its clauses 5.3,12.6 and 12.9.

[65] The appellants, without success, raised the same arguments before the court of first instance at the time of the presentation of the respondent's motion for sanctioning of its arrangement.

[66] The analysis of the issues raised by the appellants against such a sanctioning should be carried out in light of, firstly, the purpose of the CCAA and, secondly, the principles governing the role of the court seized of a motion for the sanctioning of an arrangement proposed under this statute.

PURPOSE OF THE CCAA

[67] In the case of *Multidev Immobilia Inc. v. S.A. Just Invest*, [1988] R.J.Q. 1928 (C.S. Que.), Mr. Justice Parent recalled the goal aimed at when the statute was enacted (p. 1930):

[translation] "It is in order here to recall that the Companies' Creditors Arrangement Act was enacted during the Depression to allow companies in financial difficulty, debtors under bonds or other outstanding debt security, to make agreements with their creditors, to settle their problems outside the mechanisms provided for in the Bankruptcy Act and the Liquidations Act. It is a statute of "equity" which promotes arrangements between such a company and all its creditors."

[67] Over the years, this curative character of the CCAA was confirmed by the case law, so that today there is unanimous recognition of the statute's raison d'être:

"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 . . . " Hongkong Bank v. Chef Ready Foods (1991) 4 C.B.R. (3d) 311 (B.C.C.A.) (p. 315)

" . . . 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: . . . "

Nova Metal Prods v. Comiskey (Trustee of), [1991] 1 C.B.R. (3d) 101 (O.C.A.) (p.122)

[translation] **"The statute wants to permit a debtor company to submit a reorganization plan to all its creditors . . . "**

Banque Laurentienne du Canada v. Groupe Bovac Ltée (1991) R.L. 593 (C.A.) (p.613)

[68] The first purpose of the CCAA was thus to offer companies that satisfied its terms of application an alternative to certain other statutes having more radical effects, the ultimate objective being to allow such companies to survive financial difficulties, with the agreement of their creditors.

[69] Precisely because of the goal sought, the CCAA should be interpreted liberally. A company that has recourse to this statute should be able to attain its objective.

[70] It is from this perspective that a court seized of a motion for sanctioning of an arrangement should exercise its role.

ROLE OF THE COURT ON A MOTION FOR SANCTIONING OF AN ARRANGEMENT

The case law on the subject is well established. The following principles emerge from it:

a) the first duty of the court is to assure itself that the arrangement has been accepted by the creditors in accordance with the requirements of section 6 of the CCAA: a numerical majority representing three-quarters in value of the creditors or of a class of creditors, as the case may be, present and voting either in person or by proxy at a meeting duly called for that purpose; In *Dorman, Long & Co., Re*, [1934] 1 Ch. 635 (Eng. C.A.) (p.655); *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) (p.182);

b) the court must thereafter assure itself of the reasonable character of the arrangement; it must be beneficial to both parties present; In *Alabama, New Orleans, Texas & Pacific Junction Railway, Re* (1890), [1891] 1 Ch. 213 (Eng. C.A.)(p.243); In *English, Scottish & Australian Chartered Bank, Re*, [1893] 3 Ch. 385 (Eng. C.A.) (p.408); in the first of these cases, Lord Bowen defines what must be understood as a reasonable arrangement (p.243):

"A reasonable compromise must be a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it . . . "

c) the court should not substitute its own assessment of the arrangement to that of the creditors: *Langley's Ltd., Re*, [1938] O.R. 123 (Ont. C.A.) (p.142); *Carruth v. Imperial Chemical Industries Ltd.*, [1937] A.C. 707, [1937] 2 All E.R. 422 (U.K. H.L.) (p.770);

d) however, the court must assure itself, and this is surely the most important part of its role, that a minority of creditors is not the object of coercion on the part of the majority or forced to accept unconscionable conditions:

" . . . In reviewing the arrangement, the Court is placed under an obligation to see that there is not within the apparent majority some undisclosed or unwarranted coercion of the minority who may not have voted or who may have been opposed . . . "

Re Gold Texas Resources Ltd, British Columbia Supreme Court, A883238, (judgement of February 14 1989; Judge McLachlin);

" . . . The court's role is to ensure that creditors who are bound unwillingly under the Act are not made victims of the majority and forced to accept terms that are unconscionable . . . "

Re Keddy Motors Inns Ltd., [1992] 13 C.B.R. (3d) 245 (N.S.C.A.) (p.258).

[71] It is now appropriate to move on to the grounds invoked by the appellants in support of their appeal.

THE ARRANGEMENT DOES NOT GRANT A SEPARATE VOTE TO EACH CLASS OF UNSECURED CREDITORS

The CCAA essentially provides for two classes of creditors: unsecured and secured. However sections 4 and 5 clearly imply that within one class it is possible to create categories:

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them . . .

5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them . . .

In the present case, the arrangement provides, in its section 5.4, for four classes of creditors:

[translation] "The Plan of arrangement proposes the establishment of four (4) classes of creditors: the Secured Creditors, the Crown and the Municipalities, the Unsecured Creditors and the SDI."

[72] It is for the sake of convenience that the "SDI" and "the Crown and the Municipalities" classes were created, because these creditors could have been, as the case may be, listed in one or the other of the other two classes.

[72] The "unsecured creditors" class is, in sections 8.3 to 8.3.5, divided into six sub-classes:

a) creditors having a claim of $1,000 or less;

b) creditors having a claim of more than $1,000 and less than $5,000;

c) creditors having a claim of more than $5,000 and less than $40,000;

d) creditors having a claim of more than $40,000;

e) persons having litigious claims, whose claim has not been valued definitively at the Date of Payment, as this expression is defined in section 1.1 of the arrangement;

f) the Caisse de dépôt et de placement du Québec and the Société des alcools du Québec.

[72] Despite this creation of sub-classes of unsecured creditors, section 5.4.1 of the arrangement provides that:

[translation] **"5.4.1 The division into sub-classes, if applicable, has been made only for the sake of convenience and to facilitate the explanations but has no effect on the calculation of votes."**

[73] This is precisely what the appellants are complaining about.

[73] As mentioned above, it is inferred from sections 4 and 5 of the CCAA that it is permissible to sub-classify a class of creditors. But then, one of two things:

• either the terms of the arrangement are substantially the same for the whole of the class covered and this way of proceeding is only for the purpose of adequately grouping the creditors, thus permitting, on the one hand, more rational interventions toward each class of them and, on the other hand, more relevant discussions between persons having similar claims; in this case, no one can complain about the fact that the votes are computed as if there was only one class;

• or the terms of the arrangement differ from one class to the other, while considering, for the purpose of computing the votes, only the global result; it is then appropriate to seriously analyze the reason for and the consequences of this way of proceeding; if the objective sought (which may not be obvious), achieved in practical terms, is to confiscate the rights of the minority creditors for the benefit of the majority creditors, then the arrangement cannot be qualified as fair or reasonable (*Dairy Corp. of Canada, Re*, [1934] 3 D.L.R. 347 (Ont. C.A.) (p.349); on the other hand, if the sub-classification is only to group creditors who can anticipate results identical to those proposed to the other classes, but having to get there by different routes with, perhaps, as the only inconvenience, a question of time, then there is nothing unconscionable in there being a global computation of the votes.

[74] In the present case, the appellants, claiming to have a right to a claim of almost $2,000,000, were classified in the class of "persons having litigious claims, whose claim has not been valued definitively at the Date of Payment".

[75] It appears from the relevant sections of the arrangement (8.3.3, 8.3.4 and 8.3.2) that the fate reserved for these persons is similar to that proposed for the class grouping the creditors having a claim of more than $40,000.

[76] Although the arrangement does not specify it (it did not have to do so), it is obvious that if the claim of such a person is definitively valued before the Date of Payment, the creditor will automatically fall into one of the three classes mentioned above, defined according to the value of the claim.

[77] The appellants therefore not being treated differently from the other creditors, section 5.4.1 of the arrangement is not coercive in their regard.

[78] The only class of unsecured creditors to who is reserved a payment really different from that proposed to the other classes of such creditors is the class grouping the creditors having a claim of $1,000 or less, proved at the Date of Payment.

[78] The amount of money that such class involves, $416,000, is so unimportant relative to the total amount of the claims, in excess of $400,000,000, that I fully endorse the views expressed on this subject by the judge in first instance:

[translation]" . . . Much is made out of the fact that the unsecured creditors for less than $1,000 would be paid cash on the nail. The Court sees nothing abnormal in this proposal, which is no doubt aimed at eliminating a group of small creditors and thus saving time, energy and money dealing with theses claims that are, all in all, unimportant. It is obvious that these creditors are already won over to the plan of arrangement since they will be paid in full. The Court cannot see in this sub-categorization any Machiavellian plan aimed at obtaining a majority of the creditors' votes. Moreover, it must be acknowledged that these creditors have little importance for the vote in value of the mass."

[79] The following table, attached to the arrangement, illustrates the equitable treatment proposed to the different classes of unsecured creditors, in general, and to that class which includes the appellants, in particular (a.f. 270):

[80] *4.- Unsecured Creditors*

	1 to $1,000	1,001 to $5,000	5,001 to $40,000	$40,000 & +	CDPQ
Common Shares	NO	YES	YES	YES	YES
%	-	26% (A)	26% (A)	26% (A)	14%
Redemption 5 years	-	YES	YES	YES	NO
AND					
Money - $2.5M Payment	YES 100% of claims	YES Prorata of 50% of balance of $2.5M fund	YES Prorata of 50% of balance of $2.5M fund	NO	NO
OR					
Lawsuits $17.5M plus 50% of excess collected	NO	NO	YES	YES	NO

(A) Represents the same 26% for the unsecured creditors taken globally.

[81] Therefore, I reject the first argument in appeal invoked by the appellants.

CLAUSES 5.3 AND 12.6

These clauses provide, respectively, as follows:

> [translation] **"5.3 The Plan of Arrangement approved by the Creditors and sanctioned by the Court constitutes a contract binding the Company to each of the Creditors of each of the classes respectively and, except where it does not in any manner modify the already existing obligations of the Company, and except**
>
> > a) **for the Banking Syndicate whose rights are governed by the credit agreement existing at the date hereof that will be amended by the agreement attached to the Plan and for the short-term Lenders by the renewable credit agreement existing at the date hereof;**
> >
> > b) **for the SDI whose rights are governed by the loan agreement existing at the date hereof that will be modified by an amendment to be entered into between the Company and the SDI and by the letter dated December 11, 1992 which appears in Schedule B hereto;**
> >
> > c) **for the Litigious Claims under reserve of paragraph 8.3 below;**
> >
> > d) **for Toronto-Dominion (California), Inc. (now Toronto-Dominion (Texas), Inc.) ("T-D Texas") whose rights are governed by the loan agreement dated May 1, 1991 between T-D Texas, Saint-Lawrence, Smitty's and Steinberg and the guarantee of Steinberg in favour T-D Texas dated May 1, 1991, the whole as qualified by the agreement dated December 17, 1992 between the said parties and subordination agreements dated May 1, 1991 between SDI, the Caisse, T-D Texas and Steinberg,**
> >
> > **the sanctioned Plan is substituted for the contracts previously made with each of them, constituting novation, the amount of the Dividend being substituted to the amounts due by virtue of the Claims of each of the Creditors and the payment in full of the Dividend being equivalent to a full and final release in favour of the Company."**
>
> [translation] **"12.6 Consents, renunciations and agreements**

> **At the time of the Sanction, every Creditor shall be deemed to have consented to all the provisions contained in the Plan in its entirety. In particular, each of the Creditors shall be deemed**
>
> a) **to have executed, signed and delivered to the Company all consents, renunciations, releases and assignments, statutory or otherwise, required to put in place and carry out the Plan;**
>
> b) **to have renounced to any default of the Company mentioned in any provision, express or implied, provided for in any contract or agreement, written or verbal, existing between such Creditor and the Company, that occurred at any time before the date of the Sanction; and**
>
> c) **in the event that there is any conflict between any provision, express or implied, provided for in any contract or agreement, written or verbal, existing between such Creditor and the Company at the date of the Sanction (other than those concluded by the Company or taking effect at the date of the Sanction) and the provisions of the Plan, to have consented to the provisions of the Plan taking precedence over those of such contracts or agreements and the latter are amended accordingly."**

The appellants are not very communicative in their factum about this ground of appeal, limiting themselves to writing:

> **[translation] "The effect of a plan of arrangement is stated by the CCAA. One cannot and should not attempt to insert clauses attempting to do more. The admissions that are attempted to be inserted can have dramatic effect on certain creditors in their relations with third parties. One cannot force them to admit that they have performed the acts stated in paragraph 12.6. For the reasons stated above, the Plan of Arrangement has its effect by the Act."**

[82] One must distinguish between the two clauses.

[82] I do not see anything in clause 12.6 that justifies refusing to sanction the arrangement. However, I agree that this clause is susceptible of conveying a wrong message. It is not further to a consent deemed to have been given by all the creditors that the arrangement produces the effects enumerated in paragraphs a), b) and c) of this clause, but rather, on the one hand, by the effect that the CCAA grants, in its section 6, to an arrangement sanctioned by the authority having jurisdiction and, on the other hand, by the priority granted by the same statute, in its section 8, over any stipulation previously agreed to by the parties:

> **6. . . . 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 bankruptcy order has been made under the *Bankruptcy Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.**
>
> **8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.**

[83] Clause 5.3 raises difficulties. It spreads an erroneous perception of an arrangement, which the judge in first instance took up in his judgement.

[83] The first and last words of this clause provide as follows:

> [translation] **"5.3 The Plan of Arrangement approved by the Creditors and sanctioned by the Court constitutes a contract binding the Company to each of the Creditors of each of the classes . . .**
>
> **. . .**

. . .

the sanctioned Plan is substituted for the contracts previously made with each of them, constituting novation, the amount of the Dividend being substituted to the amounts due by virtue of the Claims of each of the Creditors and the payment in full of the Dividend being equivalent to a full and final release in favour of the Company."

[83] The judge in first instance took up this idea:

[translation] " A plan of arrangement is first and foremost an offer by a company to its creditors that will become a contract upon acceptance by the latter. For this contract to become enforceable, notably against those who oppose it or abstain, there must be, on the one hand, acceptance by the statutory majority provided for in the CCAA (and that is the case) and the sanction by the court."

[84] It is true that an arrangement is an offer that, to be submitted to the authority having jurisdiction to sanction it, must be accepted by the creditors in the proportions required by the CCAA, but it is not correct, with respect, to qualify the resulting legal situation as a "contract binding the parties". The consequence of the sanctioning of an arrangement is to render it enforceable by the sole effect of the law, not to make compulsory the stipulations flowing from a contract.

[85] This distinction has its importance. It was emphasized by Mr. Justice Jacobs of the Australian New South Wales Court of Appeal in the case of *Hill v. Anderson Meat Industries Ltd.*, [1972] 2 N.S.W.L.R. 704 (New South Wales C.A.) (p.706):

What has been submitted to this Court is that by the terms of the scheme, particularly cl. 3 which I have set out, the debt owing by the packing company to Mrs. Hill was extinguished. Next, because a guarantee is an accessory obligation, upon the extinguishment of the principal indebtedness the guarantee goes also, as a result of the fact that there is no principal debt to which the accessory liability can attach. It is conceded, as of course it must be, that these principles do not apply where the obligation is extinguished by operation of law, as for instance in the case of bankruptcy or the winding up of a company, but it is submitted that the obligation in the present case is not extinguished by operation of law but rather is extinguished by the terms of the scheme which impose not only upon those creditors who assent to it, but upon all creditors, the effect of the document which constitutes the scheme. In this way it is submitted that the cases which are referred to by Street J. are distinguishable.

The argument is not substantially different from that which was propounded before the judge at first instance. He rejected it upon the ground that there is in fact a discharge of the obligation by operation of the law. I agree with this conclusion. Mrs. Hill was never party to the release of the obligation. The release came through the operation of a law which bound her as though she were a party. This seems to me in principle to be within that line of authority which so clearly establishes that the extinguishment of a principal obligation, when it is brought about by operation of law, does not result in a discharge of the surety.

[86] Despite the erroneous concept contained in clause 5.3 of the arrangement, I am not of the opinion that it is necessary to intervene. The error is not such that it should result in refusal to sanction the arrangement.

[87] It appears, on the one hand, from the juxtaposition of the first and last paragraphs of clause 5.3 and, on the other, from the very purpose of the arrangement, that the novation stipulated therein is limited to the amount of the Dividend, which is substituted to any other amount due to each of the creditors by virtue of his claim. Even so, that clause only expresses the effects of the CCAA. The word "novation" must not, here, be understood as a situation resulting from a contractual process, but as the result, by the effect of a statute, of the sanctioning of an arrangement.

[88] It is not because the judge in first instance sanctioned that clause, without having clarified it, that he extended the effects of the statute.

[89] Therefore, the ground of appeal based on the illegality of clauses 5.3 and 12.6 is rejected.

CLAUSE 12.9

That clause provides as follows:

> [translation] **"12.9 Release**
>
> **With effect from the Sanction, each Creditor shall be deemed to have definitively renounced to any lawsuit, to any action and to any recourse that he may have or may have had against the directors, officers, employees and advisors of the Company."**

The judge in first instance, among other things, wrote the following about this clause and the arguments raised with regard to it by the appellants, then called 'the Michauds":

> **[translation] "The Michauds maintain that the effect of this release is to extend the effects of the plan of arrangement to third parties, which would be illegal. The Court does not agree with this assertion. As we shall see further on in this judgement, the plan of arrangement constitutes an offer by the debtor to all of its creditors to freeze at a point in time the whole of a legal situation and to enable the company to continue carrying on its activities or certain of its activities in the best interests of the company and its creditors. Steinberg filed an extract from by-law 108 of the By-law relating to the general conduct of the affairs of Steinberg Inc. Section 9 of such by-law provides as follows:**
>
> **9.01 The company shall assume the defence of its directors and/or officers sued by a third party for acts in the performance of their duties and the company shall pay, if need be, the damages resulting from such acts, unless the directors and/or officers have committed gross misconduct or a personal fault separable from the performance of their duties.**
>
> **It is obvious that Steinberg wishes to avoid a legal situation that would allow creditors to do through the back door what is prohibited through the front door. Steinberg's proposal is a proposal that involves the company and its directors. If the company found itself with judgments against its directors for which it had to assume responsibility, it is obvious that those judgments could have an important impact on the plan of arrangement. Once again, it is a global proposal that Steinberg is making to its creditors and it is that proposal which has been accepted under reserve of the restrictions contained in article 9.01 of rule 108 and under reserve of the comments that the Court will draw up in the case of the workers' union. The Michauds' argument is not accepted."**

In their factum, the appellants argue as follows against this clause 12.9 of the arrangement (a.f. 21 and 27):

> **[translation] "In the context of a C-36, and more particularly in the context of a plan of arrangement that has the effect of coordinating the formal liquidation of the assets of Steinberg, a release of the directors who led Steinberg to insolvency is quite exorbitant and a serious infringement of the rights of the appellants and every other person under Quebec's jurisdiction.**
>
> **. . .**
>
> **. . .**
>
> **. . .**
>
> **In this instance, it is not a suspension but rather a release in favour of the directors. Thus, a recourse against third parties is eliminated. Nothing in statute C-36 or in the inherent powers of the Superior Court authorizes it to sanction release clauses in favour of third parties to the company. Since this clause did not comply with statute C-36, in accordance with the criteria in the Re Dairy case, supra, the appellants respectfully maintain that the Court should have refused to sanction it."**

For its part, the respondent maintains:

> a) that it is not in a process of liquidation, but rather of reorganization; it invokes, in this regard, the judgement rendered in this file by the Superior Court on June 26, 1992;
>
> b) that it would be unfair and inequitable to put responsibility for its current situation on the shoulders of the directors;
>
> c) that the possible claims to which the appellants refer are only pure speculation and hypothetical;
>
> d) that it has an interest in inserting this clause since, both under section 9 of its By-law 108 and section 123.87 of the Companies Act (R.S.Q. c. C-38), it could be required to indemnify its directors, officers and agents;
>
> e) that the clause is not contrary to public order and comes within freedom of contract.

[90] The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this act that these terms encompass all that should enable the person who has recourse to it to fully dispose of his debts, both those that exist on the date when he has recourse to the statute and those contingent on the insolvency in which he finds himself. From this latter perspective, I can easily understand that this person wishes, by means of a clause provided for in its arrangement, directed at the persons whom it must indemnify, to shelter itself from their recourses in warranty.

[90] Here, however, that is not what the respondent has done in clause 12.9 of its arrangement. Rather, it requests that its creditors renounce any right of action against its directors, officers, employees and advisors:

> **[translation] "With effect from the Sanction, each Creditor shall be deemed to have definitively renounced to any lawsuit, to any action and to any recourse that he may have or may have had against the directors, officers, employees and advisors of the Company."**

[91] The question is whether that clause should be sanctioned.

[92] This question must receive a negative answer.

[93] The clause, as drafted, contains no restriction. It prevents the respondent's creditors from suing the persons therein referred to for any reason whatsoever, even for "a personal fault separable from the performance of their duties" (though this is an exception provided for in section 123.87 of the Companies Act and section 9.01 of the respondent's By-law 108).

[94] The judge in first instance should have realized the excessive impact of this clause and intervened.

CONCLUSIONS

[95] I would reject the grounds of appeal based, on the one hand, on the invalidity of the vote of the unsecured creditors and, on the other hand, on the illegality of clauses 5.3 and 12.6 of the arrangement, I would accept the ground of appeal based on the invalidity of clause 12.9 of the arrangement and, for this reason, quash the judgement in first instance and return the file to the judge in first instance to, if necessary, issue the appropriate orders, with costs in both Courts.

Appel accueilli en partie/Appeal allowed in part.

Footnotes

1 R.S.C. c. C-36.

2 (1890), [1891] 1 Ch. 213 (Eng. C.A.).

3 Supra note 2 at 239.

4 *Campeau Corp., Re* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.); *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.); *Dairy Corp. of Canada, Re*, [1934] 3 D.L.R. 347 (Ont. C.A.).

5 Supra note 4.

6 *Keddy Motor Inns Ltd., Re* (1992), 110 N.S.R. (2d) 246, 299 A.P.R. 246, 13 C.B.R. (3d) 245 (N.S. C.A.) and *Fairview Industries Ltd., Re* (1991), 109 N.S.R. (2d) 32, 297 A.P.R. 32 (N.S. T.D.), where even the criterion of community of interests is departed from.

7 Supra note 6 at 249-250.

8 Supra note 6 at 251-252.

9 (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.).

10 Supra note 10 at 28.

11 *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282, 1 C.B.R. (3d) 101 (Ont. C.A.).

12 *Wellington Building Corp., Re* (1934), 16 C.B.R. 48 (Ont. S.C.), *NsC Diesel Power Inc., Re* (1990), 97 N.S.R. (2d) 295, 258 A.P.R. 295, 79 C.B.R.(N.S.) 1 (N.S. T.D.)

13 *La Lainiere de Roubaix S.A. v. Glen Glove & Hosiery Co. Ltd.* (1925), 1926 S.C. 91 (Scotland I.H.).

14 Supra note 13 at 54 and comments of Judge Bowen in Sovereign, supra note 9.

15 R.S.C. c. B-3.

16 Supra note 2, Alabama.

17 Affidavit of P. Bertrand, December 22, 1992, paragraph 19, a.f. at 426.

18 List of creditors attached to the arrangement a.f. at 269.

19 Comments of Judge Forsyth in Norcen, supra note 10 and comments of Judge Kingstone in Wellington, supra note 13.

20 Clause 12.6(b) of the arrangement.

21 R.S.Q. c. C-38.

22 Supra note 22, section 123.83.

23 (1941), 23 C.B.R. 131 (C.A. Que.).

24 [1991] B.C.J. No. 2932 (B.C. S.C.).

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COURT FILE NO.: 04-CL-5306
DATE: 20051004

SUPERIOR COURT OF JUSTICE – ONTARIO
(Commercial List)

See para. 7

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

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

BEFORE: FARLEY, J.

COUNSEL: Michael E. Barrack, James D. Gage and Geoff R. Hall for the Applicants

Robert Thornton and Kyla Mahar for the Monitor

Sean Dunphy and Ashley John Taylor for CIT/DIP Lender

John R. Varley for Salaried Active Employees

Paul G. MacDonald and Brett Harrison for the Informal Independent Convertible Debenture Committee

Gale Rubenstein and Fred Myers for the Province

Murray Gold and Andrew Hatnay for Salaried Retirees

William V. Sasso for Georgian Windpower Corporation

Kevin J. Zych, Richard Orzy and Rob Staley for the Informal Committee of Senior Debentureholders

Sharon L.C. White for USW Local 1005

Ken Rosenberg and Lily Harmer for USW International

David P. Jacobs for the USW Locals 5328 and 8782

Peter Jervis for a Group of Equity Holders

Aubrey Kauffman for Tricap Management Ltd.

Virginie Gauthier for Fleet Global

Lara Edwards and Ken Kraft for EDS Canada Inc.

HEARD: October 3, 2005

E N D O R S E M E N T

[1] This endorsement deals with the motions for a meeting order, an order supplementing the claims procedure order, an order confirming the engagements by Stelco of UBS and BMO Nesbitt, an order authorizing Stelco to enter into the Stelco Plan Restructuring Agreement with the Province, an order authorizing Stelco to enter into the Stelco/Tricap Restructuring Agreement and ancillary relief, an order authorizing Stelco to enter into a Stelco/USW Restructuring Agreement and an order extending the stay until December 2, 2005. This relief was opposed by the informal committee of Bondholders, which opposition was supported by the informal committee of Debentureholders and of shareholders plus Local 1005; otherwise it was generally supported by the other stakeholders or not opposed. Indeed, there did not seem to be any opposition to the stay extension, the meeting order and the claims procedure supplement order (Georgian Windpower will be dealt with separately as to the supplemental order).

[2] I would observe that the Stelco CCAA proceedings have been characterized by impasse upon impasse as the various and different stakeholders from time to time have been unwilling or unable to discuss and negotiate in any meaningful way adjustments which are necessary in the interests of a long term viable Stelco. The liquidity crisis which was foreseen as creating great difficulties for Stelco at the time of its filing for CCAA protection on January 29, 2004 (some 20 plus months ago) has not yet occurred because of a spike in steel prices. That does not mean that Stelco is out of the woods with nothing to worry about. Indeed, there is every good reason to be concerned that this crisis is lying in wait to happen. Steel prices have retreated from their spike but remain higher than January, 2004. Unfortunately, input costs have also significantly increased. It has been recognized by the stakeholders and Stelco that significant capital expenditures have to be made to facilitate the productivity required to ensure that Stelco remains competitive to the highest reasonably possible degree. Unfortunately, we have experienced many false starts in capital raising programs and going concern deals involving new investors. The army has been marched up the hill, only to retreat repeatedly before success (if success is possible) is achieved. It seems to me that Stelco as an ongoing enterprise is getting a little shop worn/shopped worn. It would not be helpful to once again start a new general process to find the ideal situation; rather the urgency of the situation requires that a reasonable solution be found.

[3] At the beginning of this year, the Province of Ontario dropped a bombshell on Stelco with the announcement that the Regulation 5.1 pension contribution holiday would be adjusted so that upon emergence from CCAA, Stelco would be required to fund the deficit within 5 years. When I observed that the initiation of Regulation 5.1 in the early 1990s may not have been all that helpful to the process and that in any event, it was not helpful to have such an announcement, not only was the announcement repeated, but it was also confirmed by the Minister of Finance. It seems to me that one must deal with reality as one finds it, not as one wishes, with the best of intentions and objectives, it to be. Fortunately, the Ontario Government has ameliorated its hard line position and

indeed it has been instrumental in breaking a logjam in respect of the CCAA proceedings and the pension issues specifically. That assistance has not been completely altruistic; it comes unsurprisingly with some conditions and benefits to the Province's financial commitments. The Bondholder group and others did not at that time take any steps to take on the Province.

[4] It has to be appreciated that the Stelco CCAA proceedings have not been dealing with a static situation. The ifs have changed from time to time. What was feasible earlier may not be now.

[5] It would seem to me that Stelco is in need of ongoing stabilizing financing. The Tricap deal would provide that to a reasonable degree. I note that the CRO has consulted UBS and BMO Nesbitt and been advised that the Tricap deal is not otherwise available in North American markets as there could be financing notwithstanding significant cash losses in the future. There has been quibbling as to whether Stelco needs the assurance of a $75 million rights offering backstop. It is unclear to me how this quibbling is justified. The Bondholder group does not like the deal nor the position of the Province and the union (not including 1005). They would prefer something along the lines of the Heckler proposal as set forth in his affidavit of September 22, 2005. However, the Tricap arrangement does not preclude Stelco from considering and accepting another financing arrangement it finds superior to the Tricap deal. However, Tricap has demanded a break fee if that happens. The Bondholder group objects to the size of the break fee. I do note that Tricap acknowledges that if the plan (including the Tricap deal) is voted down by the creditors, the break fee is reduced to half. However, one must also realistically appreciate that a rival financing arrangement at this stage, starting from essentially a standing start, would take considerable time for due diligence and there is no assurance that the conditions will be any less onerous than those extracted by Tricap. None of the dollar figures involved in the agreements appear to be so rich as to be so out of line that the quibbling as to their size should be a barrier to the requested authorizations.

[6] I note that the Monitor in its Thirty-Eighth Report supports the position of Stelco.

[7] The Bondholder group has indicated that it is firmly opposed to the plan as presently constituted. That group also notes that more than half of the creditors by $ value have advised the Monitor that they are opposed to the plan as presently constituted. However, the plan is not up for approval before me today. It has been acknowledged that in the next month there will be considerable discussion and negotiation as to the plan which will in fact be put to the vote. The present plan may be adjusted (with the blessing of others concerned) to the extent that it, in a revised form, is palatable to the creditors (assuming that they do not have a massive change of heart as to the presently proposed plan). On the other hand, it may be that no reasonable amount of adjustment may be made so as to make an adjusted plan palatable so that the creditors would be within their voting rights to vote against the plan. As I indicated with respect to the adjournment request reasons, I would trust that all stakeholders and Stelco would deal with this question in a positive way. Generally, I would observe that it is better to move forward than backwards, especially where progress is required.

[8] The Bondholder group calls into question whether the Province can legally affect Regulation 5.1 in the way and to the extent that the Province has indicated. It would seem to me to be undesirable to have the fate of Stelco depend of whether or not the Bondholder group may be correct. However, there does not seem to be any impediment to the Bondholder group initiating separate proceedings against the Province in this regard, but one would have to observe that this type of litigation would likely take years – and where would Stelco be at the end of that time. I note that no one took any previous legal action in that regard.

[9] It would seem to me that in the reality of the presently prevailing circumstances the various agreements up for confirmation provide a base to build on and that positive discussions and negotiations will result in a plan to be voted on that will garner general support. In saying that I wish to be absolutely clear that I am not ruling on or considering in any way the fairness of the plan as presented. However, for the benefit of all stakeholders, it would be beneficial for those who are dissatisfied with the existing proposal (i.e. the Bondholder group and others) to make their objections known to Stelco and their way of resolving the difficulty. There should be a meaningful dialogue with each side willing to listen to and digest the reasonable concerns and solutions of the other.

[10] These reasons are to be read in conjunction with the four handwritten pages of reasons I gave on October 3, 2005.

[11] The stay extension date is to be December 5, 2005 (subject to earlier termination if found warranted by this Court). The other relief requested is granted (subject to the determination of the Georgian Windpower concern about the supplemental claims procedure).

[12] Orders accordingly.

_____

J.M. Farley

DATE: October 4, 2005

CITATION: Target Canada Co. (Re), 2016 ONSC 316
COURT FILE NO.: CV-15-10832-00CL
DATE: 2016-01-15

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 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.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jeremy Dacks, Shawn Irving* and *Tracy Sandler* for 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 (the "Applicants")

Linda Galessiere and *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 and *Mathew P. Gottlieb* for KingSett Capital Inc.

Yannick Katirai and *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 and Melaney Wagner for Alvarez & Marsal Canada Inc. in its capacity as Monitor

James Harnum for Employee Representative Counsel

Harvey Chaiton for the Directors and Officers of the Applicants

Stephen M. Raicek and *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, Pharmacist Representative Counsel

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.

HEARD: December 21, 2015 & December 22, 2015

SUPPLEMENTARY WRITTEN SUBMISSIONS: December 30, 2015, January 6, 2016 and January 8, 2016

ENDORSEMENT

[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,

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

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 v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (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).

[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, (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 the 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 *Crystallex International Corp*., Re, 2013 ONSC 823, 2013 CarswellOnt 3043 [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, aff'd 2004 ABCA 31, 346 A.R. 28, 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 *Re Quintette Coal Ltd*. (1992), 13 C.B.R. (3d) 146 (B.C.S.C.); *Re Dairy Corp. of Canada Ltd*., [1934] O.R. 436 (Ont. S.C.); *Olympia & York Developments Ltd. v. Royal Trust Co*. (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.); *Re Northland Properties Ltd*. (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at p. 182, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.); *Re BlueStar Battery Systems International Corp*. (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 *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2015 ONSC 4004, 27 C.B.R. (6th) 134 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.

_____

Regional Senior Justice G.B. Morawetz

Date: January 15, 2016

CITATION: U.S. Steel Canada Inc. (Re), 2016 ONSC 7899
COURT FILE NO.: CV-14-10695-00CL
DATE: 20161222

See para. 73

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *Paul Steep, Steve Fulton* and *Jamey Gage*, for the Applicant, U.S. Steel Canada Inc.

Robert Staley and *Kevin J. Zych*, for the Monitor, Ernst & Young Inc.

Alan Mark, Gale Rubenstein and *Logan Willis* for the Province of Ontario

Ken Rosenberg, for the United Steelworkers International Union and the United Steelworkers International Union, Local 8782

Andrew Hatnay, Representative Counsel for the non-unionized active employees and retirees

Robert Thornton, Michael Barrack and *Mitch Grossell*, for United States Steel Corporation

Sharon White, for the United Steelworkers International Union, Local 1005

Michael Kovacevic and *Justyna Hidalgo*, for the City of Hamilton

Lou Brzezinski, for Robert and Sharon Milbourne

Waleed Malik, for Brookfield Capital Partners Ltd.

Mario Forte, for Bedrock Industries Canada LLC and Bedrock Industries L.P.

Bryan Finlay and *Marie-Andrée Vermette*, for the Board of Directors of U.S. Steel Canada Inc.

HEARD: December 15, 2016

ENDORSEMENT

[1] The applicant, U.S. Steel Canada Inc. (the "applicant" or "USSC"), seeks an order declaring that Bedrock Industries Canada LLC (the "Purchaser" or "Bedrock") is the Successful Bidder as that term is defined in paragraph 27 of the sales and investment solicitation process order of the Court dated January 21, 2016 (the "SISP Order"). In addition, it seeks authorization to enter into an agreement with Bedrock and Bedrock Industries L.P. dated as of December 9, 2016 referred to as the "CCAA Acquisition and Plan Sponsor Agreement" (the "PSA"). The applicant also seeks related ancillary relief as described below. At the conclusion of the hearing, the Court advised the parties that it was prepared to grant the requested relief for written reasons to follow. This Endorsement sets out the written reasons of the Court for its determination.

Background

[2] On September 16, 2014, the applicant obtained an initial order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") (as amended and restated from time to time, the "Initial Order").

[3] Over the course of more than 18 months, the applicant conducted extensive sales and marketing efforts within these CCAA proceedings. The initial marketing exercise was conducted pursuant to an order of the Court dated April 2, 2015, which authorized the applicant to commence a sale and restructuring/recapitalizing process (the "SARP"). The applicant did not receive any viable offers for a transaction or series of transactions under the SARP. By order of the Court dated October 9, 2015, the applicant was authorized to discontinue the SARP.

[4] Pursuant to the SISP Order, the applicant was authorized to commence a new sales and investment solicitation process (the "SISP"). The course of the SISP is set out in the various reports of the Monitor, Ernst & Young Inc. (the "Monitor"), including its most recent report, the thirty-third report dated December 13, 2016 (the "Monitor's Report"), and the affidavit sworn by the chief restructuring officer of the applicant, William Aziz (the "CRO") on December 13, 2016.

[5] In summary, as with the SARP, more than 100 strategic and financial parties were contacted to solicit potential interest. The first phase of the SISP ended on February 29, 2016. After that date, the applicant, the financial advisor to the applicant, and the CRO assessed the bids received and selected a number of bidders as "Phase 2 Qualified Bidders" after obtaining input from key stakeholders and with the concurrence of the Monitor. The deadline for Phase 2 Qualified Bidders to submit a binding offer was May 13, 2016. After that date, the applicant, together with its financial advisor, the CRO and the Monitor, evaluated the offers received, discussed the offers with the key stakeholders, and facilitated numerous meetings and negotiations between the bidders and various key stakeholders.

[6] At the end of July 2016, as a result of this review and the various meetings and negotiations, the applicant, with the assistance of the financial advisor and the support of the Monitor, concluded that the proposal of Bedrock was the most promising bid and designated the proposal as a "Qualified Bid" for the purposes of the SISP Order.

[7] Since that time, Bedrock has held discussions and negotiations with the principal stakeholders of the applicant, being the United Steelworkers International Union ("USW"), the USW Locals 8782 and 1005, the Province of Ontario (the "Province"), United States Steel Corporation ("USS") and Representative Counsel on behalf of the non-unionized salaried employees and retirees ("Representative Counsel").

[8] On September 21, 2016, the Province announced that it had entered into a memorandum of understanding with Bedrock (the "Province/Bedrock MOU"). On November 1, 2016, USS announced that it had agreed to proposed terms regarding the sale and transition of ownership of USSC to Bedrock, which are reflected in a term sheet (the "USS/Bedrock Term Sheet"). On November 22, 2016, USW Locals 8782 and 8782(b) (collectively, "Local 8782") delivered a letter to Bedrock confirming that the executive of these locals had approved a form of collective bargaining agreement to be entered into upon completion of Bedrock's purchase of USSC (the "Local 8782 Letter of Support"). The letter indicated that the executive was prepared to recommend the agreement to their respective memberships, conditional on satisfaction of certain arrangements relating to the funding of other post-employment benefits ("OPEBs") and the legacy and future pension plans of USSC.

[9] In addition, as a result of direct discussions between Bedrock and USSC during this period, the parties reached agreement on the principal terms of a proposed transaction by which Bedrock would acquire the business and operations of USSC (the "Proposed Transaction"). These terms of the Proposed Transaction are set out in the PSA. The PSA is largely consistent with the terms of the Province/Bedrock MOU, the USS/Bedrock Term Sheet and the understanding between Bedrock and USW Local 8782. The PSA provides that it is not binding on USSC until USSC obtains an order of this Court authorizing it to enter into the PSA and to pursue the Proposed Transaction in accordance with the PSA (the "Authorization Order").

[10] In connection with the PSA, USSC and Bedrock also requested the Province to enter into an agreement with USSC in respect of the Proposed Transaction. To this end, the Province and USSC have entered into an agreement dated December 9, 2016 (the "Province Support Agreement"). The Province Support Agreement also provides that it does not become effective unless and until the Authorization Order is granted.

The Proposed Transaction

[11] The basic structure of the Proposed Transaction is summarized in the Monitor's Report as follows:

> (a) the Purchaser will acquire substantially all of USSC's operating assets and business on a going concern basis and the outstanding shares of USSC through a CCAA plan of arrangement. Substantially all of the existing operations at both the Hamilton Works and the Lake Erie Works will continue;

(b) the Purchaser will not acquire USSC's real property in Hamilton (the "HW Lands") and at Lake Erie (the "Lake Erie Lands") but will cause USSC to lease the part of the real property needed to continue steel operations. USSC's real property will be contributed to a Land Vehicle (as defined below) to be sold, leased or developed for the benefit of USSC's five main registered pension plans (the "Stelco Plans") and OPEBs. There is an expectation that these lands will have value when redeveloped. The Land Vehicle will initially be funded by a $10 million secured revolving loan from the Province, and an amount to be agreed upon from USSC. Any proceeds generated from these lands would be available to:

(i) fund the operations of the Land Vehicle in an agreed amount;

(ii) provide reimbursement to the Ontario Ministry of the Environment and Climate Change ("MOECC") for costs, if actually incurred, to test, monitor and investigate environmental conditions on the land; and

(iii) provide additional funding to be distributed equally towards the benefit of the Stelco Plans and OPEBs;

(c) the Purchaser will provide an equity contribution to implement the Transaction and will arrange new debt financing in an amount with borrowing availability not less than $125,000,000 after satisfying all exit costs and the payment of other amounts associated with USSC's emergence from protection under the CCAA;

(d) a new administrator will be appointed for the Stelco Plans and USSC's ongoing obligations with respect to the legacy liabilities under the Stelco Plans will be fixed as described below. The Stelco Plans will continue to be covered by the Pension Benefits Guarantee Fund. In addition to any funding received by the Stelco Plans from the Land Vehicle, USSC will make various lump sum and ongoing contributions into these pension plans including:

(i) a $30 million upfront payment upon the closing of the Proposed Transaction;

(ii) a $20 million payment prior to any dividend distribution by USSC to Bedrock; and

(iii) 10% of USSC's Free Cash Flow (as defined in the PSA), subject to a minimum of $10 million per year for the first five years, and a minimum of $15 million for the next 15 years. Bedrock will guarantee $160 million of these total annual contributions required from USSC;

(e) one or more entities (the "OPEB Entity") satisfactory to USSC, the USW and the Province will be established for the purpose of receiving, holding and distributing funds on account of OPEBs. In addition to any funding received by the OPEB Entity from the Land Vehicle as referred to above, USSC will make various lump sum and ongoing contributions to the OPEB Entity, including:

(i) $15 million annual fixed payments (the "OPEB Fixed Contribution");

(ii) 6.5% of USSC's Free Cash Flow, subject to a maximum of $11 million per year; and

(iii) $30 million (the "Advance OPEB Payment") on the earlier of the date on which USSC first pays a dividend, redeems any capital stock, or makes any distribution to Bedrock or its affiliates, investors or funds, or the date that is three years after the closing of the Proposed Transaction. The Advance OPEB Payment is to be amortized in the fourth through ninth years following the closing date and applied against the OPEB Fixed Contribution described above for those years in accordance with a formula as set out in the OPEB Term Sheet (as defined below);

(f) USS will receive full payment for its secured claims and will assign its unsecured claims to the Purchaser;

(g) the Province will receive US$61 million and the MOECC will provide releases of certain legacy environmental liabilities associated with USSC's real property. The US$61 million would be used:

(i) to reimburse the professional fees of the Province related to USSC's restructuring;

(ii) as financial assurance, held by the MOECC, to cover any costs that may be incurred by the MOECC in connection with environmental conditions on USSC's real property; and

(iii) for any portion of the amount held as financial assurance that is not required by the MOECC, to be equally distributed towards the benefit of USSC's OPEBs and the Stelco Plans;

(h) USSC will be required to continue to comply with all environmental laws and regulations going forward and to enter into an environmental management plan with the MOECC going forward. USSC will fund the costs of any environmental baseline testing and monitoring;

(i) all other secured claims, as determined in accordance with the claims process order of the Court made November 13, 2014 (the "Claims Process Order"), will be paid in full or as otherwise agreed by the Purchaser and USSC; and

(j) the remaining unsecured claims will receive a distribution pursuant to the CCAA plan from a distribution pool in an amount to be determined.

[12] The Monitor believes that, if the Proposed Transaction is completed, USSC will emerge as a stand-alone steel manufacturer with a restructured balance sheet and sufficient liquidity such that it will have stability and be able to compete in challenging steel market conditions. A successful completion of the Proposed Transaction is expected to result in the preservation of jobs, ongoing business for suppliers, and ancillary economic benefits for the communities in which USSC operates its business.

The Plan Sponsor Agreement

[13] The following summarizes the significant terms of the PSA and is based on the description thereof in the Monitor's Report.

[14] The principal commitments of USSC and Bedrock are set out in sections 2.01(1) and (2) of the PSA which read as follows:

2.01 Transaction

(1) The Corporation and the Purchaser will each use commercially reasonable efforts to give effect to a restructuring of the Corporation by way of a plan of arrangement under the CCAA (the "CCAA Plan") and the Stakeholder Agreements prior to the Outside Date, on the terms set out in and consistent in all material respects with the Term Sheets and this Agreement (the "Transaction").

(2) The Corporation and the Purchaser agree to cooperate with each other in good faith and use commercially reasonable efforts to complete the following steps in accordance with the following timeline in support of the Transaction:

(a) obtain the Authorization Order by December 31, 2016;

(b) obtain the Meeting Order [being an order of the court for the convening of a meeting or meetings of the creditors to consider and vote on the CCAA Plan] by January 31, 2017 ;

(c) obtain the Sanction Order [being an order of the court for the approval of the CCAA Plan] by March 10, 2017; and

(d) implement the CCAA Plan and close the Proposed Transaction by the Outside Date [being March 31, 2017 or such later date as USSC and the Purchaser may designate by mutual agreement].

[15] The PSA attaches term sheets setting out the principal terms of the Proposed Transaction agreed to between USSC and Bedrock regarding the following matters (collectively, the "Term Sheets"):

1. the CCAA Plan contemplated to implement the Proposed Transaction;

2. the arrangements pertaining to the environmental conditions at the Hamilton Works and the Lake Erie Works;

3. the arrangements pertaining to the ownership of the HW Lands and the Lake Erie Lands after completion of the Proposed Transaction by a newly established entity (the "Land Vehicle");

4. the lease arrangements pertaining to the lands to be owned by the Land Vehicle that USSC will require for its operations at the Hamilton Works and the Lake Erie Works;

5. proposed terms for OPEBs, including the funding thereof (the "OPEB Term Sheet");

6. proposed terms regarding the Stelco Plans including the funding thereof (the "Pension Term Sheet"); and

7. arrangements concerning the tax aspects of the Proposed Transaction.

[16] The Proposed Transaction is subject to a number of important conditions, which are for the benefit of the Purchaser and USSC and must be complied with at or prior to the closing of the Proposed Transaction. Such conditions include, among others:

(a) *Competition Act* compliance and *Investment Canada Act* approval will have been obtained;

(b) the Sanction Order of the court will have been obtained;

(c) amendments to the collective agreements with USW Local 1005, USW Local 8782 and USW Local 8782(b) shall have been executed and ratified;

(d) the closing conditions to implement the arrangements described in the Term Sheets will have been satisfied on terms and conditions acceptable to the Purchaser and USSC;

(e) implementation of arrangements satisfactory to the Purchaser and USSC regarding the following:

(i) the payment in full to USS of its secured claim;

(ii) the assignment to the Purchaser of the USS unsecured claims and the issued and outstanding shares in the capital of USSC;

(iii) the execution of a transitional services agreement between USS and USSC;

(iv) the execution of an agreement with respect to intellectual property and trade secrets between USS and USSC; and

(v) the execution of an ore supply agreement between USS and USSC;

(f) the execution and delivery of a new loan agreement, security and related documentation with not less than $125,000,000 of credit available, after satisfying all exit costs and other amounts associated with USSC's emergence from protection under the CCAA, to the Purchaser and USSC by the lenders and to be available at or prior to closing of the Proposed Transaction;

(g) the execution and delivery of all other agreements contemplated by the Term Sheets, or required to satisfy the closing conditions described above, that are required to be executed prior to the time of closing between Bedrock or USSC or both, as applicable, with one or more stakeholders as applicable;

(h) the execution and delivery of all releases among each of the key stakeholders and USSC; and

(i) the satisfaction or waiver of the conditions to the implementation of the CCAA Plan giving effect to the Proposed Transaction as described in the PSA.

Preliminary Matter

[17] The relief sought in this proceeding is opposed by three parties: USW Local 1005 ("Local 1005"), the City of Hamilton ("Hamilton"), and Robert J. Milbourne and Sharon P. Milbourne (collectively, the "Milbournes"). These parties (collectively, the "Objecting Parties") each raise a common issue, the short service of the motion materials, which I will address first.

[18] The notice of motion and motion record in this matter were served on the service list on Friday, December 9, 2010 after the close of business. The Objecting Parties say that this effectively gave them three business days' notice of the motion. In paragraph 55, the Initial Order contemplates eight business days' notice of a motion, subject to further order of the Court in respect of urgent motions. To the extent necessary, the applicant seeks leave of the Court to bring this motion on short service on the grounds that it is an urgent motion.

[19] The Objecting Parties seek dismissal of the motion or, in the alternative, an adjournment of this motion for five business days. Counsel for Local 1005 and for Hamilton say that a delay would permit their clients to better understand the terms of the Proposed Transaction. In

addition, Hamilton and the Milbournes suggest that such an adjournment might permit resolution of their respective issues.

[20] It would have been preferable for the applicant to have provided the full notice contemplated by the Initial Order for motions in the ordinary course. However, I am prepared to grant leave to shorten the service to that actually provided in this case for the following reasons.

[21] First, there is real urgency to this motion in several respects. After almost two years of marketing USSC, the Proposed Transaction is not only the only viable proposal but also the best offer for USSC's stakeholders generally. However, Bedrock is not currently legally obligated to proceed with any transaction. Moreover, the economic circumstances generally, and the economics of the steel industry in particular, are subject to great uncertainty. In addition, there are no currently operating timelines for the resolution of the outstanding issues necessary to finalize the Proposed Transaction. Time does not normally improve the prospects for a successful restructuring. It is therefore imperative that Bedrock be committed to using commercially reasonable efforts to complete the Proposed Transaction at the present time.

[22] Second, there is no evidence whatsoever of any prejudice to the Objecting Parties that would result from granting the requested relief. As discussed below, none of their rights are affected by the Authorization Order. Further, there is no indication that any of them has been unable to understand the PSA in the time available or to represent their clients properly in this hearing. Indeed, they have very ably presented the principal issues of their clients. I would observe as well that Local 1005 has had knowledge of the principal terms of the Proposed Transaction in respect of pensions and OPEBs since early September through its participation in discussions regarding the Proposed Transaction.

[23] Lastly, there is no reasonable likelihood that a delay of five business days will result in the resolution of any of the claims of the Objecting Parties that require negotiation. As all of the parties acknowledge, this is a highly complex restructuring with a number of inter-related issues. I would also note that, to the extent that the position of the Milbournes under the Proposed Transaction is a matter of clarification rather than negotiation, there is no need for any delay in hearing this motion.

Declaration of Bedrock as the Successful Bidder

[24] As mentioned, the applicant seeks a declaration that Bedrock is the Successful Bidder as defined in paragraph 27 of the SISP Order with the result, among other things, that all other bids and proposals made by any other person are deemed to be rejected.

[25] Paragraph 27 of the SISP Order reads as follows:

> USSC and the Financial Advisor, in consultation with and with the approval of the Monitor, (a) will review and evaluate each Qualified Bid, provided that each Qualified Bid may be negotiated among USSC, in consultation with the Financial Advisor and the Monitor, and the applicable Phase 2 Qualified Bidder, and may be amended, modified or varied to improve such Phase 2 Qualified Bid as a result of such negotiations, and (b) identify the highest or otherwise best bid (the

> "Successful Bid", and the Phase 2 Qualified Bidder making such Successful Bid, the "Successful Bidder") for any particular Property or the Business in whole or part. The determination of any Successful Bid by USSC, with the assistance of the Financial Advisor, and the Monitor shall be subject to approval by the Court.

[26] The applicant, with the assistance of its financial advisor and the Monitor, has determined that Bedrock is the Successful Bidder and that the Proposed Transaction is the Successful Bid. Such determination is therefore now subject to the approval of the Court.

[27] The applicant says that such determination is, in effect, governed by the business judgment rule. On this basis, the determination of the applicant's board of directors should be respected absent evidence of negligence, fraud or patent unreasonableness. There is no such evidence filed in opposition to the motion, notwithstanding the objections discussed below.

[28] I am inclined to agree with the standard proposed by the applicant. In any event, however, there are the following additional considerations which weigh in favour of the granting of the Court's approval if, instead, the Court is required to address the reasonableness of the applicant's determination.

[29] First, the Proposed Transaction is the outcome of an extended search for a buyer or investor pursuant to which USSC has been very extensively marketed. There is no other viable bid or proposal before the Court which would provide as much value to the stakeholders generally. The Monitor is of the view that the Proposed Transaction is the best option for USSC and its stakeholders in the present circumstances.

[30] Second, on the evidence before the Court in the earlier reports of the Monitor, and in the opinion of the Monitor as expressed in the Monitor's Report, the SISP process which resulted in the Proposed Transaction was transparent, robust, fair and reasonable and considered all available alternatives.

[31] Third, despite the fact that the Proposed Transaction does not meet the objectives of all parties, it creates a number of benefits for stakeholders. These include the maintenance of USSC as a going concern with the attendant preservation of employment and related social benefits. In addition, the Proposed Transaction would provide significant funding for USSC's pensions and OPEBs, including through the Land Vehicle created to hold the lands not required for the operations of the Hamilton Works. It also provides for a distribution to the applicant's unsecured creditors as well as repayment of its secured creditors.

[32] Fourth, as a related matter, there is considerable support for the PSA from principal stakeholders of USSC. While Local 1005 argues that support for the Proposed Transaction has not reached "the tipping point", because of the opposition to the PSA of the Objecting Parties addressed below, the reality is the opposite. The Authorization Order is supported by the applicant's board of directors, the Province and USW Local 8782. While USS, the USW and Representative Counsel take no position on the motion, they are not raising any objections. In particular, USS is not opposed to the terms of the Proposed Transaction as set out in the PSA but is withholding its consent until the remaining issues are resolved to its satisfaction. In addition, Representative Counsel stated on behalf of his clients that his clients take reassurance from the

fact that the Authorization Order does not purport to affect the legal rights of the parties and that negotiations will continue regarding the matters of significance to his clients. Further, the board of directors of USSC is supportive of the PSA, notwithstanding the fact that an important issue to them personally remains an unresolved issue, being the operation of existing indemnities in their favour from USS. Lastly, the CRO of the applicant also recommends that Bedrock be approved as the Successful Bidder.

[33] Fifth, the Objecting Parties submit that particular provisions are intrinsically unfair and, on this basis, urge the Court to reject the Proposed Transaction, or to withhold its approval of Bedrock as the Successful Bidder. In so doing, they are implicitly urging the Court to apply its own view of fairness. I do not think that the Court's view of the fairness of the Proposed Transaction is the appropriate standard at this stage of the proceedings for the following reasons.

[34] First, the Proposed Transaction is not yet finalized. It would therefore be premature to reach any conclusion regarding the terms of the Proposed Transaction. In addition, while the Objecting Parties raise legitimate concerns regarding particular issues of importance to them or their members and retirees, such issues cannot be examined in a vacuum. They must be measured for present purposes against the alternative. In this case, as mentioned, there is no alternative transaction against which to assess these provisions of the Proposed Transaction. The only alternative would appear to be a liquidation scenario.

[35] Further, to the extent that the Court must address the fairness of a transaction, it must do so having regard to the entirety of the transaction, including the pre-existing rights of the stakeholders and the manner in which the interests of the parties are resolved given the need for concessions on the part of the stakeholders to achieve a successful restructuring. In this context, a significant consideration in assessing the fairness of any transaction is whether or not it has received the approval of the affected stakeholders. In other words, the fairness of the issues raised by Local 1005, which are important issues, are more properly addressed by the members and retirees of Local 1005 themselves in the creditors' meeting or otherwise after the Proposed Transaction and CCAA Plan are finalized.

[36] Sixth, as discussed below, the Monitor has provided a strong recommendation in favour of the Court granting approval of the Authorization Order. The Monitor is of the view that the Proposed Transaction represents the best available option for USSC and its stakeholders in the present circumstances.

[37] Accordingly, I am satisfied that the Court should approve the Proposed Transaction as the Successful Bid for the purposes of the SISP Order.

Authorization to Enter into the PSA and the Province Support Agreement

[38] The applicant also seeks the authorization of the Court to enter into the PSA and the Province Support Agreement. I will address this matter by dealing first with the authority of the Court to grant such authorization, then with the reasons for the Court's determination to authorize the applicant to sign these agreements, next with two particular terms of the PSA for which the applicant has sought specific authorization, and finally with the objections of the Objecting Parties.

Authority of the Court to Authorize the Execution of the PSA and the Province Support Agreement by the Applicant

[39] Section 11 of the CCAA provides the Court with broad powers to "make any order that it considers appropriate in the circumstances" and section 11.02(2) provides specific authority to vary a stay of proceedings. The Court therefore has the authority to authorize a debtor company in CCAA proceedings to enter into an agreement to facilitate a prospective restructuring.

[40] The issue of the authority of a court was addressed in *Re Stelco* (2005), 78 O.R. (3d) 254 (C.A.). In that case, the Court of Appeal upheld an order of the motion judge authorizing the debtor company to enter into three agreements with the provincial government, the USW and a proposed financing party. The three agreements were said to be "intrinsic to the success" of the proposed plan of arrangement. The debtor company had negotiated those agreements "in an attempt to successfully emerge from CCAA protection." They established the framework for the proposed transaction which would in turn form the basis of the proposed plan of arrangement. It appears that these agreements served a similar purpose in that case as the Province/Bedrock MOU, the USS/Bedrock Term Sheet and the Local 8782 Letter of Support in the present proceeding.

[41] In reaching its decision, the Court of Appeal expressed the following test at paras. 18 and 19, which I think is equally applicable in the present context:

> In my view, the motions judge had jurisdiction to make the orders he did authorizing Stelco to enter into the agreements. Section 11 of the CCAA provides a broad jurisdiction to impose terms and conditions on the granting of the stay. In my view, s.11(4) [the predecessor of section 11.02] includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the status quo. The point of the CCAA process is not simply to preserve the status quo but to facilitate restructuring so that the company can successfully emerge from the process. This point was made by Gibbs J.A. in *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at para. 10:
>
> [Excerpt omitted.]
>
> In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgment of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

Authorization of the PSA and the Province Support Agreement

[42] I will address the authorization of the applicant's execution of the PSA first and will then briefly address authorization of the Province Support Agreement.

Authorization of the Plan Sponsor Agreement

[43] The following sets out the four principal reasons of the Court for its determination to authorize the applicant to enter into the PSA.

[44] First, the Authorization Order does not alter or otherwise affect any legal rights of any of the creditors. As it is not a plan sanction order, it does not alter the right of creditors to approve or reject a plan of arrangement, based on a finalized Proposed Transaction, when it is presented to the creditors. Nor does it constitute approval of a plan of arrangement. For that, the applicant requires a finalized Proposed Transaction upon which to base such a plan. It does not even constitute approval of a final Proposed Transaction. It constitutes no more than authorization to USSC to enter into the PSA and thereby commit to use commercially reasonable efforts to pursue finalization of a transaction based on the framework of the Proposed Transaction described therein, as well as an authorization to enter into the Province Support Agreement.

[45] In order to finalize a binding agreement for the Proposed Transaction that is capable of being completed, the applicant will have to negotiate the final terms of the agreement and take the necessary actions to be in a position to satisfy the conditions of closing contemplated in the PSA. The former requires resolution of a number of outstanding issues among the stakeholders who have already been involved as well as consultation and negotiation with other stakeholders who have not been involved to date, including Hamilton and the Milbournes, among others, regarding the treatment of their claims and interests. The latter requires negotiation of a number of agreements giving effect to the arrangements contemplated by the Term Sheets as well as new collective agreements with each of Local 1005 and Local 8782. There is nothing in the Authorization Order that prohibits USSC from continuing negotiations with its creditors on these matters. Rather, the PSA expressly contemplates that such discussions and negotiations are necessary to finalize all of the terms of the Proposed Transaction and of the proposed plan of arrangement.

[46] Second, while the Objecting Parties' concern that granting the Authorization Order will limit or constrain their bargaining power in such negotiations is understandable, the fact is that the Order itself does not affect the bargaining power or "leverage" of any of the creditors. Nor is it correct to say that future negotiations will take place in a "take it or leave it" atmosphere.

[47] On the one hand, there is scope for negotiations between the stakeholders and USSC and Bedrock. As mentioned, the PSA itself expressly contemplates serious negotiations on a large number of issues that are important to various stakeholders and that ultimately require their approval or consent. It does not predetermine or foreclose the outcome of these negotiations, which are integral to the proposed restructuring of USSC. Further, as mentioned above, the extent to which particular creditors are able to achieve their priorities or objectives in such negotiations will continue to depend, among other factors, on the overall economics of the

Proposed Transaction and the willingness of other parties to make concessions or tradeoffs to complete a transaction, rather than on the existence of the Authorization Order.

[48] On the other hand, and more significantly, while the terms of the Authorization Order grant exclusivity to Bedrock while the necessary consultations and negotiations are proceeding, this merely reflects the reality of the current situation even without the Order. To the extent that any of the creditors believe themselves to be constrained in some manner in future negotiations, that is a reflection of the circumstances in which the parties find themselves quite apart from the Order. The Court's authorization of the applicant's request to enter into the PSA does not alter the environment in which future negotiations will take place if there is to be a successful restructuring of USSC. While that could be the case if the effect of the Authorization Order were to prevent stakeholders from negotiating simultaneously with two or more potential purchasers, this is no longer a realistic possibility. The SISP has run its course and the stakeholders must now address its outcome. The Proposed Transaction is not only the option that provides the most value to the stakeholders of USSC, it is the only viable option. There is no competing offer for the business and operations of USSC on a going concern basis. The only alternative to proceeding to finalize the Proposed Transaction is a liquidation of USSC on a controlled or an uncontrolled basis.

[49] Third, there are real benefits that will flow from execution of the PSA. In general terms, the commitments of the applicant and Bedrock in the PSA will increase the likelihood of a successful restructuring to the benefit of all of the stakeholders. In this regard, the present circumstances are very similar to those in *Re Stelco*. The PSA is a necessary step in the progression toward finalization of a plan of arrangement for submission to the creditors. The PSA establishes the framework for the Proposed Transaction which would, in turn, form the basis of a proposed plan of arrangement. As in *Re Stelco*, the PSA is therefore intrinsic to the success of the prospective plan of arrangement and it is doubtful that the proposed plan could proceed if the Authorization Order were not granted.

[50] More particularly, the execution of the PSA provides a binding commitment of Bedrock to use commercially reasonable efforts to finalize a restructuring of USSC based on the terms of the Proposed Transaction. As Bedrock is not otherwise obligated in respect of the Proposed Transaction, this commitment, even with the qualifications in the PSA, is important to maintain the confidence of the applicant's employees, suppliers and customers in the continued progress of the restructuring. As mentioned, it provides a framework for future negotiations among stakeholders as well as transparency regarding the interests of the other stakeholders, which will facilitate such negotiations. In addition, it provides some momentum to the process of finalizing the Proposed Transaction by bringing the creditors who have not been involved to date into the consultations and negotiations on an informed basis. Lastly, the PSA sets timelines for completion of a finalized Proposed Transaction and a plan of arrangement based on such Proposed Transaction, which are critical if there is to be successful restructuring.

[51] Fourth, an important consideration for the Court is the strong recommendation of the Monitor that the Court grant the Authorization Order. The Monitor's recommendation is based on the following:

- the integrity of the SISP process used to arrive at the Proposed Transaction;
- the Monitor's judgment that the Proposed Transaction set out in the PSA is the best available option for USSC and its stakeholders in the circumstances and has only been possible to achieve after two marketing processes that took more than 18 months;
- the Monitor's view that the Proposed Transaction provides a foundation upon which a successful restructuring of USSC can be built; and
- the Monitor's belief that approval of the PSA should assist in focusing the efforts of the key stakeholders towards completing the negotiations of the definitive agreements and arrangements contemplated by the PSA.

Authorization of the Province Support Agreement

[52] At the hearing of this motion, the focus of the arguments of all parties was on approval of the PSA, with little attention paid to the related issue of the request for the Court's authorization for the applicant to enter into the Province Support Agreement. I have proceeded on the basis that the opposition of the Objecting Parties also extended to opposition to authorization of the Province Support Agreement, given that it was also necessary in order to progress the Proposed Transaction.

[53] In any event, to the extent that there is any opposition to this relief, the Court is satisfied that the applicant should be authorized to enter into the Province Support Agreement for the same reasons as it authorized the applicant to enter into the PSA.

Non-Solicitation and Expense Reimbursement Provisions of the PSA

[54] The applicant also seeks approval of the Court of the non-solicitation provision in section 5.06 of the PSA and the expense reimbursement provision in section 7.02(2) of the PSA.

[55] The non-solicitation provision runs in favour of Bedrock until such time as the PSA is terminated. Given the Court's approval of the applicant's determination of Bedrock as the Successful Bidder and the Court's authorization of the PSA, this is a commercially reasonable provision. It would be unreasonable to expect that Bedrock would commit the time and resources necessary to finalize and implement the Proposed Transaction, and a plan of arrangement giving effect to the Proposed Transaction, without the assurance that it could not be displaced by a subsequent offer. In addition, the significant level of stakeholder support in favour of the Authorization Order described above also weighs in favour of authorization of this covenant.

[56] The expense reimbursement provision contemplates reimbursement of Bedrock's transaction-related expenses up to a maximum of $4 million in the event Bedrock terminates the PSA under section 7.01(a) thereof. However, this provision relates only to termination in the event of a material breach of any representation, warranty, covenant, obligation or other provisions of the PSA by the other party — i.e. by the applicant. Accordingly, Bedrock is only entitled to reimbursement of its expenses in the event of a material breach of the PSA by the applicant.

[57] In my view, given the complexity and attendant cost of the Proposed Transaction, including the remaining actions required to complete a successful transaction, this is an eminently reasonable provision from a commercial perspective.

[58] Based on the foregoing, the Court is satisfied that both provisions should be approved as commercially reasonable, given the context in which the PSA has been negotiated and executed. In addition, each of these provisions enhances the prospects for a successful restructuring of USSC and, as such, are consistent with the purposes of the CCAA.

The Objections

[59] In reaching the Court's determination to authorize the applicant to enter into the PSA, the Court considered the following substantive objections to the Authorization Order and rejected them for the reasons expressed below.

The City of Hamilton

[60] Hamilton objects to the declaration of Bedrock as the Successful Bidder and to the authorization of USSC to enter into the PSA. Hamilton says it has been excluded from meaningful consultation and negotiation regarding the Proposed Transaction. It says such consultation was due given its status as a creditor of the applicant and its role as the approval authority for land use and development on the HW Lands.

[61] In its Notice of Objection dated December 13, 2016, Hamilton says it has three main areas of concern: (1) pension and benefits for retirees of USSC; (2) payment of past (accrued and unpaid) and future property taxes; and (3) the future of the HW Lands.

[62] Of these matters, its principal objection pertains to the uncertainty regarding the treatment of the accrued and unpaid past property taxes on the HW Lands as well as the payment of future property taxes. It asks the Court to order, as a condition of the authorization of the PSA, that the PSA confirm that USSC will pay its accrued past taxes and all future property taxes on the HW Lands.

[63] It is not entirely clear that the City has been excluded from negotiations with Bedrock, as counsel for the City suggests. However, the more important point is that on each of the two issues that are of direct concern to the City — payment of its accrued and future taxes and the regime pertaining to the HW Lands — the effect of the relief granted is to permit consultations and negotiations to take place among Bedrock, Hamilton and the other parties involved in these issues. It is inappropriate for the Court to order that Hamilton's rights be enshrined in the

provisions of the PSA pending the outcome of such discussions and negotiations. Moreover, the Authorization Order does not impair or otherwise affect its rights in any manner whatsoever. Among other things, Hamilton retains the right to oppose the prospective CCAA Plan, both at the creditors' meeting and in the sanction hearing, if it believes that the Proposed Transaction is not fair to it given its legal rights.

The Milbournes

[64] The Milbournes have filed an objection dated December 14, 2016. The Milbournes say that they object to the Authorization Order because the PSA "fails to provide for treatment of the pension benefits and OPEBs for individuals in uniquely situated positions", including, in particular, themselves. They say the resulting uncertainty is prejudicial to their interests, given that these benefits stand to be compromised under the proposed plan of arrangement.

[65] In addition to registered pension benefits, the Milbournes receive non-registered pension benefits under a retirement compensation agreement. They submit that, if the Authorization Order is granted, the Court should require that the PSA confirm their continued entitlement to these benefits.

[66] The circumstances of the Milbournes, and any other parties who currently receive similar benefits, are not before the Court, although the Court understands that there may be a trust established to fund some or all of these benefits. In any event, it would be premature to address the treatment of these benefits at the present time.

[67] As with the issues raised by Hamilton, the intended treatment of these benefits under the Proposed Transaction will be the subject of discussion and negotiation, depending, among other things, upon the extent to which such benefits are currently entitled to the benefit of a trust. Further, the Milbournes' rights are not affected in any way by the Authorization Order. They retain the right to oppose the fairness of any plan of arrangement in the sanction hearing to the extent they consider that their rights have been unfairly affected by such plan.

Local 1005

[68] I have addressed above the principal objections of Local 1005 to approval of Bedrock as the Successful Bidder for purposes of the SISP Order. Local 1005 also opposes authorizing the applicant to enter into the PSA. It says that, if the PSA is authorized, significant issues outstanding among the parties will essentially be presented to stakeholders on a "take it or leave it basis". I do not agree with this characterization of the situation for the reasons set out above.

[69] The Proposed Transaction is a multiparty transaction. The principal stakeholders have reached agreement on governing principles regarding a number of critical issues. However, Local 1005 is not bound by those arrangements as a legal matter. They are free to negotiate based on their own priorities. As mentioned, the extent to which they are able to achieve those priorities or objectives will depend, among other factors, on the overall economics of the Proposed Transaction and the willingness of other parties to make concessions or tradeoffs in order to complete a transaction. However, in the present circumstances, it will not be affected by the execution of the PSA and the exclusivity that the SISP Order and the PSA grant Bedrock.

[70] Local 1005 also refers to the fact that the PSA and the CCAA Term Sheet stipulate that changes to Local 1005's collective agreement must be agreed to, as well as changes to the pension and OPEB arrangements. It says that, if the PSA is authorized, these conditions will have a significant impact on collective bargaining and contractual rights. The CCAA Term Sheet does contemplate amendments to existing arrangements affecting employees and retirees of USSC. I do not agree, however, that the authorization of the PSA has a significant impact by itself on the negotiation process.

[71] After a lengthy search process, this is the transaction that is on the table. It reflects what Bedrock is prepared to offer and, in a larger sense, what the market assesses as the value of USSC. There remains considerable scope for negotiations between the parties. However, the scope of such negotiation is defined by the financial limitations imposed by the broad terms of the Bedrock offer and, in a larger sense, by the market. Any sense of constraint in this negotiating process is a reflection of these economic realities, not the authorization of the PSA. Moreover, the consequences of not approving the PSA would establish constraints of a more immediate and draconian nature.

[72] Lastly, Local 1005 objects that certain provisions are, in its opinion, unfair to its members and retirees. This includes their treatment in respect of OPEBs relative to the treatment of members and retirees of Local 8782. Local 1005 also says the arrangements regarding the pension plans and OPEBs are unfair in that they do not provide retirees and beneficiaries, as well as future retirees and future beneficiaries, with any security regarding their pensions and benefits.

[73] It is premature to address these issues at this time. They remain the subject of further negotiations among the stakeholders. They will also be addressed in the context of negotiations regarding satisfaction of the conditions to implementation of the Proposed Transaction. Concerns of this nature are also more properly addressed, as mentioned, by the creditors in the creditors' meeting or in the sanction hearing before the Court if a plan of arrangement is approved.

Sealing Order

[74] The applicant also requests a sealing order regarding the un-redacted versions of the PSA and the Province Support Agreement. These versions differ from the redacted versions in only one respect: disclosure of the minimum equity contribution of Bedrock.

[75] It is my understanding that none of the parties oppose this relief. In any event, I am satisfied that the requirements for sealing the un-redacted versions of the PSA and the Province Support Agreement contemplated by the test in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, 211 D.L.R. (4th) 193, at para. 53, have been met at this stage of the CCAA proceedings. The minimum equity figure is commercially sensitive information, disclosure of which could be prejudicial to Bedrock and/or USSC and, ultimately, to the prospects for a successful restructuring. The benefits of protecting this information in furthering the restructuring far outweigh any negative impact from its redaction. More generally, there is no obvious reason why the other stakeholders should know the position taken by their counterparty, Bedrock, in its negotiations with the applicant. Accordingly, the ability of stakeholders to

negotiate the remaining outstanding issues is not reasonably affected in any manner by the non-disclosure of this information.

Wilton-Siegel, J.

Date: December 22, 2016

Unlike the court-appointed receiver who is neither the agent of the security holder nor of the debtor, the privately appointed receiver acquires the powers of the security holder and is therefore an agent on behalf of the security holder in the exercise of those powers. The privately appointed receiver is empowered to take possession, realize, and remit the proceeds to the security holder. The privately appointed receiver takes instructions from the security holder to whom the receiver is responsible and is clearly acting as the agent of the security holder.[63] The party appointing the receiver usually indemnifies the receiver in the proper discharge of its powers and duties save for claims of negligence, misfeasance, or non-feasance.

If the security instrument provides for a deemed agency clause, then the receiver is also the agent of the debtor *vis-à-vis* third parties such as employees, landlords, and trade creditors. In this capacity the receiver acts as a manager of the business. The appointment of the receiver is effectively a change of management of the debtor and places the receiver in a position of control over the debtor's property. The purpose of the deemed agency clause is to make the security holder immune from contractual or tortious liability arising out of the operations or realization of the debtor's assets. If no provision is made in the security instrument, it follows that the receiver is merely the agent of the security holder in all respects.[64] Where this agency provision is absent, the security holder is personally liable for wages to employees and to third parties dealing with the receiver. The security holder also remains liable for the receiver's acts, omissions, and remuneration.[65]

In essence, the receiver is agent of the security holder and appointed primarily to recover the debt. The receiver is not appointed to carry on the business in the best interests of the debtor but merely to realize upon the property.[66] Where the security instrument also contains a deemed agency clause, the receiver becomes an agent of the debtor in its dealings with third parties. The receiver does not become an officer of the debtor but it does become a manager of the debtor's property akin to a mortgagee in possession.[67]

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[63] **Peat Marwick Ltd. v. Consumers' Gas Co.**, [1980] O.J. No. 3669, 35 C.B.R. (N.S.) 1, 29 O.R. (2d) 336 (Ont. C.A.).

[64] See **Re Vimbos, Ltd.**, [1900] 1 Ch. 470, where the security instrument did not contain a provision that the receiver was to be the agent of the debtor.

[65] **Deyes v. Wood et al.**, [1911] 1 K.B. 806 (C.A.).

[66] **Re B. Johnson & Co. (Bldrs.) Ltd.**, [1955] Ch. 634, [1955] 2 All E.R. 775 (C.A.).

[67] See also **R. v. Coopers & Lybrand Ltd. (also reported as Canada v. Mercantile Bank of Canada (Agent of))**, [1980] F.C.J. No. 251, 34 C.B.R. (N.S.) 97, [1980] C.T.C. 367

court does under the *CCAA* is establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve. In the course of acting as referee, the court has authority to effectively maintain the *status quo* in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement that will be to the benefit of both the company and its creditors. The Court in *Re Stelco Inc.* observed that the fact that [former] s. 11 did not itself provide the authority for a *CCAA* judge to order the removal of directors, however, did not mean that the supervising judge was powerless to make such an order. The Court held that [former] s. 20 of the *CCAA* offered a gateway to the oppression remedy and other provisions of the *Canada Business Corporations Act* (*CBCA*) and similar provincial statutes.[6]

Subsequent to that judgment, the *CCAA* was amended effective 2009, granting the court express authority to remove directors. Section 11.5(1) now specifies that the court may, on application of any person interested in the matter, make an order removing from office any director if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable plan or is acting or likely to act inappropriately as a director in the circumstances.[7] The court has the authority to appoint new directors to fill the vacancy.[8]

Thus, while governance remains with the directors and officers during the *CCAA* proceeding, where creditors are concerned that the directors are operating in a manner that is inappropriate in the circumstances, or is unreasonably impairing the possibility of a viable plan, they can make an application to the court to remove and replace the director or directors. The court has authority to make the order if it determines the statutory criteria have been met. While it is anticipated that this provision will be rarely utilized, it is an important remedy available to creditors in particular circumstances. Moreover, it is a very helpful provision for the monitor and creditors to get the directors to focus on the *CCAA* proceeding, as the board operates in the shadow of this statutory language, and can be reminded that particular kinds of conduct during the proceeding could give rise to a motion to replace them.

3. Fiduciary Obligations during Insolvency

The scope of directors' duties and to whom they are owed when the firm is financially distressed was largely settled by the Supreme Court of Canada in *People's*

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6 *Canada Business Corporations Act*, RSC 1985, c. C-44.

7 Section 11.5(1), *CCAA*.

8 Section 11.5(2), *CCAA*.

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 **JTI-MACDONALD CORP.**
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED** AND **IMPERIAL TOBACCO COMPANY LIMITED**
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

SUPPLEMENTAL JOINT BOOK OF AUTHORITIES OF THE MEDIATOR & IMPERIAL & RBH MONITORS
Motions for Meeting Orders & Claims Procedure Orders
(Returnable October 31, 2024)

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