Court File No. CV-09-8067-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR.	)	MONDAY, THE 27TH DAY
	)	
JUSTICE WILTON-SIEGEL	)	OF JULY, 2009.

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 BILTRITE RUBBER (1984) INC. AND BILTRITE RUBBER INC.

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

AMENDED **APPROVAL AND VESTING ORDER**

THIS MOTION, made by RSM Richter Inc. (the "**Monitor**") in its capacity as the Court-appointed Monitor in this proceeding for an order, *inter alia* approving the sale transaction (the "**Transaction**") contemplated by the Asset Purchase Agreement (as amended from time to time, the "**Sale Agreement**") between the Biltrite Rubber, Inc. (the "**Seller**") and Robbins LLC (the "**Purchaser**") made as of July 17, 2009 and appended to the Fourth Report of the Monitor dated July 20, 2009 (the "**Report**"), and vesting in the Purchaser the Seller's right, title and interest in and to the assets described in the Sale Agreement (the "**Transferred Assets**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Report and on hearing the submissions of counsel for the Seller and the Monitor, no one appearing for any other person on the service list, although properly served as appears from the Affidavit of Service of Tanya Zitt sworn July 20, 2009 filed:

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record is hereby abridged so that this Motion is properly returnable today and that further service thereof is hereby dispensed with.

2. THIS COURT ORDERS that the Report and the activities of the Monitor referred to therein be and are hereby approved.

3. THIS COURT ORDERS that unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

4. THIS COURT ORDERS AND DECLARES that the Transaction is hereby approved, and that the Sale Agreement is commercially reasonable and in the best interests of the Seller and its stakeholders. The execution of the Sale Agreement by the Monitor on behalf of the Seller is hereby authorized and approved, and the Monitor and the Seller are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Transferred Assets to the Purchaser.

5. THIS COURT ORDERS AND DECLARES that upon the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule A hereto (the "**Monitor's Certificate**"), all of the Seller's right, title and interest in and to the Transferred Assets described in the Sale Agreement shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Initial Order of the Honourable Justice Morawetz dated March 12, 2009; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario), the *Bank Act* or any other personal property registry system; (iii) those Claims listed on Schedule C hereto; and (iv) all charges or security interests created pursuant to Sections 81.3, 81.4, 81.5 and 81.6 of the *Bankruptcy and Insolvency Act* (Canada) ("**BIA**") (all of which are collectively referred to as the "**Encumbrances**", which

term shall not include the Permitted Encumbrances listed on Schedule D hereto) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Transferred Assets are hereby expunged and discharged as against the Transferred Assets.

6. THIS COURT ORDERS that upon the registration of this Order, and any relevant recognition order of the United States Bankruptcy Court for the Northern District of Ohio, with the applicable governmental units in the State of Ohio, the applicable governmental units of the State of Ohio are hereby directed to enter the Purchaser as the owner of the subject real property identified in Schedule B hereto (the **"Real Property"**) in fee simple.

7. THIS COURT ORDERS that, in accordance with Subsection 2(h)(i) of the Sale Agreement, the Monitor shall: hold in trust the Repair Holdback (as defined in the Sale Agreement) until the earlier of (A) the completion of the repairs specified in Section 5.7 of the Sale Agreement, and (B) the date on which it has delivered to the Seller an amount claimed under a Repair Quote pursuant Section 2.7(h)(i) of the Sale Agreement; and distribute amounts from the Repair Holdback as required under the Sale Agreement.

8. THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Transferred Assets shall stand in the place and stead of the Transferred Assets, and that from and after the delivery of the Monitor's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Transferred Assets with the same priority as they had with respect to the Transferred Assets immediately prior to the sale, as if the Transferred Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

9. THIS COURT ORDERS AND DIRECTS the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof.

10. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Monitor is authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Seller's records pertaining to the Seller's past and current employees. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal

information provided to it in a manner which is in all material respects identical to the prior use of such information by the Seller.

11. THIS COURT ORDERS that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the BIA in respect of the Seller and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the Seller;

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

12. THIS COURT ORDERS AND DECLARES that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario) (**"BSA"**) and the BSA does not apply and, further, the Seller and Purchaser are discharged from any obligation under Section 6 of the *Retail Sales Tax Act* (Ontario) (**"RSTA"**) and the Purchaser shall not incur any liability under Section 6 of the RSTA.

13. THIS COURT ORDERS that the Sale Agreement be temporarily sealed until the earlier of the closing of the Transaction or further order of this Court and that Confidential Appendix "1" to the Report be sealed pending further order of this court.

14. THIS COURT HEREBY REQUESTS the aid, recognition and assistance of other courts in Canada in accordance with Section 17 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, and requests that the Federal Court of Canada and the courts and judicial, regulatory and administrative bodies of or constituted by the provinces and territories of Canada, the Parliament of Canada, the United States of America, the states and other

subdivisions of the United States of America, including, without limitation, the United States Bankruptcy Court for the Northern District of Ohio – Western Division, and other nations and states act in aid, recognition and assistance of, and be complementary to, this Court in carrying out the terms of this Order. Each of the Applicants and the Monitor shall be at liberty, and is hereby authorized and empowered, to make such further applications, motions or proceedings to or before such other courts and judicial, regulatory and administrative bodies, and take such other steps, in Canada or the United States of America, as may be necessary or advisable to give effect to this Order.

Christina Irwin
Registrar, Superior Court of Justice

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUL 2 8 2009

PER / PAR:

Schedule A – Form of Monitor's Certificate

Court File No. CV-09-8067-00CL

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 BILTRITE RUBBER (1984) INC. AND BILTRITE RUBBER INC.

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

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to an Initial Order of the Honourable Justice Morawetz of the Ontario Superior Court of Justice (the "**Court**") dated March 12, 2009, RSM Richter Inc. was appointed as the monitor (the "**Monitor**") of Biltrite Rubber (1984) Inc. and Biltrite Rubber, Inc.

B. Pursuant to an Order of the Court dated **[DATE]**, the Court, *inter alia* approved the Asset Purchase Agreement made as of July 17, 2009 (the "**Sale Agreement**") between Biltrite Rubber, Inc. (the "**Seller**") and Robbins LLC (the "**Purchaser**") and provided for the vesting in the Purchaser of the Seller's right, title and interest in and to the Transferred Assets, which vesting is to be effective with respect to the Transferred Assets upon the delivery by the Monitor to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Transferred Assets; (ii) that the conditions to Closing as set out in sections 8.1, 8.2, 9.1, 9.2, 9.3, 9.4, 9.5, 10.1, 10.2 and 10.3 of the Sale Agreement have been satisfied or waived by the Seller and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Monitor.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE MONITOR CERTIFIES the following:

1. The Purchaser has paid and the Seller has received the Purchase Price for the Transferred Assets payable on the Closing Date pursuant to the Sale Agreement;

2. The conditions to Closing as set out in section 8.1, 8.2, 9.1, 9.2, 9.3, 9.4, 9.5, 10.1, 10.2 and 10.3 of the Sale Agreement have been satisfied or waived by the Seller and the Purchaser; and

3. The Transaction has been completed to the satisfaction of the Monitor.

4. This Certificate was delivered by the Monitor at ________ **[TIME]** on _______ **[DATE]**.

RSM RICHTER INC., in its capacity as Court-appointed Monitor of Biltrite Rubber (1984) Inc. and Biltrite Rubber, Inc., and not in its personal capacity

Per ______________________________

Name: ■

Title: ■

Schedule B – Real Property

Parcel No. 1

Situated in the City of Findlay, County of Hancock, State of Ohio, being a part of the S1/2 of the N1/2 of the SW1/4 of Section 23, T 1 N, R 10 E, a tract of land bounded and described as follows:

Beginning at the southeast corner of the S1/2 of the N1/2 of the SW1/4 of said Section 23, said point lying in the centerline of the right-of-way of Morrical Boulevard;

Thence along the south line of said S51/2 of the N1/2 of the SW1/4 of Section 23, North 89°02'20" West, a distance of 574.48 feet to a point in the easterly right-of-way line of relocated Harrison Street and described as lying 41.50 feet right of Station 118+55 in the centerline of survey thereof;

Thence with said easterly right-of-way line of Harrison Street, in a northeasterly direction, and being a curve to the right with a radius of 913.43 feet, a distance of 400, 06 feet to a point described as lying 41.50 feet right of Station 122+71.13, the chord of said curve segment bearing North 28°18'00" East, a distance of 394.00 feet;

Thence continuing along said right-of-way line North 41°20'20" East, a distance of 412.61 feet to a point described as lying 50 feet right of Station 126+82.71;

Thence South 89°11'40" East, a distance of 152.34 feet to a point 25.00 east of the east line of said S1/2 of the N1/2 of the SW1/4 of Section 23;

Thence parallel with and 25.00 feet east of said east line, South 01°06'20" West, a distance of 664.56 feet to a point on the south line of the SE1/4 of Section 23;

Thence along said south line, North 89°02'20" West, a distance of 25.00 feet to the point of beginning, and containing 6.36 acres of land, more or less, subject however, to all legal highways.

NOTE: The bearings in this legal description are based upon an assumed meridian and are used only for the purpose of describing angular measurements.

Survey and Legal Description prepared by Jan F. Nigh, Registered Surveyor No. 5490 and dated December 13, 1982.

Parcel No. 2

Situated in the City of Findlay, County of Hancock, State of Ohio and known as being Lots Numbered 1 and 12, both inclusive, in Block 2; Lots Numbered 1 through 21, both inclusive in Block 4; Lots Numbered 1 through 4, both inclusive in Block 6 and Lot Numbered 13 in Block Six 6, all in the West Part Subdivision.

Together with all the right, title and interest in and to vacated streets and alley abutting on said lots.

ST 31842

June 15, 2009

Schedule C – Claims to be deleted and expunged from title to Real Property

Royal Bank of Canada, UCC Financing Statement, file number 200700056536, filed with the Hancock Country Recorder, State of Ohio, on October 15, 2007.

Royal Bank of Canada, UCC Financing Statement, file number 200700056544, filed with the Hancock Country Recorder, State of Ohio, on October 25, 2007.

Royal Bank of Canada, UCC Financing Statement, file number OH00120249647, filed with the Office of the Secretary of State of Ohio on October 15, 2007.

Schedule D – Permitted Encumbrances, Easements and Restrictive Covenants

(unaffected by the Vesting Order)

"Permitted Encumbrances" means:

(a) statutory Liens for Taxes, assessments and other governmental levies, fees, or charges that are (i) not due and payable as of the Closing Date or (ii) being contested by appropriate proceedings;

(b) mechanics' and material men's liens and similar liens for labor, materials, or supplies, carriers' liens, warehousemen's liens, landlord's liens and other similar statutory liens incurred in the ordinary course of business for amounts that are (i) not delinquent as of the Closing Date or (ii) being contested by appropriate proceedings;

(c) zoning, building codes, and other land use laws regulating the use or occupancy of any Real Property or the activities conducted thereon that are imposed by any governmental authority;

(d) liens for any financing that is an Assumed Liability;

(e) easements, covenants, conditions, restrictions and other similar matters affecting title to Real Property and other encroachments and title and survey defects that (i) are of record, or (ii) do not or would not materially impair the use or occupancy of such Real Property in the operation of the business of Seller; and

(f) Toyota Motor Credit Corporation, P.O. Box 3457, Torrance, CA, 90510, UCC-1 Financing Statement, file number OH00095681762, filed with the Office of the Secretary of State of Ohio on November 16, 2005, with respect to the following collateral: One (1) New 2005 Toyota Forklift Model 7FGCU25, s/n 94045.

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

Court File No: CV-09-8067-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

ORDER

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44th Floor, 1 First Canadian Place
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Jay A. Swartz (LSUC #15417L)
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Lawyers for RSM Richter Inc., in its capacity as Court-appointed Monitor of Biltrite Rubber (1984) Inc. and Biltrite Rubber Inc., and not in its personal capacity

Court File No. 09-8067-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	) MONDAY, THE 27TH
	)
JUSTICE WILTON-SIEGEL	) DAY OF JULY, 2009

COURT OF JUSTICE SUPERIOR COUR SUPÉRIEURE DE JUSTICE JUSTICIA

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 BILTRITE RUBBER (1984) INC. AND BILTRITE RUBBER, INC.

AMENDED <u>STAY EXTENSION AND USE OF PROCEEDS ORDER</u> AWS

THIS MOTION, made by Biltrite Rubber (1984) Inc. ("**Biltrite**") and Biltrite Rubber, Inc. ("**Biltrite U.S.**", and collectively with Biltrite, the "**Applicants**") for an Order substantially in the form attached at Tab 2 of the Motion Record herein was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of James Chung sworn July 21, 2009 (the "**Chung Affidavit**") and the Fourth Report of the Monitor dated July 20, 2009 (the "**Fourth Report**"), and on hearing the submissions of counsel for the Applicants and RSM Richter Inc. (the "**Monitor**") and such other counsel as were present and wished to be heard,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged so that this Motion is properly returnable today and that further service thereof is hereby dispensed with.

EXTENSION OF THE STAY OF PROCEEDINGS

2. **THIS COURT ORDERS** that the Stay Period, as such term is defined in and used throughout the Order of this Court in respect of the Applicants dated March 12, 2009 (the

"**Initial CCAA Order**"), as it has been extended by the Order of this Court from time to time, be and is hereby extended to and including 11:59 p.m. on September 18, 2009, and that all other terms of the Initial CCAA Order shall remain in full force and effect, unamended, except as may be required to give effect to this paragraph or as otherwise provided in this Order.

USE OF PROCEEDS

3. **THIS COURT ORDERS** that the Applicants and the Monitor, on behalf of the Applicants, shall be entitled to utilize the proceeds resulting from the sale of the assets, property, undertaking and business of the Applicants and all other cash or near-cash assets, property and undertaking of the Applicants (the "**Proceeds**") in accordance with the cash-flow budget attached to the Chung Affidavit as Exhibit "C" (the "**Cash Flow Budget**"), on a cumulative basis, to and including September 18, 2009.

SECOND DIP AMENDMENT

4. **THIS COURT ORDERS** that the agreement between the Applicants and Royal Bank of Canada ("**RBC**") dated as of July 21, 2009, attached to the Chung Affidavit as Exhibit "D" (the "**Second DIP Amendment**") is hereby approved *nunc pro tunc* and the Applicants are hereby authorized and directed to execute and deliver the Second DIP Amendment.

5. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to continue to borrow from RBC pursuant to the Loan Agreement (as that term is defined in the Initial CCAA Order), as it has been amended by: (i) the DIP Agreement (as that term is defined in the Initial CCAA Order); (ii) the DIP Extension Agreement (as that term is defined in the Order of this Court in respect of these proceedings dated July 3, 2009); and (iii) the Second DIP Amendment (the "**Amended Loan Agreement**"), provided that the Applicants' borrowings shall not exceed the borrowing base availability provided under the Amended Loan Agreement unless permitted by further Order of this Court.

DISTRIBUTION TO RBC

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Applicants, be and is hereby authorized and directed to irrevocably distribute $6 million to RBC on account of amounts owing

by the Applicants to RBC pursuant to the Amended Loan Agreement, including amounts in respect of principal, interest and costs.

7. **THIS COURT ORDERS** that from and after the closing of any sale of the assets, property, business and undertaking of Biltrite U.S., and otherwise upon the receipt of additional monies or proceeds by or on behalf of the Applicants (including, without limitation, as a result of the collection of Biltrite U.S.'s accounts receivable by the Monitor from time to time), the Monitor, on behalf of the Applicants, shall be and is hereby authorized and directed to irrevocably distribute additional Proceeds to RBC on account of amounts owing by the Applicants to RBC from time to time pursuant to the Amended Loan Agreement, including amounts in respect of principal, interest and costs, as such additional Proceeds become available, provided that the aggregate of all distributions made to RBC shall not exceed the indebtedness of the Applicants to RBC pursuant to the Amended Loan Agreement and provided further that, pending further Order of this Court, the Monitor, on behalf of the Applicants, shall hold back: (i) sufficient Proceeds to secure the Administrative Charge and the Directors' Charge (each as defined in the Initial Order); (ii) sufficient Proceeds to enable the Applicants to use the Proceeds as contemplated in the Cash Flow Budget and such other cash flow budgets as may be approved by this Court; and (iii) $50,000 fund the costs of bankruptcy proceedings in respect of the Applicants.

8. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

(b) the bankruptcy of one or both of the Applicants; or

(c) the provisions of any federal or provincial statute,

the distributions to RBC pursuant to paragraphs 6 and 7 of this Order shall be binding upon any trustee in bankruptcy that may be appointed in respect of any of the Applicants and shall not be void or voidable by creditors of any of the Applicants, nor shall the payments constitute or be deemed to be settlements, fraudulent preferences, assignments, fraudulent conveyances, or other reviewable transactions under the Bankruptcy and Insolvency Act or any other applicable federal or provincial legislation, nor do they constitute conduct which is oppressive, unfairly prejudicial to or which unfairly disregards the interests of any person.

EFFECT, RECOGNITION AND ASSISTANCE

9. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their powers and duties or the interpretation or application of this Order.

10. **THIS COURT REQUESTS** the aid, recognition and assistance of other courts in Canada in accordance with Section 17 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, and requests that the Federal Court of Canada and the courts and judicial, regulatory and administrative bodies of or constituted by the provinces and territories of Canada, the Parliament of Canada, the United States of America, the states and other subdivisions of the United States of America, including, without limitation, the United States Bankruptcy Court for the Northern District of Ohio – Western Division, and other nations and states act in aid, recognition and assistance of, and be complementary to, this Court in carrying out the terms of this Order. Each of the Applicants and the Monitor shall be at liberty, and is hereby authorized and empowered, to make such further applications, motions or proceedings to or before such other courts and judicial, regulatory and administrative bodies, and take such other steps, in Canada or the United States of America, as may be necessary or advisable to give effect to this Order.

Christina Irwin
Registrar, Superior Court of Justice

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUL 2 8 2009

PER / PAR:

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

Court File No. 09-0867-00C

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BILTRITE RUBBER (1984) INC. AND BILTRITE RUBBER, INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER

(July 27, 2009)

GOODMANS LLP
Barristers & Solicitors
250 Yonge Street, Suite 2400
Toronto, Canada M5B 2M6

David Bish (LSUC# 41629A)
Jason Wadden (LSUC# 46757M)
Logan Willis (LSUC# 53894K)

Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for the Applicants
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The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.

Dated: August 07 2009

Mary Ann Whipple
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re:	Chapter 15
Biltrite Rubber (1984) Inc., *et al.*,	Case No. 09-31423 (MAW)
Foreign Applicants in Foreign Proceedings.	Jointly Administered

ORDER ENFORCING THE ORDERS OF THE ONTARIO COURT (i) APPROVING THE SALE OF ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES, (ii) AUTHORIZING A DISTRIBUTION OF THE SALE PROCEEDS AND (iii) GRANTING RELATED RELIEF

This matter was brought before the Court upon the motion (the "**Motion**")[1] of RSM Richter Inc., the court-appointed monitor (the "**Monitor**") and authorized foreign representative of Biltrite Rubber (1984) Inc. ("**Biltrite Canada**") and Biltrite Rubber, Inc. ("**Biltrite U.S.**" and together with Biltrite, the "**Biltrite Group**") in proceedings (the "**Canadian Proceedings**") under Canada's *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in the Motion.

amended, pending before the Ontario Superior Court of Justice (Commercial List) (the "**Ontario Court**") seeking the entry of an order pursuant to sections 1507, 1520, 1521, 363 and 105(a) of title 11 of the United States Code (the "**Bankruptcy Code**") giving effect in the United States to the order of the Ontario Court dated July 28, 2009 (the "**Approval and Vesting Order**") (i) approving the sale of assets of the Findlay Operations free and clear of all liens, claims and encumbrances to Robbins LLC (the "**Purchaser**") pursuant to the asset purchase agreement between Biltrite U.S. and the Purchaser dated July 17, 2009 (the "**Purchase Agreement**") and (ii) to the order of the Ontario Court dated July 28, 2009 authorizing a distribution of the sale proceeds from the sale of the Findlay Operations to Royal Bank of Canada (the "**Distribution Order**"), annexed hereto as Exhibits 1 and 2, respectively. Adequate notice of the Motion has been given. The Court has considered and reviewed the Motion, including the Approval and Vesting Order and the Distribution Order. Any objections to the Motion that have not been withdrawn have been overruled and the Court having heard argument by counsel appearing at the Hearing; and after due deliberation and sufficient cause appearing therefore; the Court finds and concludes as follows:

(A) This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

(B) This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P).

(C) Venue is proper in this District pursuant to 28 U.S.C. §§ 1410(1) and (3).

(D) The relief granted hereby is necessary and appropriate, in the interests of the public and international comity, consistent with the public policy of the United States, warranted pursuant to section 1520 and 1521 of the Bankruptcy Code, and will not cause any hardship to any parties in interest that is not outweighed by the benefits of granting that relief.

(E) Purchaser has acted in good faith, within the meaning of section 363(m) of the Bankruptcy Code and cause has been shown as to why this Order should not be subject to the stay provided by Rule 6004 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**").

(F) Time is of the essence in consummating the sale. To maximize the value of the assets, it is essential that the sale of the Purchased Assets occur within the time constraints set forth in the Purchase Agreement.

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. The provisions of section 1520 and 1521 of the Bankruptcy Code apply in these Chapter 15 Cases.

2. The Approval and Vesting Order is hereby given full force and effect in the United States.

3. The Distribution Order is hereby given full force and effect in the United States.

4. The Purchaser is hereby found to be a good faith purchaser and granted all of the protections provided to a good-faith purchaser under section 363(m) of the Bankruptcy Code.

5. As set forth in the Approval and Vesting Order, effective as of the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule A to the Approval and Vesting Order (the "**Monitor's Certificate**"), the sale of the Purchased Assets by Biltrite U.S. to the Purchaser shall constitute a legal, valid, and effective transfer of Biltrite U.S.'s right, title and interest in the Purchased Assets, notwithstanding any requirement for approval or consent by any person and shall vest in the Purchaser all right, title, and interest of the Biltrite Group in and to the Purchased Assets, free and clear of all liens, claims and encumbrances of any kind, pursuant to section 363(f) of the Bankruptcy Code.

6. Biltrite U.S. is authorized and empowered to cause to be filed with the secretary of state of any state or other applicable officials of any applicable governmental units any and all certificates, agreements, or amendments necessary or appropriate to effectuate the transactions contemplated by the Purchase Agreement, any related agreements and this Order,

including amended and restated limited-liability-company agreements, certificates or articles of incorporation and by-laws or certificates or articles of amendment, and all such other actions, filings, or recordings as may be required under appropriate provisions of the applicable laws of all applicable governmental units or as any officer of the Biltrite Group may determine are necessary or appropriate. The execution of any such document or the taking of any such action is deemed conclusive evidence of the authority of such person to so act. Without limiting the generality of the foregoing, this Order shall constitute all approvals and consents, if any, required by the laws of the state of Ohio and all other applicable business corporation, trust, and other laws of the applicable governmental units with respect to the implementation and consummation of the Purchase Agreement, any related agreements and this Order, and the transactions contemplated thereby and hereby.

7. This Order constitutes authorization under all applicable jurisdictions' version of the Uniform Commercial Code (the "**UCC**") for the Purchaser to file UCC termination statements with respect to all security interests and liens on the Purchased Assets. A copy of this Order may be filed with the appropriate clerk and/or recorded with the recorder to cancel any liens, claims or interests of record.

8. This Order shall be binding upon and govern the acts of all filing agents, filing officers, administrative agencies or units, governmental departments or units, secretaries of state, federal, state and local officials and other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to the Purchased Assets.

9. Notwithstanding Bankruptcy Rules 6004, 7062, and 9021, this Order shall be effective and enforceable immediately upon entry and its provisions shall be self-executing. In the absence of any person or entity obtaining a stay pending appeal, Biltrite U.S. and Purchaser are free to close under the agreement at any time, subject to the terms of the agreement. In the absence of any person or entity obtaining a stay pending appeal, if Biltrite U.S. and Purchaser close under the agreement, Purchaser shall be entitled to the protections of section 363(m) of the Bankruptcy Code as to all aspects of the transactions under and pursuant to the agreement if this Order or any authorization contained herein is reversed or modified on appeal.

10. The automatic stay under section 362(a) of the Bankruptcy Code and this Court's prior orders providing for a stay or injunction shall not apply to and otherwise shall not prevent the exercise or performance by any party of its rights or obligations under the agreement.

11. This Court shall retain jurisdiction with respect to the enforcement, amendment or modification of this Order, any request for additional relief or any adversary proceeding brought in and through these chapter 15 cases, and any request by an entity for relief from the provisions of this Order, for cause shown, that is properly commenced and within the jurisdiction of this Court.

12. Service in accordance with this Order shall constitute adequate and sufficient service and notice.

13. The Motion shall be made available by the Monitor through its website at http://www.rsmrichter.com or upon request at the offices of Allen & Overy LLP, 1221 Avenue of the Americas, New York, New York 10020 to the attention of Amélie Baudot.

14. Notwithstanding Bankruptcy Rule 7062, made applicable to these Chapter 15 Cases by Bankruptcy Rule 1018, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry, and upon its entry, this Order shall become final and appealable.

SO ORDERED.

###.

EXHIBIT 1

Court File No. CV-09-8067-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR.	)	MONDAY, THE 27TH DAY
	)	
JUSTICE WILTON-SIEGEL	)	OF JULY, 2009.

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 BILTRITE RUBBER (1984) INC. AND BILTRITE RUBBER INC.

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

AMENDED **APPROVAL AND VESTING ORDER**

THIS MOTION, made by RSM Richter Inc. (the "**Monitor**") in its capacity as the Court-appointed Monitor in this proceeding for an order, *inter alia* approving the sale transaction (the "**Transaction**") contemplated by the Asset Purchase Agreement (as amended from time to time, the "**Sale Agreement**") between the Biltrite Rubber, Inc. (the "**Seller**") and Robbins LLC (the "**Purchaser**") made as of July 17, 2009 and appended to the Fourth Report of the Monitor dated July 20, 2009 (the "**Report**"), and vesting in the Purchaser the Seller's right, title and interest in and to the assets described in the Sale Agreement (the "**Transferred Assets**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Report and on hearing the submissions of counsel for the Seller and the Monitor, no one appearing for any other person on the service list, although properly served as appears from the Affidavit of Service of Tanya Zitt sworn July 20, 2009 filed:

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record is hereby abridged so that this Motion is properly returnable today and that further service thereof is hereby dispensed with.

2. THIS COURT ORDERS that the Report and the activities of the Monitor referred to therein be and are hereby approved.

3. THIS COURT ORDERS that unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

4. THIS COURT ORDERS AND DECLARES that the Transaction is hereby approved, and that the Sale Agreement is commercially reasonable and in the best interests of the Seller and its stakeholders. The execution of the Sale Agreement by the Monitor on behalf of the Seller is hereby authorized and approved, and the Monitor and the Seller are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Transferred Assets to the Purchaser.

5. THIS COURT ORDERS AND DECLARES that upon the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule A hereto (the "**Monitor's Certificate**"), all of the Seller's right, title and interest in and to the Transferred Assets described in the Sale Agreement shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Initial Order of the Honourable Justice Morawetz dated March 12, 2009; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario), the *Bank Act* or any other personal property registry system; (iii) those Claims listed on Schedule C hereto; and (iv) all charges or security interests created pursuant to Sections 81.3, 81.4, 81.5 and 81.6 of the *Bankruptcy and Insolvency Act* (Canada) ("**BIA**") (all of which are collectively referred to as the "**Encumbrances**", which

term shall not include the Permitted Encumbrances listed on Schedule D hereto) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Transferred Assets are hereby expunged and discharged as against the Transferred Assets.

6. THIS COURT ORDERS that upon the registration of this Order, and any relevant recognition order of the United States Bankruptcy Court for the Northern District of Ohio, with the applicable governmental units in the State of Ohio, the applicable governmental units of the State of Ohio are hereby directed to enter the Purchaser as the owner of the subject real property identified in Schedule B hereto (the **"Real Property"**) in fee simple.

7. THIS COURT ORDERS that, in accordance with Subsection 2(h)(i) of the Sale Agreement, the Monitor shall: hold in trust the Repair Holdback (as defined in the Sale Agreement) until the earlier of (A) the completion of the repairs specified in Section 5.7 of the Sale Agreement, and (B) the date on which it has delivered to the Seller an amount claimed under a Repair Quote pursuant Section 2.7(h)(i) of the Sale Agreement; and distribute amounts from the Repair Holdback as required under the Sale Agreement.

8. THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Transferred Assets shall stand in the place and stead of the Transferred Assets, and that from and after the delivery of the Monitor's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Transferred Assets with the same priority as they had with respect to the Transferred Assets immediately prior to the sale, as if the Transferred Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

9. THIS COURT ORDERS AND DIRECTS the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof.

10. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Monitor is authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Seller's records pertaining to the Seller's past and current employees. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal

information provided to it in a manner which is in all material respects identical to the prior use of such information by the Seller.

11. THIS COURT ORDERS that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the BIA in respect of the Seller and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the Seller;

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

12. THIS COURT ORDERS AND DECLARES that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario) (**"BSA"**) and the BSA does not apply and, further, the Seller and Purchaser are discharged from any obligation under Section 6 of the *Retail Sales Tax Act* (Ontario) (**"RSTA"**) and the Purchaser shall not incur any liability under Section 6 of the RSTA.

13. THIS COURT ORDERS that the Sale Agreement be temporarily sealed until the earlier of the closing of the Transaction or further order of this Court and that Confidential Appendix "1" to the Report be sealed pending further order of this court.

14. THIS COURT HEREBY REQUESTS the aid, recognition and assistance of other courts in Canada in accordance with Section 17 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, and requests that the Federal Court of Canada and the courts and judicial, regulatory and administrative bodies of or constituted by the provinces and territories of Canada, the Parliament of Canada, the United States of America, the states and other

subdivisions of the United States of America, including, without limitation, the United States Bankruptcy Court for the Northern District of Ohio – Western Division, and other nations and states act in aid, recognition and assistance of, and be complementary to, this Court in carrying out the terms of this Order. Each of the Applicants and the Monitor shall be at liberty, and is hereby authorized and empowered, to make such further applications, motions or proceedings to or before such other courts and judicial, regulatory and administrative bodies, and take such other steps, in Canada or the United States of America, as may be necessary or advisable to give effect to this Order.

Christina Irwin
Registrar, Superior Court of Justice

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUL 2 8 2009

PER / PAR:

Schedule A – Form of Monitor's Certificate

Court File No. CV-09-8067-00CL

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 BILTRITE RUBBER (1984) INC. AND BILTRITE RUBBER INC.

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

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to an Initial Order of the Honourable Justice Morawetz of the Ontario Superior Court of Justice (the "**Court**") dated March 12, 2009, RSM Richter Inc. was appointed as the monitor (the "**Monitor**") of Biltrite Rubber (1984) Inc. and Biltrite Rubber, Inc.

B. Pursuant to an Order of the Court dated [DATE], the Court, *inter alia* approved the Asset Purchase Agreement made as of July 17, 2009 (the "**Sale Agreement**") between Biltrite Rubber, Inc. (the "**Seller**") and Robbins LLC (the "**Purchaser**") and provided for the vesting in the Purchaser of the Seller's right, title and interest in and to the Transferred Assets, which vesting is to be effective with respect to the Transferred Assets upon the delivery by the Monitor to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Transferred Assets; (ii) that the conditions to Closing as set out in sections 8.1, 8.2, 9.1, 9.2, 9.3, 9.4, 9.5, 10.1, 10.2 and 10.3 of the Sale Agreement have been satisfied or waived by the Seller and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Monitor.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE MONITOR CERTIFIES the following:

1. The Purchaser has paid and the Seller has received the Purchase Price for the Transferred Assets payable on the Closing Date pursuant to the Sale Agreement;

2. The conditions to Closing as set out in section 8.1, 8.2, 9.1, 9.2, 9.3, 9.4, 9.5, 10.1, 10.2 and 10.3 of the Sale Agreement have been satisfied or waived by the Seller and the Purchaser; and

3. The Transaction has been completed to the satisfaction of the Monitor.

4. This Certificate was delivered by the Monitor at _______ [TIME] on _______ **[DATE]**.

RSM RICHTER INC., in its capacity as Court-appointed Monitor of Biltrite Rubber (1984) Inc. and Biltrite Rubber, Inc., and not in its personal capacity

Per ______________________________

Name: ■

Title: ■

Schedule B – Real Property

Parcel No. 1

Situated in the City of Findlay, County of Hancock, State of Ohio, being a part of the S1/2 of the N1/2 of the SW1/4 of Section 23, T 1 N, R 10 E, a tract of land bounded and described as follows:

Beginning at the southeast corner of the S1/2 of the N1/2 of the SW1/4 of said Section 23, said point lying in the centerline of the right-of-way of Morrical Boulevard;

Thence along the south line of said S51/2 of the N1/2 of the SW1/4 of Section 23, North 89°02'20" West, a distance of 574.48 feet to a point in the easterly right-of-way line of relocated Harrison Street and described as lying 41.50 feet right of Station 118+55 in the centerline of survey thereof;

Thence with said easterly right-of-way line of Harrison Street, in a northeasterly direction, and being a curve to the right with a radius of 913.43 feet, a distance of 400, 06 feet to a point described as lying 41.50 feet right of Station 122+71.13, the chord of said curve segment bearing North 28°18'00" East, a distance of 394.00 feet;

Thence continuing along said right-of-way line North 41°20'20" East, a distance of 412.61 feet to a point described as lying 50 feet right of Station 126+82.71;

Thence South 89°11'40" East, a distance of 152.34 feet to a point 25.00 east of the east line of said S1/2 of the N1/2 of the SW1/4 of Section 23;

Thence parallel with and 25.00 feet east of said east line, South 01°06'20" West, a distance of 664.56 feet to a point on the south line of the SE1/4 of Section 23;

Thence along said south line, North 89°02'20" West, a distance of 25.00 feet to the point of beginning, and containing 6.36 acres of land, more or less, subject however, to all legal highways.

NOTE: The bearings in this legal description are based upon an assumed meridian and are used only for the purpose of describing angular measurements.

Survey and Legal Description prepared by Jan F. Nigh, Registered Surveyor No. 5490 and dated December 13, 1982.

Parcel No. 2

Situated in the City of Findlay, County of Hancock, State of Ohio and known as being Lots Numbered 1 and 12, both inclusive, in Block 2; Lots Numbered 1 through 21, both inclusive in Block 4; Lots Numbered 1 through 4, both inclusive in Block 6 and Lot Numbered 13 in Block Six 6, all in the West Part Subdivision.

Together with all the right, title and interest in and to vacated streets and alley abutting on said lots.

ST 31842

June 15, 2009

Schedule C – Claims to be deleted and expunged from title to Real Property

Royal Bank of Canada, UCC Financing Statement, file number 200700056536, filed with the Hancock Country Recorder, State of Ohio, on October 15, 2007.

Royal Bank of Canada, UCC Financing Statement, file number 200700056544, filed with the Hancock Country Recorder, State of Ohio, on October 25, 2007.

Royal Bank of Canada, UCC Financing Statement, file number OH00120249647, filed with the Office of the Secretary of State of Ohio on October 15, 2007.

Schedule D – Permitted Encumbrances, Easements and Restrictive Covenants

(unaffected by the Vesting Order)

"Permitted Encumbrances" means:

(a) statutory Liens for Taxes, assessments and other governmental levies, fees, or charges that are (i) not due and payable as of the Closing Date or (ii) being contested by appropriate proceedings;

(b) mechanics' and material men's liens and similar liens for labor, materials, or supplies, carriers' liens, warehousemen's liens, landlord's liens and other similar statutory liens incurred in the ordinary course of business for amounts that are (i) not delinquent as of the Closing Date or (ii) being contested by appropriate proceedings;

(c) zoning, building codes, and other land use laws regulating the use or occupancy of any Real Property or the activities conducted thereon that are imposed by any governmental authority;

(d) liens for any financing that is an Assumed Liability;

(e) easements, covenants, conditions, restrictions and other similar matters affecting title to Real Property and other encroachments and title and survey defects that (i) are of record, or (ii) do not or would not materially impair the use or occupancy of such Real Property in the operation of the business of Seller; and

(f) Toyota Motor Credit Corporation, P.O. Box 3457, Torrance, CA, 90510, UCC-1 Financing Statement, file number OH00095681762, filed with the Office of the Secretary of State of Ohio on November 16, 2005, with respect to the following collateral: One (1) New 2005 Toyota Forklift Model 7FGCU25, s/n 94045.

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 BILTRITE RUBBER (1984) INC. AND BILTRITE RUBBER INC.

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

Court File No: CV-09-8067-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

ORDER

Davies Ward Phillips & Vineberg LLP
44th Floor, 1 First Canadian Place
Toronto, ON M5X 1B1

Jay A. Swartz (LSUC #15417L)
Natasha J. MacParland (LSUC #42383G)
Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for RSM Richter Inc., in its capacity as Court-appointed Monitor of Biltrite Rubber (1984) Inc. and Biltrite Rubber Inc., and not in its personal capacity

EXHIBIT 2

Court File No. 09-8067-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	) **MONDAY, THE 27TH**
	)
JUSTICE WILTON-SIEGEL	) **DAY OF JULY, 2009**

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 BILTRITE RUBBER (1984) INC. AND BILTRITE RUBBER, INC.

AMENDED **STAY EXTENSION AND USE OF PROCEEDS ORDER** AW-S

THIS MOTION, made by Biltrite Rubber (1984) Inc. (**"Biltrite"**) and Biltrite Rubber, Inc. (**"Biltrite U.S."**, and collectively with Biltrite, the **"Applicants"**) for an Order substantially in the form attached at Tab 2 of the Motion Record herein was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of James Chung sworn July 21, 2009 (the **"Chung Affidavit"**) and the Fourth Report of the Monitor dated July 20, 2009 (the **"Fourth Report"**), and on hearing the submissions of counsel for the Applicants and RSM Richter Inc. (the **"Monitor"**) and such other counsel as were present and wished to be heard,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged so that this Motion is properly returnable today and that further service thereof is hereby dispensed with.

EXTENSION OF THE STAY OF PROCEEDINGS

2. **THIS COURT ORDERS** that the Stay Period, as such term is defined in and used throughout the Order of this Court in respect of the Applicants dated March 12, 2009 (the

"**Initial CCAA Order**"), as it has been extended by the Order of this Court from time to time, be and is hereby extended to and including 11:59 p.m. on September 18, 2009, and that all other terms of the Initial CCAA Order shall remain in full force and effect, unamended, except as may be required to give effect to this paragraph or as otherwise provided in this Order.

USE OF PROCEEDS

3. **THIS COURT ORDERS** that the Applicants and the Monitor, on behalf of the Applicants, shall be entitled to utilize the proceeds resulting from the sale of the assets, property, undertaking and business of the Applicants and all other cash or near-cash assets, property and undertaking of the Applicants (the "**Proceeds**") in accordance with the cash-flow budget attached to the Chung Affidavit as Exhibit "C" (the "**Cash Flow Budget**"), on a cumulative basis, to and including September 18, 2009.

SECOND DIP AMENDMENT

4. **THIS COURT ORDERS** that the agreement between the Applicants and Royal Bank of Canada ("**RBC**") dated as of July 21, 2009, attached to the Chung Affidavit as Exhibit "D" (the "**Second DIP Amendment**") is hereby approved *nunc pro tunc* and the Applicants are hereby authorized and directed to execute and deliver the Second DIP Amendment.

5. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to continue to borrow from RBC pursuant to the Loan Agreement (as that term is defined in the Initial CCAA Order), as it has been amended by: (i) the DIP Agreement (as that term is defined in the Initial CCAA Order); (ii) the DIP Extension Agreement (as that term is defined in the Order of this Court in respect of these proceedings dated July 3, 2009); and (iii) the Second DIP Amendment (the "**Amended Loan Agreement**"), provided that the Applicants' borrowings shall not exceed the borrowing base availability provided under the Amended Loan Agreement unless permitted by further Order of this Court.

DISTRIBUTION TO RBC

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Applicants, be and is hereby authorized and directed to irrevocably distribute $6 million to RBC on account of amounts owing

by the Applicants to RBC pursuant to the Amended Loan Agreement, including amounts in respect of principal, interest and costs.

7. **THIS COURT ORDERS** that from and after the closing of any sale of the assets, property, business and undertaking of Biltrite U.S., and otherwise upon the receipt of additional monies or proceeds by or on behalf of the Applicants (including, without limitation, as a result of the collection of Biltrite U.S.'s accounts receivable by the Monitor from time to time), the Monitor, on behalf of the Applicants, shall be and is hereby authorized and directed to irrevocably distribute additional Proceeds to RBC on account of amounts owing by the Applicants to RBC from time to time pursuant to the Amended Loan Agreement, including amounts in respect of principal, interest and costs, as such additional Proceeds become available, provided that the aggregate of all distributions made to RBC shall not exceed the indebtedness of the Applicants to RBC pursuant to the Amended Loan Agreement and provided further that, pending further Order of this Court, the Monitor, on behalf of the Applicants, shall hold back: (i) sufficient Proceeds to secure the Administrative Charge and the Directors' Charge (each as defined in the Initial Order); (ii) sufficient Proceeds to enable the Applicants to use the Proceeds as contemplated in the Cash Flow Budget and such other cash flow budgets as may be approved by this Court; and (iii) $50,000 fund the costs of bankruptcy proceedings in respect of the Applicants.

8. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

(b) the bankruptcy of one or both of the Applicants; or

(c) the provisions of any federal or provincial statute,

the distributions to RBC pursuant to paragraphs 6 and 7 of this Order shall be binding upon any trustee in bankruptcy that may be appointed in respect of any of the Applicants and shall not be void or voidable by creditors of any of the Applicants, nor shall the payments constitute or be deemed to be settlements, fraudulent preferences, assignments, fraudulent conveyances, or other reviewable transactions under the Bankruptcy and Insolvency Act or any other applicable federal or provincial legislation, nor do they constitute conduct which is oppressive, unfairly prejudicial to or which unfairly disregards the interests of any person.

EFFECT, RECOGNITION AND ASSISTANCE

9. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their powers and duties or the interpretation or application of this Order.

10. **THIS COURT REQUESTS** the aid, recognition and assistance of other courts in Canada in accordance with Section 17 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, and requests that the Federal Court of Canada and the courts and judicial, regulatory and administrative bodies of or constituted by the provinces and territories of Canada, the Parliament of Canada, the United States of America, the states and other subdivisions of the United States of America, including, without limitation, the United States Bankruptcy Court for the Northern District of Ohio – Western Division, and other nations and states act in aid, recognition and assistance of, and be complementary to, this Court in carrying out the terms of this Order. Each of the Applicants and the Monitor shall be at liberty, and is hereby authorized and empowered, to make such further applications, motions or proceedings to or before such other courts and judicial, regulatory and administrative bodies, and take such other steps, in Canada or the United States of America, as may be necessary or advisable to give effect to this Order.

Christina Irwin
Registrar, Superior Court of Justice

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUL 2 8 2009

PER / PAR:

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

Court File No. 09-0867-00C

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BILTRITE RUBBER (1984) INC. AND BILTRITE RUBBER, INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER

(July 27, 2009)

GOODMANS LLP
Barristers & Solicitors
250 Yonge Street, Suite 2400
Toronto, Canada M5B 2M6

David Bish (LSUC# 41629A)
Jason Wadden (LSUC# 46757M)
Logan Willis (LSUC# 53894K)

Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for the Applicants
\5741240

\5741240

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: POPE & TALBOT, INC., et al.[1], Foreign Applicants in Foreign Proceeding	Case No. 08 -08-11933(CSS) Chapter 15 Jointly Administered **Re: D.I. 3**

ORDER GRANTING RECOGNITION OF
FOREIGN MAIN PROCEEDINGS AND RELATED RELIEF

This matter was brought before the Court to consider the Petition for Recognition of Foreign Main Proceedings (the "Recognition Petition"), which was filed for each of the Debtors (defined below) (the "Chapter 15 Petitions"), pursuant to sections 105(a), 1504, 1507, 1515, 1520 and 1521 of the United States Bankruptcy Code (the "Bankruptcy Code") commencing the above-captioned chapter 15 cases (the "Chapter 15 Cases") filed on August 22, 2008 by PricewaterhouseCoopers Inc. ("PwC"), the court appointed receiver and duly authorized foreign representative for the Debtors in a Canadian receivership proceeding pending in British Columbia (the "Receivership").[2] This Court entered an order (the "Notice Order") on August 27, 2008 shortening the time for the hearing on the Recognition Petition and approving the manner of notice of the Recognition Proceeding. Due and timely notice of the filing of the Chapter 15 Petitions was given in accordance with the Notice Order. The Court has considered and reviewed the other pleadings and exhibits submitted by PwC in support of the Chapter 15

[1] The Debtors in these proceedings are: Pope & Talbot, Inc.; Penn Timber, Inc.; Pope & Talbot Lumber Sales, Inc.; Pope & Talbot Pulp Sales U.S., Inc.; Pope & Talbot Relocation Services, Inc.; Pope & Talbot Spearfish Ltd. Partnership; P&T Power Company; Mackenzie Pulp Land Ltd.; Pope &. Talbot Ltd.; P&T Factoring Limited Partnership; P&T Finance One Limited Partnership; P&T Finance Three LLC; P&T Finance Two Limited Partnership; P&T Funding Ltd.; and P&T LFP Investment Limited Partnership.

[2] The Receivership includes proceedings under both Canadian federal and provincial law. PwC was appointed as interim receiver pursuant to Section 47(1) of the *Bankruptcy and Insolvency Act* and as receiver pursuant to Section 39 of the *Law and Equity Act* (British Columbia).

petitions and no objections to the Recognition Petition were filed. After due deliberation and sufficient cause appearing therefore, the Court finds and concludes as follows:

A. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(P).

B. Venue is proper in this district pursuant to 28 U.S.C. § 1410.

C. The statutory bases for the relief requested are sections 105(a), 1507, 1512, 1517, 1520 and 1521 of the Bankruptcy Code.

D. PwC is a "foreign representative" and a person within the meaning of sections 101(24), 101(41) and 1517(a)(2) of the Bankruptcy Code.

E. The Chapter 15 Cases were properly commenced pursuant to sections 1504 and 1515 of the Bankruptcy Code.

F. The Receivership pending in British Columbia, Canada, which is where the center of main interests of the Debtors is located, and is a "foreign main proceeding" within the meaning of section 1502(4) of the Bankruptcy Code and under section 1517(b091) of the Bankruptcy Code.

G. PwC is the duly appointed foreign representative of the Debtors as required by section 101(24) of the Bankruptcy Code.

H. The Form 1 Petitions and the Recognition Petition meet the requirements of section 1515 of the Bankruptcy Code.

I. The Receivership is entitled to recognition as a foreign main proceeding under section 1517 of the Bankruptcy Code.

J. PwC is entitled to all of the relief provided under section 1520 of the Bankruptcy Code without limitation.

K. The relief granted hereby is necessary and appropriate, in the interests of the public and international comity, consistent with the public policy of the United States, warranted pursuant to sections 1517, 1520 and 1521 of the Bankruptcy Code, and will not cause any hardship to any parties in interest that is not outweighed by the benefits of granting this relief.

L. The relief sought by PwC under section 1521 of the Bankruptcy Code is necessary to effectuate the purpose of Chapter 15 and to protect the interests of creditors.

NOW THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. The Receivership is granted recognition pursuant to section 1517 of the Bankruptcy Code.

2. The Receivership is granted recognition as a foreign main proceeding as to each of the Debtors pursuant to section 1517(b)(1) of the Bankruptcy Code.

3. All provisions of section 1520 of the Bankruptcy Code apply in these Chapter 15 Cases, including without limitation, the stay under section 362 of the Bankruptcy Code through the duration of these Chapter 15 Cases or until otherwise ordered by this Court.

4. To the extent not otherwise provided for under section 1520 of the Bankruptcy Code, pursuant to section 1521 of the Bankruptcy Code, PwC is entitled and shall be afforded the protections of the automatic stay of section 362 of the Bankruptcy Code as if PwC were a trustee in a case under Chapter 11 of the Bankruptcy Code.

5. To the extent not already stayed by section 362 of the Bankruptcy Code (applicable to this proceeding pursuant to section 1520 of the Bankruptcy Code), pursuant to section 1521 of the Bankruptcy Code, all persons and entities (other than PwC and its authorized representatives and agents) are, except as expressly authorized by PwC, hereby enjoined from:

(a) commencing or continuing an action or proceeding concerning the Debtors' assets, rights, obligations or liabilities;

(b) executing against the Debtors' assets within the territorial jurisdiction of the United States;

(c) taking or continuing any act to obtain possession of, or exercise control over, the Debtors or any assets of the Debtors;

(d) taking or continuing any act to create, perfect or enforce a lien or other security interest, set-off or other claim against the Debtors or PwC (in its capacity as receiver for the Debtors) or any assets of the Debtors;

(e) transferring, encumbering, relinquishing or disposing of any assets of the Debtors to any person or entity other than PwC and its expressly authorized representatives and agents; or

(f) managing, exercising control over, or possessing any of the Debtors' assets.

6. Pursuant to section 1521(a)(4) of the Bankruptcy Code PwC is hereby to authorized and granted the authority to examine witnesses, take evidence or delivery of information concerning the Debtors' assets, affairs, rights, obligations or liabilities.

7. Pursuant to section 1521 (a)(5), PwC is hereby given interim authority subject to a final hearing on September 18, 2008 at 11:00 a.m. (the "Final Hearing") ~~entrusted~~ with the administration or realization of all of the Debtors' assets within the territorial jurisdiction of the United States. Additionally, pursuant to section 1521(b) of the Bankruptcy Code, the distribution of the Debtors' assets is hereby entrusted to PwC, subject to any limitations, terms and conditions that may have been or may be imposed on PwC by the Canadian Court in the Receivership. The foregoing is without prejudice to the right of PwC to seek additional relief under applicable provisions of the Bankruptcy Code, including, without limitation, sections 363 and 521 of the Bankruptcy Code.

8. Pursuant to section 1512 of the Bankruptcy Code, PwC is entitled to participate as a party in interest in a case regarding the Debtors under this title. Accordingly, PwC is authorized to participate as a party in interest in the Chapter 7 Cases.

9. Pursuant to sections 105(a), 1520(a)(3) and 1521(a) of the Bankruptcy Code, PwC is hereby granted on an interim basis, subject to the Final Hearing, the rights, powers, protections, privileges and immunities of a trustee in a bankruptcy in the United States. No action taken during the interim period by PwC, or its agents, representatives, advisors or counsel, in preparing, disseminating, applying for, implementing or otherwise acting in furtherance of or in connection with the Receivership, this Order, or these Chapter 15 Cases, or any adversary proceeding herein, or any further proceeding commenced hereunder, any action taken in the Chapter 7 Cases, shall be deemed to constitute a waiver of the immunity afforded such person under sections 306 and 1510 of the Bankruptcy Code.

10. This Court shall retain jurisdiction with respect to the enforcement, amendment or modification of this Order, any requests for additional relief or any adversary proceeding brought in and through these Chapter 15 Cases, and any request by an entity for relief from the provisions of this Order, for cause shown, that is properly commenced and within the jurisdiction of this Court.

The Court shall conduct the Final Hearing on September 18, 2008 at 11:00 am. All objections and responses to entry of a final order on those matters to which interim approval has been given, shall be filed no later than Monday September 15, 2008 at 4:00 pm Eastern Time.

DATED: Wilmington, Delaware
September 5, 2008

CHRISTOPHER S. SONTCHI
UNITED STATES BANKRUPTCY JUDGE

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Case No. 08-11933 (CSS)
POPE & TALBOT, INC.[1], *et. al.*,	Chapter 15
Debtors.	(Jointly Administered)
	Re: D.I. 25

ORDER PURSUANT TO SECTIONS 105(a), 363(b) AND 1520 OF THE BANKRUPTCY CODE AUTHORIZING THE FOREIGN REPRESENTATIVE TO SELL CERTAIN REAL PROPERTY OF POPE & TALBOT, INC. LOCATED IN NORTHPORT, WASHINGTON BY PRIVATE SALE

Upon the Motion of PwC for an Order, pursuant to Sections 105(a), 363(b) and 1520 of the Bankruptcy Code, authorizing the Foreign Representative to sell certain real property of Pope & Talbot, Inc. located in Northport, Washington by private sale (the "Motion"), filed by the Foreign Representative in the above-referenced Chapter 15 cases (the "Foreign Representative"); the Court having reviewed the Motion and the Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and finding that sufficient notice of this Motion was provided to all parties with an interest in the relief sought by the Trustee; that no other or further notice need be provided; and sufficient cause appearing, it is therefore

ORDERED, that the relief requested in the Motion is GRANTED; it is further

ORDERED, that the Purchase Agreement[2] is approved; it is further

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Pope & Talbot, Inc. (Delaware) (7139), Penn Timber, Inc. (Oregon) (7380), Pope & Talbot Lumber Sales, Inc. (Delaware) (7029), Pope & Talbot Pulp Sales U.S., Inc. (Delaware) (2041), Pope & Talbot Relocation Services, Inc. (Oregon) (9015), Pope & Talbot Spearfish Limited Partnership (South Dakota) (2569), P & T Power Company (Oregon) (2710), Mackenzie Pulp Land Ltd. (British Columbia, Canada) Canadian Reg No. (625473, CICD No. 89483705), Pope & Talbot Ltd. (British Columbia, Canada) (3102), P & T Factoring Limited Partnership (British Columbia, Canada) (1538), P & T Finance One Limited Partnership (British Columbia, Canada) (8395), P & T Finance Three LLC (Oregon) (2468), P & T Finance Two Limited Partnership (British Columbia, Canada) (7960), P & T Funding Ltd. (British Columbia, Canada) (3717), P & T LFP Investment Limited Partnership (British Columbia, Canada) (None).

ORDERED, pursuant to section 363(b) of the Bankruptcy Code, that the Foreign Representative shall be, and hereby is, authorized and empowered to consummate the private sale of the Northport Property pursuant to the terms of the Purchase Agreement; it is further

ORDERED that the Foreign Representative is authorized to transfer the Northport Property pursuant to the terms of the Purchase Agreement free and clear of any and all liens, claims and encumbrances, with such liens to be transferred and attached to the net proceeds from the sale with the same validity and priority that such liens had against Pope & Talbot; it is further

ORDERED, that the provisions of Bankruptcy Rule 6004(g) staying the effectiveness of this Order for 10 days are hereby waived, and this order shall be effective immediately upon entry thereof; it is further

ORDERED that, to the extent there is a dispute arising from or relating to the sales of assets hereunder or this Order, the Court shall retain exclusive jurisdiction to resolve any dispute.

Dated: 9/18, 2008

THE HONORABLE CHRISTOPHER S. SONTCHI
UNITED STATES BANKRUPTCY JUDGE

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[2] All capitalized terms not defined herein shall have the meaning ascribed to them in the Motion.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re POPE & TALBOT, INC., et al.[1], Foreign Applicants in Foreign Proceeding	Chapter 15 Case No. 08-11933 (CSS) **Objection Date:** September 15, 2008 at 4:00 p.m. [Pending approval of Expedited Motion] **Hearing Date:** September 18, 2008 at 11:00 a.m. [Pending approval of Expedited Motion] Jointly Administered

MOTION OF PWC FOR AN ORDER, PURSUANT TO SECTIONS 105(A), 363(b) AND 1520 OF THE BANKRUPTCY CODE, AUTHORIZING THE FOREIGN REPRESENTATIVE TO SELL CERTAIN REAL PROPERTY OF POPE & TALBOT, INC. LOCATED IN NORTHPORT, WASHINGTON BY PRIVATE SALE

PricewaterhouseCoopers Inc. ("PwC"), the duly recognized foreign representative in the above-captioned chapter 15 bankruptcy cases, hereby moves the Court, pursuant to sections 105(a), 363(b) and 1520 of title 11 of the United States Code, (the "Bankruptcy Code") for the entry of an order authorizing PwC to sell real property located in Northport, Washington, belonging to Pope & Talbot, Inc., one of the above-captioned debtors (the "Debtors"), free and clear of all liens, claims and encumbrances (the "Motion"). In support of the Motion, PwC respectfully represent as follows:

[1] The Debtors in these proceedings are: Pope & Talbot, Inc.; Penn Timber, Inc.; Pope & Talbot Lumber Sales, Inc.; Pope & Talbot Pulp Sales U.S., Inc.; Pope & Talbot Relocation Services, Inc.; Pope & Talbot Spearfish Ltd. Partnership; P&T Power Company; Mackenzie Pulp Land Ltd.; Pope & Talbot Ltd.; P&T Factoring Limited Partnership; P&T Finance One Limited Partnership; P&T Finance Three LLC; P&T Finance Two Limited Partnership; P&T Funding Ltd.; and P&T LFP Investment Limited Partnership.

Jurisdiction

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

General Background

2. On August 22, 2008, (the "Petition Date"), PwC commenced the Debtors' respective Chapter 15 cases by filing petitions for relief under Chapter 15 of the Bankruptcy Code.

3. Pope & Talbot, Inc. ("Pope & Talbot"), which was founded in 1849, is the direct or indirect corporate parent of all of the other Debtors and their non-debtor affiliates (collectively, the "Company"). The Company was headquartered in Portland, Oregon, and historically conducted its business in two operating segments: (i) pulp, the principal raw material used in the manufacture of paper products, which the Company produced in three of its mills (two in British Columbia and one in Oregon) and (ii) lumber, which the Company produced in four of its mills (three in British Columbia and one in South Dakota.

4. On October 29, 2007, certain of the Debtors — Pope & Talbot, Pope & Talbot Ltd., Mackenzie Pulp Land Ltd., Penn Timber, Inc., Pope & Talbot Lumber Sales, Inc., Pope & Talbot Pulp Sales U.S., Inc., Pope & Talbot Relocation Services, Inc., P&T Power Company, P&T Finance Three LLC and P&T Funding Ltd. (collectively, the "Canadian Debtors") — applied for protection from their creditors in Canada pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (Canada) (the "CCAA"; and the cases commenced by the Canadian Debtors thereunder, the "CCAA Proceedings") in the Ontario Superior Court of Justice

(Commercial List) (the "Ontario Court"). On the same date, the Ontario Court issued an "initial order" (the "CCAA Initial Order") pursuant to which, among other things, it granted the application of the Canadian Debtors for protection under the CCAA. An order extending and supplementing the CCAA Initial Order was issued by the Ontario Court on November 2, 2007.

5. The CCAA Initial Order, among other things, appointed PwC as monitor (the "Canadian Monitor") in the CCAA Proceedings. Although certain of the Debtors (i.e. Pope & Talbot Spearfish Limited Partnership, P&T Factoring Limited Partnership, P&T Finance One Limited Partnership, P&T Finance Two Limited Partnership, P&T LFP Investment Limited. Partnership), being partnerships, were not entitled to relief under the CCAA, the provisions of the CCAA Initial Order, including the CCAA Stay, were made applicable to such entities.

6. Venue of the CCAA Proceedings was transferred from the Ontario Court to British Columbia Supreme Court by order dated November 19, 2008. On November 21, 2007, the British Columbia Supreme Court approved the transfer of the CCAA Proceedings. Thereafter, the Canadian Debtors sought and received orders from the British Columbia Supreme Court approving actions previously approved by the Ontario Court.

7. In order to obtain protection in the U.S., and facilitate debtor in possession financing with their lenders, on November 19, 2007, each of the Debtors (the "Chapter 11 Debtors") sought relief under Chapter 11 of the U.S. Bankruptcy Code (the "Chapter 11 Cases") in the U.S. Bankruptcy Court for the District of Delaware.

8. During the Chapter 11 Cases and the CCAA Proceedings, the Debtors sought to sell substantially all of their assets. Two of these sales fell through, which significantly impacted the estates. Accordingly, on June 8, 2008, the Debtors filed a motion with the Court to convert

their Chapter 11 Cases to chapter 7 cases. A hearing on the motion was held by the Court on May 9, 2008. The result of the hearing was entry of an order converting the Chapter 11 Cases to cases under chapter 7 of the Bankruptcy Code. Similarly, on May 8, 2008, a motion was made to the Canadian Court by PwC to have PwC appointed Receiver in the CCAA Proceeding. On May 10, 2008, the Canadian Court entered an order in the CCAA Proceeding appointing PwC receiver of the assets and undertakings of the Debtors. As a result, PwC now has the dual role of Monitor and Receiver.

The Proposed Sale of the Northport Property

9. PwC in its capacity as Monitor, and then as Receiver, sought to locate purchasers for certain real estate owned by certain of the Debtors both in the United States and Canada. PwC retained Colliers International ("Colliers") to market certain of this property. One of the parcels of property marketed by Colliers was approximately 8 acres located in Northport, Washington, commonly known as 113 3rd Street (the "Northport Property").

10. Colliers located a number of parties who were interested in purchasing the Northport Property and solicited bids from each of them. After receiving bids, some of which were increased as part of the negotiations, Colliers determined that 351513 B.C., Ltd, a subsidiary of H&M Group had submitted the highest bid ("Purchaser").

11. Purchaser and Pope & Talbot executed a purchase agreement on March 20, 2008 (the "Purchase Agreement"). The Agreement is attached hereto as Exhibit A. Purchaser has agreed to pay $95,820.00 for the Northport Property, which includes all trade fixtures located on the property other than a 1973 Cat Loader. Purchaser provided earnest money in the amount of $4,791.00 on or about March 20, 2008. Additionally, Purchase has been paying the costs of

security service and utility service at the Northport Property since February, 2008. To date these costs total $14,525.00.

12. PwC seeks to sell the Northport Property to Purchaser subject to the following terms and conditions:

a. Purchase Price and Closing. The purchase price will be $95,820.00 to be paid in cash at closing and subject to no financing condition. Closing will occur no later than September 30, 2008.

b. Free and Clear. The Northport Property shall be sold free and clear of all liens, claims, encumbrances and interests of any other person or entity.[2] Liens, claims, encumbrances and interests shall attach to the sale proceeds. Purchaser will not assume any liabilities or obligations of or relating to the Debtors or the Northport Property, including without limitation liabilities relating to products, employees or environmental matters.

c. Closing Condition. The only condition to closing shall be entry of an order by the Bankruptcy Court approving the sale free and clear in a form reasonably satisfactory to Purchaser.

d. Earnest Money Deposit. Purchaser has deposited $4,791.00 with Columbia Title Company of Colville Washington as earnest money, which funds will be credited toward the purchase price at closing or refunded to Purchaser if closing does not occur for any reason other than a material breach by Purchaser.

[2] Burlington Northern Railroad Company held a right of first refusal to purchase the property under the terms of that certain Quitclaim Deed recorded as Document No. 9504066 on July 8, 1995 in the official records of Stevens County, Washington. Notice was provided to Burlington Northern of the proposed sale and no response was received from Burlington Northern during the appropriate time period.

e. Expenses. Each party will bear its own expenses related to the transaction. If the closing of the sale of the Northport Property to Purchaser does not occur because it has been sold to a different party, then PwC will request that the Purchaser be reimbursed for all reasonable expenses, including the cost of security and utilities paid by Purchaser (including without limitation reasonable attorneys' fees) incurred by Purchaser in connection with the purchase of the Northport Property. The proceeds of any sale of the Northport Property shall be used for such reimbursement.

Requested Relief

13. Pursuant to sections 105, 363 and 1520 of the Bankruptcy Code, and Bankruptcy Rules 4001 and 6004, PwC seeks authority to sell the Northport Property by private sale in accordance with the terms and conditions of the Purchase Agreement, free and clear of all liens, claims and encumbrances.

The Proposed Transaction Is In the Best Interests of the Debtors, Their Estates and Creditors

14. Section 105 of the Bankruptcy Code provides in pertinent part that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105(a). Bankruptcy Code section 363(b) provides, in relevant part, that the trustee "after notice and hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). "In determining whether to authorize the use, sale or lease of property of the estate under this section, courts require the debtor to show that a sound business purpose justifies such actions." Dai-ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.), 242 B.R. 147, 153 (D. Del. 1999) (citing Committee of Equity Sec. Holders v.

Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983) (setting forth the "sound business purpose" test in the context of a sale of assets under § 363(b))); see also In re Delaware & Hudson Ry. Co., 124 B.R. 169 (D. Del. 1991) (adopting Lionel in this District in the context of a sale of assets). Section 363 applies in chapter 15 cases pursuant to Section 1520 after recognition of a foreign main proceeding.

15. Courts have considered four factors in determining whether a sound business justification exists: (i) whether a sound business reason exists for the proposed transaction; (ii) whether fair and reasonable consideration is provided; (iii) whether the transaction has been proposed and negotiated in good faith; and (iv) whether adequate and reasonable notice is provided. Lionel, 722 F.2d at 1071; see also In re Abbotts Dairies, 788 F.2d 143, 145-47 (3d Cir. 1986) (implicitly adopting the articulated business justification test of Lionel and adding the "good faith" requirement); In re Delaware & Hudson Ry. Co., 124 B.R. at 176; Lubrizol Enters. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.), 756 F.2d 1043, 1047 (4th Cir. 1985), cert. denied, 475 U.S. 1057 (1986) (court should approve debtor's business decision unless that decision is the product of bad faith, whim, or caprice).

16. The standards set forth above are plainly met in this case. The proposed transactions will allow PwC to recover for the estate approximately $100,00 in cash paid immediately upon closing. Absent this sale, either the Debtors' lenders, Ableco Finance LLC as collateral agent and term loan B agent and the lenders thereunder (the "Lenders") would foreclose on the Northport Property or PwC would have to seek to abandonment. Because PwC is in the process of liquidating the estates assets for the benefit of the Lenders, such an outcome

is not in the best interests of any party. For this reason, the private sale contemplated herein is time sensitive and should be approved.

17. Fair and reasonable consideration is being provided for the Northport Property pursuant to the Purchase Agreement. The Purchase Price to be paid by Purchaser for the Northport Property is based on exposure of the property to the market. Accordingly, PwC believes that the Purchase Price represents fair and reasonable consideration for the Northport Property.

18. Further, the Purchase Agreement is the product of good-faith, arm's-length negotiations between Purchaser and PwC.

The Assets Should Be Sold Free and Clear of
Liens, Claims and Encumbrances

19. Section 363(f) of the Bankruptcy Code provides that the trustee may sell property free and clear of liens, claims and encumbrances if one of the following conditions is satisfied:

a. applicable nonbankruptcy law permits the sale of such property free and clear of such interest;

b. the lienholder or claimholder consents;

c. such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

d. such interest is in bona fide dispute; or

e. the lienholder or claimholder could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

20. The court also may authorize the sale of a debtor's assets free and clear of any liens, claims or encumbrances under 11 U.S.C. § 105. See, e.g., In re Trans World Airlines, Inc., No. 01-0056, 2001 Bankr. LEXIS 723 at *9, 10 (Bankr. D. Del. March 27, 2001) (stating that

"bankruptcy courts have long had the authority to authorize the sale of estate assets free and clear even in the absence of § 363(f)"); Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.), 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) ("Authority to conduct such sales [free and clear of liens] is within the court's equitable powers when necessary to carry out the provisions of Title 11"). As set forth above, the Lenders support the sale and have consented to it.

21. The Court should authorize PwC to transfer the Northport Property free and clear of any and all liens, claims and encumbrances, with such liens to be transferred and attached to the net proceeds from the sale with the same validity and priority that such liens had against the Debtors.

Notice

22. Notice of this Motion has been given to: (a) the U.S. Trustee; (b) counsel to the Lenders; (c) each party filing a notice of appearance in the either the Debtors' Chapter 11 Cases or the Chapter 7 Cases; and (d) all parties that PwC believes may possess a lien, claim or encumbrance on the Northport Property, including Burlington Northern Santa Fe Railway. PwC submits that no other or further notice need be given.

Code Section 363(m) and Bankruptcy Rule 6004(g)

23. The proposed sales are the result of arm's-length negotiations and were negotiated in good faith. Purchaser is a "good-faith" purchaser within the meaning of Section 363(m) of the Bankruptcy Code. PwC believes that Purchaser has the financial capability to consummate the sale without delay. For these reasons, PwC believes that the sale is in the best interests of the Debtors.

24. The provisions of Bankruptcy Rule 6004(g) staying the effectiveness of this order requested by this Motion for 10 days should be waived, allowing the order to become effective immediately upon entry thereof.

No Previous Request for Relief

25. No previous motion for the relief requested herein has been made to this or any other Court.

WHEREFORE PwC respectfully requests the Court enter an Order, substantially in the form attached hereto as Exhibit B, granting the relief requested in the Motion and such other and further relief as is just.

DATED: September 8, 2008
Wilmington, Delaware

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Attorneys for PricewaterhouseCoopers Inc. in its capacity as Court Appointed Receiver and duly authorized Foreign Representative for the Debtors

DATE: 20060523
DOCKET: C45225

COURT OF APPEAL FOR 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 PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

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

BEFORE: MCMURTRY C.J.O., WEILER and BLAIR JJ.A.

COUNSEL: Paul Macdonald and Brett Harrison for Sunrise Partners Ltd.

Larry Ellis for the Monitor

Robert Staley and Derek Bell for Informal Committee of Senior Debenture Holders

Aubrey Kauffman for 2074600 Ontario Inc.

HEARD & RELEASED ORALLY: May 16, 2006

On appeal from the order of Justice Farley of the Superior Court of Justice dated March 7, 2006.

ENDORSEMENT

[1] The appellants are the holders of certain Convertible Notes of Stelco. They seek to set aside the order of Farley J. dated March 7, 2006, which they describe as imposing "an expedited, summary 'CCAA-style' claims process" for the determination of certain inter-creditor claims in the Stelco restructuring. They assert that the order was made without jurisdiction either under the CCAA or through the exercise of the court's inherent

jurisdiction, and that the order deprives them of their rights to require those who wish to assert Subordination Claims as against other Stelco creditors to prove those claims in a ordinary civil lawsuit with all the bells and whistles that go with such a proceeding.

[2] The respondents say that the March 7 order was a discretionary, interlocutory, scheduling order made in the course of the CCAA proceedings by the experienced supervising judge, familiar with those proceedings, and that the decision should be granted deference and left in place.

[3] We agree with the respondents.

[4] The Stelco restructuring Plan under the CCAA was negotiated and approved by all creditors – including the appellant Convertible Noteholders and the respondent Senior Bondholders. It was sanctioned by Justice Farley on January 20, 2006.

[5] The Plan establishes a pool of cash, warrants, and securities of various kinds for purposes of satisfying the claims of Stelco's creditors. These are known as the "Turnover Proceeds". Distributions cannot be made out of the pool in relation to the Convertible Noteholders and the Senior Bondholders until the issue of the latter's subordination claims has been determined. This is because the instruments establishing the rights of the Convertible Noteholders and the Senior Bondholders provide that the latter are entitled to be paid in full before the former can recover anything. Thus, it is necessary to fix the Senior Bondholder's claim – which in turn requires a valuation of the securities in the pool – to determine the respective distributions from the Turnover Proceeds.

[6] Section 6.01(2) of the Plan specifically provides that the Plan is not to prejudice the rights of the holders of the Senior Debt to pursue their subordination claims or the rights of the Convertible Noteholders to raise any defences. "In that regard", it then stipulates that the Monitor (who holds the Turnover Proceeds) will apply within 30 days of the Plan Implementation Date for an order "seeking directions in respect of a process to determine *on a timely basis* entitlements to the Turnover Proceeds".

[7] The appellants are creditors of Stelco and at least some of them participated in the negotiation of the Plan. In any event they voted on approval and the Plan was approved and is binding on them.

[8] In short, the parties negotiated as part of the Plan, and agreed to – and the Court sanctioned -- a mechanism for resolving "entitlements to the Turnover Proceeds". That is what this dispute is about. The evidence before Farley J. indicated that a significant portion of the Turnover Proceeds consists of potentially volatile marketable securities that could not be traded until this dispute is resolved. The procedure created by Farley J. reflects this dynamic of the Stelco process and responds to the particular exigencies of this restructuring.

[9] Mr. Macdonald argues that the appellants should be entitled to their full rights of process under the Rules of Civil Procedure and to put the respondents to compliance with the Class Proceedings Act. We do not agree. That is not what the Plan calls for, nor is it what we would expect in the context of a complicated and time-driven CCAA proceeding such as the Stelco restructuring. The Plan contemplates *directions* with respect to a *process to determine* entitlements to the Turnover Proceeds *on a timely basis*. If the parties and the Court had intended the subordination claims issue to be resolved by way of a regular lawsuit, they would simply have said so or left the Convertible Noteholders and the Senior Bondholders to their normal remedies. They did not.

[10] This is not a pure inter-creditor dispute that is unconnected to the debtor, Stelco. It is a dispute that invokes – at least insofar as the subordination claims that have to be resolved for purposes of distribution of the Turnover Proceeds are concerned – the provisions of the Plan and the court's control of its own process in relation to matters pertaining to the roll out of the Plan.

[11] Thus, the circumstances differ from those involved in either of the two prior Stelco cases to which we were referred. In *Re Stelco* (2005), 75 O.R. (3d) 5 (C.A.) – the directors case – the court was dealing with a matter relating to the company's role in the restructuring process as opposed to the court's role in the restructuring process. The present case pertains to the court's control over the restructuring process. In *Re Stelco*, [2005] O.J. No. 4883 (C.A.) – 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. As pointed out above, however, 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.

[12] The Monitor duly applied to the Court, as required, and Farley J., exercising his jurisdiction as the supervising judge of the Stelco restructuring put a timely process in place – in CCAA Commercial List fashion – to resolve the entitlements to the Turnover Proceeds. His jurisdiction over the process of the CCAA restructuring extends at least to continued process-related matters concerning the rollout of the Plan in accordance with its provisions.

[13] Farley J. is entitled to considerable deference in respect of this type of discretionary decision, which, as the respondent submits, is in the nature of an interlocutory, scheduling order. We see no basis for interfering with his order

[14] Accordingly, the appeal is dismissed.

[15] The respondent Informal Committee of Senior Debenture Holders is entitled to the costs of the motion before Labrosse J.A., fixed at $500.00, and to the costs of the appeal, fixed in the total amount of $12,500.00 inclusive of disbursements and GST.

"R.R. McMurtry C.J.O."
"K.M. Weiler J.A."
"R.A. Blair J.A."

1997 CarswellOnt 1914

T. Eaton Co., Re

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

And in the Matter of the Courts of Justice Act, R.S.O. 1990, c. C.43

And in the Matter of a Plan of Compromise or Arrangement of the T. Eaton Company Limited and All other Companies Set out in Schedule "A"

The T. Eaton Company Limited, et al., Applicants

Ontario Court of Justice, General Division

Houlden J.A.

Oral reasons: May 8, 1997
Docket: RE 7483/97

Counsel: *Jonathan Stainsby* and *Kenneth D. Kraft*, for moving parties.

Lyndon Barnes, R.G. Marantz and *John MacDonald*, for The T. Eaton Company Limited.

J.A. Carfagnini and *Robert J. Chadwick*, for The Cadillac Fairview Corporation Limited.

Robert Arcand, for Cambridge Leaseholds Limited and other landlords.

Jeff Carhart, for Ontario Pension Board Subsidiary Corporations.

R. Thornton, for 2725354 Canada Inc.

Kevin Zych, for Hammerson Canada Inc.

Hilary Clarke, for G.E. Capital Heard.

Subject: Insolvency; Property; Civil Practice and Procedure

Landlord and Tenant --- Nature and elements of lease — Particular types of leases

Order under Companies' Creditors Arrangement Act (CCAA) prevented tenants at shopping centres in which E Co. was anchor tenant from terminating leases during E Co.'s restructuring period — D never served with notice of application — D's motion to vary order to allow it to exercise its rights under co-tenancy clauses in its leases dismissed — If court were to grant order it would have to grant same relief to other tenants in similar positions which would seriously jeopardize E Co.'s restructuring plans — Section 11 of CCAA and inherent jurisdiction of court sufficiently wide to permit making of orders against third parties who were not creditors where their actions would potentially prejudice success of plan — None of E Co.'s stores had yet closed such that D had not in fact suffered any prejudice and benefits of maintaining stay far outweighed the prejudice to D — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

The court made an order under the *Companies Creditors Arrangement Act* (the "CCAA") to permit E Co. to present a plan of compromise and arrangement to its creditors. The order contained a clause preventing tenants at retail shopping centres in which E Co. was an anchor tenant from terminating their leases during the restructuring period. D was never served with notice of the application. D operated retail stores in regional shopping centres in which E Co. operated one of the anchor stores. The D leases contained co-tenancy clauses which permitted D to terminate or alter the lease terms if E Co. ceased to operate in a shopping centre. The reasons given by the landlords for maintaining the stay included that no plan was yet filed, and it was unclear at the time how the claims would be addressed, that the exercise of the moving parties' rights would have a negative impact on the ability of E Co. to restructure, that if E Co. were prevented from concluding a successful restructuring with its landlords economic harm would be far reaching, and that the exodus of tenants could result in mall closures, causing a significant ripple effect throughout local economies and cause further job loss. D brought a motion to vary the order to allow D to exercise its rights under the co-tenancy clauses in its leases.

Held: The motion was dismissed.

If the court were to grant the order it would have to grant the same relief to other tenants in similar positions. If this were to happen, there was evidence that E Co.'s restructuring plan would be seriously jeopardized. If tenants were allowed to reduce rents or terminate leases under the clauses, the claims of landlords against E Co. would be greately increased, and would have a serious impact on a restructuring plan. The court had jurisdiction to make the order. Section 11 of the CCAA, and the inherent jurisdiction of the court, were sufficiently wide to permit the making of orders against third parties who were not creditors where their actions would potentially prejudice the success of a plan. Furthermore, the prejudice to the moving parties did not outweigh the benefits of maintaining the stay. The reasons given by the landlords for maintaining the stay were accurate. Furthermore, no stores had yet been closed such that D had not in fact suffered any prejudice. As such the benefits of maintaining a stay far outweighed the prejudice to D.

Cases considered by *Houlden J.A.*:

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) — referred to

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

Statutes considered:

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

Generally — referred to

s. 11 [am. 1992, c. 27, s. 90(1)(f); 1996, c. 6, s. 167(1)(d)] — referred to

MOTION to vary the order to allow D to exercise its rights under co-tenancy clauses in its leases.

***Houlden J.A.* (orally):**

1 On February 27, 1997, I made an order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, (the "*CCAA*") to permit the T. Eaton Company Limited ("Eaton's") to present a plan of compromise and arrangement to its creditors. The order contained a clause preventing tenants at retail shopping centres in which Eaton's was an anchor tenant from terminating their leases during the restructuring period. When the clause was put in the order, counsel for Eaton's explained the purpose of the clause and the necessity for it being part of the plan. However, as Mr. Stainsby has pointed out, Dylex (and for convenience I will refer to the moving parties by that name) was not served with notice of the application nor was it represented. Accordingly, I believe that Dylex has the status to request the variation of my order.

2 As part of its restructuring plan, Eaton's must close uneconomic stores. To carry out a successful restructuring, Eaton's will have to terminate the leases of those stores and obtain the support of its former landlords for its plan of compromise and arrangement.

3 Dylex operates retail stores in regional shopping centres of which Eaton's is one of the anchor stores. The Dylex leases contain co-tenancy clauses. While the clauses vary, generally they permit Dylex to terminate or otherwise alter the terms of their leases if Eaton's ceases to operate its store in a shopping centre. When Eaton's closes a store, Dylex will suffer a loss of traffic flow and this will have a deleterious affect on Dylex's sales and profitability.

4 In this motion, Dylex is seeking an order amending my order of February 27, 1997 to permit Dylex to exercise its rights under the co-tenancy clauses in its leases. Co-tenancy clauses in shopping centre leases are not uncommon. If I were to grant the order requested by Dylex, I would have to grant the same relief to other tenants in a similar position. There is material before me that indicates that if this were to happen, Eaton's restructuring plan would be seriously jeopardized and might prove to be impossible. As Mr. Carhart pointed out, if tenants are permitted by the exercise of co-tenancy clauses to reduce rents or terminate leases, the claims of the landlords against Eaton's will be greatly increased and this will have a serious impact on a restructuring plan.

5 Although I have considerable sympathy for the problem facing Dylex as a result of the closing of anchor stores by Eaton's, I must do all in my power to bring about a successful plan of compromise and arrangement. Eaton's has more than 15,000 full and part-time employees. It has sales of about $1,500,000,000 a year and the continuation of that source of business is of great importance to Eaton's suppliers.

6 Two grounds are advanced for varying my order of February 27th. First, it is submitted that I had no jurisdiction to make the order since Dylex is not a creditor of Eaton's. With respect, I believe that s. 11 of the *CCAA* and the inherent jurisdiction of the court are sufficiently wide to permit the making of orders against third parties who are not creditors where their actions would potentially prejudice the success of a plan: *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.).

7 Secondly, it is submitted that, even if I had jurisdiction to make the order, the prejudice to the moving parties outweighs the benefits of maintaining the stay. Again, with respect, I do not agree. In the factum filed by the Ca-

dillac Fairview Corporation Limited and a number of other landlords, the following reasons, which I find to be accurate, are given for maintaining the stay:

(a) no Plan has been filed and it is unclear at this time how the claims of all the stakeholders will be addressed;

(b) the exercise of rights of the Moving Parties and others in similar circumstances at this time would have a negative impact on Eaton's ability to restructure, potentially jeopardizing the success of the plan and thereby the continuance of the company;

(c) if Eaton's were prevented from concluding a successful restructuring with its landlords, the economic harm would be far-reaching and devastating;

(d) the exodus of tenants could result in malls being forced to close; this could have a significant ripple effect throughout the local economies and cause further job loss;

(e) Eaton's bankruptcy would have an even more devastating impact on all of Eaton's stakeholders, including its employees, suppliers, shareholders, creditors and landlords.

In connection with (a), Mr. Stainsby acknowledges that, as yet, no stores have been closed so that Dylex has in fact suffered no prejudice. In my opinion, the benefits of maintaining the stay, far outweigh the prejudice to Dylex.

8 For these reasons, the motion will be dismissed. There will, in the circumstances, be no order for costs. Mr. Stainsby requested that if I dismissed the motion, I should do so without prejudice to Dylex raising the same objections when the plan is presented for approval. I do not believe that it is appropriate to make such an order at this time. Dylex will, of course, have the right to oppose the sanctioning of the plan, and to raise such grounds as it sees fit. How the court will deal with those grounds is a matter to be decided when, and if, the issue arises on the application for approval.

Motion dismissed.

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2008 CarswellOnt 4811

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

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 AND ARRANGEMENT INVOLVING 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., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO (Applicants / Respondents in Appeal) and 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., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO (Respondents / Respondents in Appeal) and AIR TRANSAT A.T. INC., TRANSAT TOURS CANADA INC., THE JEAN COUTU GROUP (PJC) INC., AÉROPORTS DE MONTRÉAL INC., AÉROPORTS DE MONTRÉAL CAPITAL INC., POMERLEAU ONTARIO INC., POMERLEAU INC., LABOPHARM INC., DOMTAR INC., DOMTAR PULP AND PAPER PRODUCTS INC., GIRO INC., VÊTEMENTS DE SPORTS R.G.R. INC., 131519 CANADA INC., AIR JAZZ LP, PETRIFOND FOUNDATION COMPANY LIMITED, PETRIFOND FOUNDATION MIDWEST LIMITED, SERVICES HYPOTHÉCAIRES LA PATRIMONIALE INC., TECSYS INC. SOCIÉTÉ GÉNÉRALE DE FINANCEMENT DU QUÉBEC, VIBROSYSTM INC., INTERQUISA CANADA L.P., REDCORP VENTURES LTD., JURA ENERGY CORPORATION, IVANHOE MINES LTD., WEBTECH WIRELESS INC., WYNN CAPITAL CORPORATION INC., HY BLOOM INC., CARDACIAN MORTGAGE SERVICES, INC., WEST ENERGY LTD., SABRE ENERTY LTD., PETROLIFERA PETROLEUM LTD., VAQUERO RESOURCES LTD. and STANDARD ENERGY INC. (Respondents / Appellants)

Ontario Court of Appeal

J.I. Laskin, E.A. Cronk, R.A. Blair JJ.A.

Heard: June 25-26, 2008
Judgment: August 18, 2008[FN*]
Docket: CA C48969

Proceedings: affirming *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List])

Counsel: Benjamin Zarnett, Frederick L. Myers for Pan-Canadian Investors Committee

Aubrey E. Kauffman, Stuart Brotman for 4446372 Canada Inc., 6932819 Canada Inc.

Peter F.C. Howard, 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, UBS AG

Kenneth T. Rosenberg, Lily Harmer, Max Starnino for Jura Energy Corporation, Redcorp Ventures Ltd.

Craig J. Hill, Sam P. Rappos for Monitors (ABCP Appeals)

Jeffrey C. Carhart, Joseph Marin for Ad Hoc Committee, Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor

Mario J. Forte for Caisse de Dépôt et Placement du Québec

John B. Laskin for National Bank Financial Inc., National Bank of Canada

Thomas McRae, Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)

Howard Shapray, Q.C., Stephen Fitterman for Ivanhoe Mines Ltd.

Kevin P. McElcheran, Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia, T.D. Bank

Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada, BNY Trust Company of Canada, as Indenture Trustees

Usman Sheikh for Coventree Capital Inc.

Allan Sternberg, Sam R. Sasso for Brookfield Asset Management and Partners Ltd., Hy Bloom Inc., Cardacian Mortgage Services Inc.

Neil C. Saxe for Dominion Bond Rating Service

James A. Woods, Sebastien Richemont, Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc., Jazz Air LP

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.

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.

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Releases — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — CCAA permits inclusion of third party releases in plan of compromise or arrangement to be sanctioned by court where those releases were reasonably connected to proposed restructuring — It is implicit in language of CCAA that court has authority to sanction plans incorporating third-party releases that are reasonably related to proposed restructuring — CCAA is supporting framework for resolution of corporate insolvencies in public interest — Parties are entitled to put anything in Plan that could lawfully be incorporated into any contract — Plan of compromise or arrangement may propose that creditors agree to compromise claims against debtor and to release third parties, just as any debtor and creditor might agree to such terms in contract between them — Once statutory mechanism regarding voter approval and court sanctioning has been complied with, plan becomes binding on all creditors.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Miscellaneous cases

Leave to appeal — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — Criteria for granting leave to appeal in CCAA proceedings was met — Proposed appeal raised issues of considerable importance to restructuring proceedings under CCAA Canada-wide — These were serious and arguable grounds of appeal and appeal would not unduly delay progress of proceedings.

Cases considered by *R.A. Blair J.A.*:

Air Canada, Re (2004), 2004 CarswellOnt 1842, 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) — referred to

Anvil Range Mining Corp., Re (1998), 1998 CarswellOnt 5319, 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]) — referred to

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — considered

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 2000 ABCA 238, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to

Canadian Airlines Corp., Re (2001), 2001 CarswellAlta 888, 2001 CarswellAlta 889, 275 N.R. 386 (note), 293 A.R. 351 (note), 257 W.A.C. 351 (note) (S.C.C.) — referred to

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

Cineplex Odeon Corp., Re (2001), 2001 CarswellOnt 1258, 24 C.B.R. (4th) 201 (Ont. C.A.) — followed

Country Style Food Services Inc., Re (2002), 158 O.A.C. 30, 2002 CarswellOnt 1038 (Ont. C.A. [In Chambers]) — followed

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — considered

Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd. (1976), 1976 CarswellQue 32, [1978] 1 S.C.R. 230, 26 C.B.R. (N.S.) 84, 75 D.L.R. (3d) 63, (sub nom. *Employers' Liability Assurance Corp. v. Ideal Petroleum (1969) Ltd.)* 14 N.R. 503, 1976 CarswellQue 25 (S.C.C.) — referred to

Fotinis Restaurant Corp. v. White Spot Ltd. (1998), 1998 CarswellBC 543, 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) — referred to

Guardian Assurance Co., Re (1917), [1917] 1 Ch. 431 (Eng. C.A.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — considered

Muscletech Research & Development Inc., Re (2006), 25 C.B.R. (5th) 231, 2006 CarswellOnt 6230 (Ont. S.C.J.) — considered

NBD Bank, Canada v. Dofasco Inc. (1999), 1999 CarswellOnt 4077, 1 B.L.R. (3d) 1, 181 D.L.R. (4th) 37, 46 O.R. (3d) 514, 47 C.C.L.T. (2d) 213, 127 O.A.C. 338, 15 C.B.R. (4th) 67 (Ont. C.A.) — distinguished

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

C.A.) — considered

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

Pacific Coastal Airlines Ltd. v. Air Canada (2001), 2001 BCSC 1721, 2001 CarswellBC 2943, 19 B.L.R. (3d) 286 (B.C. S.C.) — distinguished

Quebec (Attorney General) v. Bélanger (Trustee of) (1928), 1928 CarswellNat 47, [1928] A.C. 187, [1928] 1 W.W.R. 534, [1928] 1 D.L.R. 945, (sub nom. *Quebec (Attorney General) v. Larue)* 8 C.B.R. 579 (Canada P.C.) — referred to

Ravelston Corp., Re (2007), 2007 CarswellOnt 2114, 2007 ONCA 268, 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]) — referred to

Reference re Companies' Creditors Arrangement Act (Canada) (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — considered

Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces (1933), [1934] 1 D.L.R. 43, 1933 CarswellNat 47, [1933] S.C.R. 616 (S.C.C.) — referred to

Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces (1935), [1935] 1 W.W.R. 607, [1935] 2 D.L.R. 1, 1935 CarswellNat 2, [1935] A.C. 184 (Canada P.C.) — considered

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006 (S.C.C.) — considered

Royal Penfield Inc., Re (2003), 44 C.B.R. (4th) 302, [2003] R.J.Q. 2157, 2003 CarswellQue 1711, [2003] G.S.T.C. 195 (Que. S.C.) — referred to

Skydome Corp., Re (1998), 1998 CarswellOnt 5914, 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]) — referred to

Society of Composers, Authors & Music Publishers of Canada v. Armitage (2000), 2000 CarswellOnt 4120, 20 C.B.R. (4th) 160, 50 O.R. (3d) 688, 137 O.A.C. 74 (Ont. C.A.) — referred to

Steinberg Inc. c. Michaud (1993), [1993] R.J.Q. 1684, 55 Q.A.C. 298, 1993 CarswellQue 229, 1993 CarswellQue 2055, 42 C.B.R. (5th) 1 (Que. C.A.) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 6483, 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 6818, 204 O.A.C. 205, 78 O.R. (3d) 241, 261 D.L.R. (4th) 368, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307 (Ont. C.A.) — considered

Stelco Inc., Re (2006), 210 O.A.C. 129, 2006 CarswellOnt 3050, 21 C.B.R. (5th) 157 (Ont. C.A.) — referred to

T&N Ltd., Re (2006), [2007] Bus. L.R. 1411, [2007] 1 All E.R. 851, [2006] Lloyd's Rep. I.R. 817, [2007] 1 B.C.L.C. 563, [2006] B.P.I.R. 1283 (Eng. Ch. Div.) — considered

Statutes considered:

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

Generally — referred to

Business Corporations Act, R.S.O. 1990, c. B.16

s. 182 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 192 — referred to

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

Companies Act, 1985, c. 6

s. 425 — referred to

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

Generally — referred to

s. 4 — considered

s. 5.1 [en. 1997, c. 12, s. 122] — considered

s. 6 — considered

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 ¶ 21 — referred to

s. 92 — referred to

s. 92 ¶ 13 — referred to

Words and phrases considered:

arrangement

"Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor.

APPEAL by opponents of creditor-initiated plan from judgment reported at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 (Ont. S.C.J. [Commercial List]), granting application for approval of plan.

***R.A. 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 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 time-table — 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 *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30 (Ont. C.A. [In Chambers]), 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.

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 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 Montréal Protocol — the parties committed 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 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 Article 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 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 cooperated 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^{th}. The vote was overwhelmingly in support of the Plan — 96% 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% of those connected with the development of the Plan voted positively, as did 80% 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 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?

(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.[FN1] 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 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 entrée 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 / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]). As Farley J. noted in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), at 111, "[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,"[FN2] 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 — 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] 1 S.C.R. 27 (S.C.C.) 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 (S.C.C.) 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 *Québec* 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.

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 *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 318, 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, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), *per* Doherty J.A. in dissent; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 125

(Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]).

52 In this respect, I agree with the following statement of Doherty J.A. in *Elan, supra*, at pp. 306-307:

> . . . [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".[FN3] 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 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 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.

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: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N§10. It has been said to be "a very wide and indefinite [word]": *Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces*, [1935] A.C. 184 (Canada P.C.) at 197, affirming S.C.C. [1933] S.C.R. 616 (S.C.C.). See also, *Guardian Assurance Co., Re*, [1917] 1 Ch. 431 (Eng. C.A.) at 448, 450; *T&N Ltd., Re* (2006), [2007] 1 All E.R. 851 (Eng. Ch. Div.).

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., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230 (S.C.C.) at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (Ont. 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), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at 518.

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., Re, supra*, is instructive in this regard. It is a rare example of a court focussing 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 vir-

tually identical to the scheme of the CCAA — including the concepts of compromise or arrangement.[FN4]

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 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. [FN5] 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 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[FN6] *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;

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, just 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:

> [76] 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.

> [77] 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 Bench in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201 (Alta. Q.B.), leave to appeal refused by (2000), 266 A.R. 131 (Alta. C.A. [In Chambers]), and (2001), 293 A.R. 351 (note) (S.C.C.). In *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. 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 Corp., Re*, however, the releases in those restructurings — including *Muscletech Research & Development Inc., Re* — 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 Corp., 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 well-spring 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 *Steinberg Inc. c. Michaud*,[FN7] 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).

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 *Steinberg Inc. c. Michaud, supra*; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C. S.C.); and *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg Inc.*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg Inc.* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines Ltd.*, 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 Airlines Ltd.* 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. 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, Canada* 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:

> 53 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 297, the *CCAA* is remedial legislation "intended to provide a structured environ-

> ment 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.
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> 54 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 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, Canada* 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 Bank, Canada* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank, Canada* 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, Canada* 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-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]

See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) 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 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), 21 C.B.R. (5th) 157 (Ont. 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 *Steinberg Inc. c. Michaud, 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):

> [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.
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> . . . . .
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> [54] 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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> . . . . .
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> [58] 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 Inc.*, 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 appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act — an approach inconsistent with the jurisprudence referred to above.

94 Finally, the majority in *Steinberg Inc.* 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 Inc.* 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 Inc.* 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 Inc.* 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.

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.

1997, c. 12, s. 122.

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:[FN8]

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*

Inc.. 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 & Morawetz, vol.1, *supra*, at 2-144, E§11A; *Royal Penfield Inc., Re*, [2003] R.J.Q. 2157 (Que. S.C.) 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 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; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: 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.*

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 Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.). As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Quebec (Attorney General) v. Bélanger (Trustee of)*, [1928] A.C. 187 (Canada 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 with-

in 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 the absence of a demonstrable error an appellate court will not interfere: see *Ravelston Corp., Re* (2007), 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]).

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: *Fotinis Restaurant Corp. v. White Spot Ltd* (1998), 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) 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, 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 Note-holders 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, 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% 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 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.

***J.I. Laskin J.A.*:**

I agree.

***E.A. Cronk J.A.*:**

I agree.

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 dépôt et placement du Québec

Canaccord Capital Corporation

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 A — 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 Dépôt et Placement du Québec

8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada

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, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements 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.

Application granted; appeal dismissed.

FN* Leave to appeal refused at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.).

FN1 Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

FN2 Justice Georgina R. Jackson and Dr. 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: Thomson Carswell, 2007).

FN3 Citing Gibbs J.A. in *Chef Ready Foods, supra*, at pp.319-320.

FN4 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.*

FN5 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.

FN6 A majority in number representing two-thirds in value of the creditors (s. 6)

FN7 *Steinberg Inc.* was originally reported in French: *Steinberg Inc. c. Michaud*, [1993] R.J.Q. 1684 (Que. C.A.). All paragraph references to *Steinberg Inc.* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055 (Que. C.A.)

FN8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp.234-235, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

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Hongkong Bank of Canada v. Chef Ready Foods Ltd.

RE CHEF READY FOODS LTD. et al.; CHEF READY FOODS LTD. v. HONGKONG BANK OF CANADA

British Columbia Court of Appeal

Carrothers, Cumming and Gibbs JJ.A.

Heard: October 12, 1990
Judgment: October 29, 1990
Docket: Doc. Vancouver CA12944

Counsel: *D.I. Knowles* and *H.M. Ferris*, for appellant bank.

R.H. Sahrmann and *L.D. Goldberg*, for respondent debtor.

Subject: Corporate and Commercial; Insolvency

Banking and Banks --- Loans and discounts — Loans under s. 178 of Bank Act (R.S.C. 1985, c. B-1, formerly s.88, R.S.C. 1970, c. B-1).

Banking and Banks --- Loans and discounts — Loans under s. 178 of Bank Act (R.S.C. 1985, c. B-1, formerly s. 88, R.S.C. 1970, c. B-1).

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Application of Act.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings.

Corporations — Arrangements and compromises — Where conflict between Companies' Creditors Arrangement Act and rights of holder of s. 178 Bank Act security, the broad scope of the Companies' Creditors Arrangement Act is to prevail — Appeal dismissed — Bank Act, R.S.C. 1985, c. B-1 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

The bank held a s. 178 *Bank Act* security on the debtor's accounts receivables. The bank demanded payment of the debt. When the debtor failed to pay, the bank appointed an agent under the general assignment of book debts with instructions to the agent to realize upon the accounts. The debtor filed a petition for relief under the *Companies' Creditors Arrangement Act*. An order was granted pursuant to s. 11 of the *Companies' Creditors Ar-*

rangement Act staying realization upon, or other dealings with, any security on the undertaking, property and assets of the debtor. The bank appealed and sought that the stay order be varied to exclude the s. 178 security.

Held:

The appeal was dismissed.

The purpose of the *Companies' Creditors Arrangement Act* was to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company was able to continue in business. The statute did not exempt any creditors of a debtor company from its provisions. The *Companies' Creditors Arrangement Act* did not detract from the title held by the bank, it merely postponed the exercise of the right to seize and sell. Nor did the *Bank Act* exclude the operation of the *Companies' Creditors Arrangement Act*.

In contrast to ss. 178 and 179 of the *Bank Act*, which focussed on the competing rights and duties of the borrower and the lender, the *Companies' Creditors Arrangement Act* served the interests of a broad constituency of investors, creditors and employees. To grant a bank holding a s. 178 *Bank Act* security immunity from the *Companies' Creditors Arrangement Act* would render the protection afforded that constituency illusory and frustrate the public policy objectives of the *Companies' Creditors Arrangement Act*. Realization by the bank on its security would destroy the company as a going concern.

Cases considered:

Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, [1990] 2 W.W.R. 193, 46 B.L.R. 161, 9 P.P.S.A.C. 177, 65 D.L.R. (4th) 361, 104 N.R. 110, 82 Sask. R. 120 — *considered*

Feifer and Frame Manufacturing Corp., Re, [1947] Que. K.B. 348, 28 C.B.R. 124 (C.A.) — *referred to*

Flintoff v. Royal Bank, [1964] S.C.R. 631, 7 C.B.R. (N.S.) 78, 49 W.W.R. 301, 47 D.L.R. (2d) 141 — *referred to*

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

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., 72 C.B.R. (N.S.) 20, [1989] 2 W.W.R. 566, 64 Alta. L.R. (2d) 139 (Q.B.) — *referred to*

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

Wynden Canada Inc. v. Gaz Métropolitain Inc. (1982), 44 C.B.R. (N.S.) 285 (Que. S.C.) [affirmed 45 C.B.R. (N.S.) 11 (Que. C.A.)] — *referred to*

Statutes considered:

Bank Act, R.S.C. 1985, c. B-1 —

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

s. 179

Bankruptcy Act, R.S.C. 1927, c. 11.

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

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

s. 8

s. 11

Company Act, R.S.B.C. 1979, c. 59.

Limitation of Civil Rights Act, The, R.S.S. 1978, c. L-16 —

ss. 19-36

Winding-up Act, R.S.C. 1927, c. 213.

Words and phrases considered:

creditor — as used in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, includes a bank holding a security under s. 178 of the *Bank Act*, R.S.C. 1985, c. B-1.security — as used in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, includes a security under s. 178 of the *Bank Act*, R.S.C. 1985, c. B-1.

Appeal from order of Maczko J. dated August 30, 1990, granting stay pursuant to s. 11 of *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [reported 4 C.B.R. (3d) 307].

The judgment of the Court was delivered by *Gibbs J.A.*:

1 The sole issue on this appeal is whether a stay order made by a chambers Judge under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, is a bar to realization by the Hongkong Bank of Canada (the "bank") on security granted to it under s. 178 of the *Bank Act*, R.S.C. 1985, c. B-1.

2 The facts relevant to resolution of the issue are not in dispute. The respondent Chef Ready Foods Ltd. ("Chef Ready") is in the business of manufacturing and wholesaling fresh and frozen pizza products. The appellant bank provided credit and other banking services to Chef Ready. As part of the security for its indebtedness Chef Ready executed the appropriate documentation and filed the appropriate notices under s. 178 of the *Bank Act*. Accordingly, the bank holds what is commonly referred to as "section 178 security."

3 Chef Ready encountered financial difficulties. On August 22, 1990, following upon some fruitless negotiations, the bank, through its solicitors, demanded payment from Chef Ready. The debt then stood at $365,318.69 with interest accruing thereafter at $150.43 per day. Chef Ready did not pay.

4 On August 27, 1990, the bank commenced proceedings upon debenture security which it held and upon guarantees by the principals of Chef Ready. Also on August 27, 1990, the bank appointed an agent under a general assignment of book debts which it held, with instructions to the agent to realize upon the accounts. In the mean-

time, on August 23, 1990, so as to qualify under the *Companies' Creditors Arrangement Act* (the "C.C.A.A."), Chef Ready had granted a trust deed to a trustee and issued an unsecured $50 bond. On August 28, 1990, the day after the bank commenced its debenture and guarantee proceedings, Chef Ready filed a petition seeking various forms of relief under the C.C.A.A. On the same day Chef Ready filed an application, ex parte, as they were entitled to do under the C.C.A.A., for an order to be issued that day granting the relief claimed in the petition.

5 The application was heard in chambers in the afternoon of August 28, 1990 and the following day. The bank learned "on the grapevine" of the application and appeared on the hearing and was given standing to make submissions. It also filed affidavit evidence which appears to have been taken into account by the chambers Judge. The affidavit evidence had appended to it, inter alia, the s. 178 security documentation. On August 30, 1990, the chambers Judge granted the order and delivered oral reasons at the end of which he said:

> I therefore conclude that the *Companies' Creditors Arrangement Act* is an overriding statute which gives the court power to stay all proceedings including the right of the bank to collect the accounts receivable.

6 The reasons refer specifically to the accounts receivable because the bank was then poised ready to take possession of those accounts and collect the amounts owing. Its right to do so arose under the general assignment of book debts and under cl. 4 of the s. 178 security instrument:

> 4. If the Customer shall sell the property or any part thereof, the proceeds of any such sale, including cash, bills, notes, evidence of title, and securities, and the indebtedness of any purchaser in connection with such sales shall be the property of the Bank to be forthwith paid or transferred to the Bank, and until so paid or transferred to be held by the Customer on behalf of and in trust for the Bank. Execution by the Customer and acceptance by the Bank of an assignment of book debts shall be deemed to be in furtherance of this declaration and not an acknowledgement by the Bank of any right or title on the part of the Customer to such book debts.

7 The formal order made by the chambers Judge contains a paragraph which stays realization upon or otherwise dealing with any securing on "the undertaking, property and assets" of Chef Ready:

> THIS COURT FURTHER ORDERS THAT all proceedings taken or that might be taken by any of the Petitioners' creditors or any other person, firm or corporation under the *Bankruptcy Act* (Canada) or the *Winding-up Act* (Canada) shall be stayed until further Order of this Court upon 2 days notice to the Petitioners and that further proceedings in any action, suit or proceeding commenced by any person, firm or corporation against any of the Petitioners be stayed until the further Order of this Court upon 2 days notice to the Petitioners, that no action, suit or other proceeding may be proceeded with or commenced against any of the Petitioners by any person, firm or corporation except with leave of this Court upon 2 days notice to the Petitioners and subject to such terms as this Court may impose and that *the right of any person, firm or corporation to realize upon or otherwise deal with any property, right or security held by that person, firm or corporation on the undertaking, property and assets of the Petitioners be and the same is postponed.*

[Emphasis added.]

8 The jurisdiction in the Court to make such a stay order is found in s. 11 of the C.C.A.A.:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested

in the matter, may, on notice to any other person or without notice as it may see fit,

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

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

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

9 The question of whether a step, not involving any court or litigation process, taken to realize upon the accounts receivable is a "suit, action or other proceeding ... against the company" is not before the Court on this appeal. The bank does not put its case forward on that footing. Its contention is more general in nature. It is that s. 178 security is beyond the reach of the C.C.A.A.; put another way, that whatever the scope of the C.C.A.A., it does not go so far as to impede or qualify, or give jurisdiction to make orders which will impede or qualify, the rights of realization of a holder of s. 178 security. Consistent with that position, by way of relief on the appeal the bank asks only that the stay order be varied to free up the s. 178 security:

(Nature of Order Sought)

An order that the appeal of the Appellant be allowed and an order be made the Order of the Judge in the Court below be set aside insofar as it restrains the Appellant from exercising its rights under its section 178 security ...

10 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.

11 There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all-encompassing scope of the Act qua creditors is even underscored by s. 8, which negates any contracting out provisions in a security instrument. And Chef Ready emphasizes the obvious, that if it had been intended that s. 178 security or the holders of s. 178 security be exempt from the C.C.A.A. it would have been a simple matter to say so. But that does not dispose of the issue. There is the *Bank Act* to consider.

12 There is nothing in the Loans and Security division of the *Bank Act* either, where s. 178 is found, which specifically excludes direct or indirect impact by the C.C.A.A. Nonetheless, the bank's position, in essence, is that there is a notional cordon sanitaire around s. 178 and other sections associated with it such that neither the C.C.A.A. nor orders made under it can penetrate. In support of its position, the bank relies heavily upon the recent unanimous judgment of the Supreme Court of Canada in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121,

[1990] 2 W.W.R. 193, 46 B.L.R. 161, 9 P.P.S.A.C. 177, 65 D.L.R. (4th) 361, 104 N.R. 110, 82 Sask. R. 120, and to a lesser degree upon an earlier unanimous Supreme Court of Canada judgment in *Flintoft v. Royal Bank*, [1964] S.C.R. 631, 7 C.B.R. (N.S.) 78, 49 W.W.R. 301, 47 D.L.R. (2d) 141.

13 The principal issue in *Hall* was whether ss. 19 to 36 of the Saskatchewan *Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16 applied to a security taken under ss. 178 and 179 of the *Bank Act*. The Court held that it was beyond the competence of the Saskatchewan Legislature "to superadd conditions governing realization over and above those found within the confines of the *Bank Act*" (p. 154 [S.C.R.]). In the course of arriving at its decision, the Court considered the property interest acquired by a bank under s. 178 security, the legislative history leading up to the present ss. 178 and 179, the purposes intended to be achieved by the legislation, and the rights of a bank holding s. 178 security. All of those considerations have application to the issue here, and the judgment merits reading in full to appreciate the relevance of all of its parts. However, a few extracts will serve to illustrate the bank's reliance:

14 Page 134:

> ... a bank taking security under section 178 effectively acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower ...

15 Pages 139-140:

> ... the Parliament of Canada has enacted these sections not so much for the benefit of banks as for the benefit of manufacturers.

. . . . .

> These sections of the *Bank Act* have become an integral part of bank lending activities and are a means of providing support in many fields of endeavour to an extent which otherwise would not be practical from the standpoint of prudent banking ...

16 Page 143:

> ... The bank obtains and may assert its right to the goods and their proceeds against the world, except as only Parliament itself may reduce or modify these rights.

17 Pages 143-144:

> the rights, duties and obligations of creditor and debtor are to be determined solely by reference to the *Bank Act*.

18 Page 152:

> The essence of that regime [ss. 178 and 179], it hardly needs repeating, is to assign to the bank, on the taking out of the security, right and title to the goods in question, and to confer, on default of the debtor, an *immediate* right to seize and sell those goods.

19 Page 154:

> [I]t was Parliament's manifest legislative purpose that the sole realization scheme applicable to the s. 178

security interest be that contained in the *Bank Act* itself.

20 Page 155:

Parliament, under its power to regulate banking, has enacted a complete code that at once defines and provides for the realization of a security interest.

21 It is the insular theme which runs through these propositions that the bank seizes upon to support its claim for immunity. But, it must be asked, in what respect does the preservation of the status quo qua creditors under the C.C.A.A. for a temporary period infringe upon the rights of the bank under ss. 178 and 179? It does not detract from the bank's title; it does not distort the mechanics of realization of the security in the sense of the steps to be taken; it does not prevent immediate crystallization of *the right* to seize and sell; it does not breach the "complete code." All that it does is postpone the exercise of the right to seize and sell. And here the bank had already allowed at least 5 days to expire between the accrual of the right and the taking of a step to exercise. It follows from this analysis that there is no apparent bar in the *Bank Act* to the application of the C.C.A.A. to s. 178 security and the bank's rights in respect of it.

22 Having regard to the broad public policy objectives of the C.C.A.A., there is good reason why s. 178 security should not be excluded from its provisions. The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent, liquidation followed because that was the consequence of the only insolvency legislation which then existed — the *Bankruptcy Act*, R.S.C. 1927, c. 11, and the *Winding-up Act*, R.S.C. 1927, c. 213. 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. These excerpts from an article by Stanley E. Edwards (1947) 25 Can. Bar Rev. 587, entitled "Reorganizations Under the Companies' Creditors Arrangement Act," explain very well the historic and continuing purposes of the Act (p. 592):

It is important in applying the C.C.A.A. to keep in mind its purpose and several fundamental principles which may serve to accomplish that purpose. Its object, as one Ontario judge has stated in a number of cases, is to keep a company going despite insolvency. Hon. C.H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation, through reorganization, to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the manage ment may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often a sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders.

23 Page 590:

There are a number of conditions and tendencies in this country which underline the importance of this statute. There has been over the last few years a rapid and continuous growth of industry, primarily manufacturing. The tendency here, as in other expanding private enterprise countries, is for the average size of corporations to increase faster than the number of them, and for much of the new wealth to be concentrated in the hands of existing companies or their successors. The results of permitting dissolutions of companies without giving the parties an adequate opportunity to reorganize them would therefore likely be more serious in the future than they have been in the past.

Because of the country's relatively small population, however, Canadian industry is and will probably continue to be very much dependent on world markets and consequently vulnerable to world depressions. If there should be such a depression it will become particularly important that an adequate reorganization procedure should be in existence, so that the Canadian economy will not be permanently injured by discontinuance of its industries, so that whatever going concern value the insolvent companies have will not be lost through dismemberment and sale of their assets, so that their employees will not be thrown out of work, and so that large numbers of investors will not be deprived of their claims and their opportunity to share in the fruits of the future activities of the corporations. While we hope that the dismal prospect will not materialize, it is nevertheless a possibility which must be recognized. But whether it does or not, the growing importance of large companies in Canada will make it important that adequate provision be made for reorganization of insolvent corporations.

24 It is apparent from these excerpts and from the wording of the statute that, in contrast with ss. 178 and 179 of the *Bank Act*, which are preoccupied with the competing rights and duties of the borrower and the lender, the C.C.A.A. serves the interests of a broad con stituency of investors, creditors and employees. If a bank's rights in respect of s. 178 security are accorded a unique status which renders those rights immune from the provisions of the C.C.A.A., the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern. Here, for example, if the bank signifies and collects the accounts receivable, Chef Ready will be deprived of working capital. Collapse and liquidation must necessarily follow. The lesson will be that where s. 178 security is present a single creditor can frustrate the public policy objectives of the C.C.A.A. There will be two classes of debtor companies: those for whom there are prospects for recovery under the C.C.A.A.; and those for whom the C.C.A.A. may be irrelevant dependent upon the whim of the s. 178 security holder. Given the economic circumstances which prevailed when the C.C.A.A. was enacted, it is difficult to imagine that the legislators of the day intended that result to follow.

25 In the exercise of their functions under the C.C.A.A. Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives. See such cases as *Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc. v. Nu-West Ltd.*, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39 (Q.B.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, 73 C.B.R. (N.S.) 195, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 (C.A.); *Re Feifer and Frame Manufacturing Corp.*, [1947] Que. K.B. 348, 28 C.B.R. 124 (C.A.); *Wynden Canada Inc. v. Gaz Métropolitain Inc.* (1982), 44 C.B.R. (N.S.) 285 (Que. S.C.); and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, 72 C.B.R. (N.S.) 20, [1989] 2 W.W.R. 566, 64 Alta. L.R. (2d) 149 (Q.B.). The trend demonstrated by these cases is entirely consistent with the object and purpose of the C.C.A.A.

26 The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

27 For these reasons the disposition by the chambers Judge of the application made by Chef Ready will be upheld. It follows that the appeal is dismissed.

Appeal dismissed.

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2001 CarswellOnt 3482

Consumers Packaging Inc., 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 Consumers Packaging Inc., Consumers International Inc. and 164489 Canada Inc.

Ontario Court of Appeal

McMurtry C.J.O., Finlayson, Austin JJ.A.

Heard: September 27, 2001
Judgment: October 10, 2001
Docket: CA M27743

Proceedings: refusing leave to appeal (), 2001 CarswellOnt 3331 (Ont. S.C.J. [Commercial List])

Counsel: *Peter F.C. Howard, Patrick O'Kelly, Craig Martin*, for Ardagh PLC.

Robert S. Harrison, Carole J. Hunter, for Ad Hoc Noteholders Committee.

Daniel V. MacDonald, Paul G. Macdonald, for Consumers Packaging Inc., Consumers International Inc. and 164489 Canada Inc.

L. Joseph Latham, Elizabeth Moore, for Toronto-Dominion Bank Syndicate.

Lily I. Harmer, for United Steelworkers of America.

Marc Lavigne, for Anchor Glass Container Corp.

Dale Denis, for Owens-Illinois Inc.

Terrence J. O'Sullivan (Court-appointed Monitor), for KPMG Inc.

Subject: Insolvency; Corporate and Commercial

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Corporation filed for protection under Companies' Creditors Arrangement Act — Monitor was appointed and process was put in place for third parties to submit offers to purchase any part of corporation's business — Two companies, OI and A, participated in process — Monitor's application for court approval of sale of corporation to OI was granted, over A's objections — A brought application for leave to appeal — Application denied — Evidence supported finding that bid process was fair and open, and that OI's bid was most favourable for corporation's stakeholders — OI's bid provided more cash to creditors, had least completion risk, was not conditional on financing, was likely to close within reasonable time-frame, was made by credible purchaser and would result in continuation of corporation's business — Granting leave to appeal would be prejudicial to corporation's prospects for restructuring business — Not clear that disappointed bidder has standing to seek leave to appeal from order approving sale to another bidder — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered:

Algoma Steel Inc., Re, 2001 CarswellOnt 1742, 25 C.B.R. (4th) 194 (Ont. C.A.) — followed

Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — followed

Statutes considered:

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

Generally — referred to

s. 11.7 [en. 1997, c. 12, s. 124] — referred to

APPLICATION by unsuccessful bidder for leave to appeal from judgment reported at 2001 CarswellOnt 3331, 27 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]), approving sale of corporation's assets.

***Per curiam*:**

1 Ardagh PLC ("Ardagh"), seeks leave to appeal and if leave is granted appeals the Order of The Honourable Mr. Justice Farley dated August 31, 2001 which approved a sale of certain assets of Consumers Packaging Inc. and Consumers International Inc. and 164489 Canada Inc. (hereinafter collectively "Consumers") to Owens-Illinois, Inc. ("Owens-Illinois").

2 Consumers had filed for protection under the *Companies' Creditors Arrangement Act* (the "CCAA") on May 23, 2001 and Farley J. made an initial order on that date approving an amendment and forbearance agreement between Consumers and its institutional lenders and arranging interim credit. KPMG Inc. was appointed Monitor under s. 11.7 of the CCAA. On June 18, 2001 Farley J. authorized Consumers through an Independent Restructuring Committee and its Chief Restructuring Officer to fix a date upon which interested third parties were to submit firm, fully financed offers to purchase all or any part of Consumers' business. Both Ardagh and Owens-Illinois participated in the bid process. The Independent Restructuring Committee, the Chief Restructuring Officer and the Monitor agreed on behalf of Consumers that Owens-Illinois was the preferred bid. On the sale approval motion heard August 31, 2001, Farley J. found as a fact that Consumers was "quite sick" and "financially fragile" and that there "exists a material risk that [Consumers] will be destabilized by a withdrawal of funding by the [consortium of lenders] which have been continuously adamant about a September 2001 deadline for pay out."

3 On the evidence before us, the Owens-Illinois bid approved by Farley J. on August 31, 2001 was the result of a fair and open process developed by Consumers and its professional advisors and carried out, after May 23,

2001, under the supervision of the court and with the participation of Ardagh. The Owens-Illinois bid provides more cash to Consumers' creditors than a proposal from Ardagh, has the least completion risk, is not conditional on financing, is likely to close in a reasonable period of time, is made by a credible purchaser (the largest glass bottle manufacturing company in the world) and will result in the continuation of Consumers' Canadian business, the retention of a vast majority of Consumers' 2,400 Canadian employees and the assumption by the purchaser of significant obligations under Consumers' employee pension plan. It is supported by all parties before this court with the exception of Ardagh.

4 The respondents on this motion submit that the restructuring proposals put forward by Ardagh were not backed by financing commitments, required further due diligence by Ardagh and its lenders, could not be completed in a timely way, offered less by way of recovery to Consumers' creditors and were no more than proposals to negotiate. It appears to have been the unanimous view of the Monitor, Consumers' Independent Restructuring Committee and Consumers' Chief Restructuring Officer that Ardagh's proposals were not viable and would, if pursued, result in the liquidation of Consumers, resulting in lower return to creditors, loss of jobs and cessation of business operations. This view was accepted by Farley J. who stated in his endorsement approving the Owens-Illinois bid that it was the "only presently viable option better than a liquidation with substantially reduced realization of value".

5 In our opinion, leave to appeal should not be granted. The authorities are clear that, due to the nature of CCAA proceedings, leave to appeal from orders made in the course of such proceedings should be granted sparingly: see *Algoma Steel Inc., Re,* a judgment of the Ontario Court of Appeal, delivered May 25, 2001, (Ont. C.A.) at p. 3. Leave to appeal should not be granted where, as in the present case, granting leave would be prejudicial to the prospects of restructuring the business for the benefit of the stakeholders as a whole, and hence would be contrary to the spirit and objectives of the CCAA. The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA. There is a real and substantial risk that granting leave to appeal in the present case will result in significant prejudice to Consumers and its stakeholders, in light of the significant time and financial constraints currently faced by Consumers. Both Farley J. and KPMG Inc., the court-appointed Monitor in the CCAA proceedings, have concluded that the Owens-Illinois bid represents the only presently viable option available to Consumers, which would be better than a liquidation.

6 The transactions contemplated by the Owens-Illinois bid are expected to close on September 28, 2001. If the Owens-Illinois bid does not close before the end of September, 2001, it is uncertain if, and for how long, Consumers would be able to continue its operations. The financial institutions that are prepared to finance these transactions have appeared before this court and have advised, both before and throughout the CCAA proceedings, that they will not fund the operations of Consumers beyond the end of September, the time at which Consumers' credit requirements seasonally increase on an annual basis. There is no evidence on the record, and certainly none from Ardagh, as to the manner in which the operations of Consumers would be funded until the Ardagh proposal contained in its bid, if successful, could be implemented.

7 Further, despite its protestations to the contrary, it is evident that Ardagh is a disappointed bidder that obtained its security interest in the assets of Consumers in order to participate in their restructuring and obtain a controlling equity position in the restructured entity. There is authority from this court that an unsuccessful bidder has no standing to appeal or to seek leave to appeal. As a general rule, unsuccessful bidders do not have standing to challenge a motion to approve a sale to another bidder (or to appeal from an order approving the

sale) because the unsuccessful bidders "have no legal or proprietary right as technically they are not affected by the order": see the statement of Farley J., dealing with a receiver's motion to approve a sale, that is quoted with approval by O'Connor J.A. of this court in *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (2000), 47 O.R. (3d) 234 (Ont. C.A.), at 238. O'Connor J.A. went on to say at p. 242:

> There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands [of] a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

8 The position of Ardagh is not advanced by the fact that it did not challenge the order of Farley J. of June 18, 2001 which set out the parameters for the bidding. Instead it participated in the bidding process which it now attacks as being *ultra vires* the CCAA.

9 Finally, while we do not propose to become involved in the merits of the appeal, we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose and flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered.

10 Accordingly, leave to appeal is refused with costs.

Application denied.

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2007 CarswellOnt 4962

BNP Paribas (Canada) v. BCE Inc.

BNP PARIBAS (CANADA) (Plaintiff / Respondent) and BCE INC., RICHARD J. CURRIE, TERENCE J. JARMAN, THOMAS E. KIERANS, JEAN C. MONTY, and H. ARNOLD STEINBERG (Defendants / Appellants)

Ontario Court of Appeal

M. Rosenberg, E.E. Gillese, S.E. Lang JJ.A.

Heard: May 23-24, 2007
Judgment: August 7, 2007
Docket: CA C45855

Proceedings: affirming *BNP Paribas (Canada) v. BCE Inc.* (2006), 24 C.B.R. (5th) 233, 33 C.P.C. (6th) 180, 2006 CarswellOnt 4982 (Ont. S.C.J.)

Counsel: Thomas G. Heintzman, Q.C., Darryl R. Ferguson for Appellants

William J. Burden, John N. Birch, Linda I. Knol for Respondent

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

Conflict of laws --- Contracts — Choice of law — Forum conveniens — General principles

Plaintiff lent money to T Inc. pursuant to lending agreement — Lending agreement contained exclusive jurisdiction clause which mandated it would be governed by laws of Quebec — Defendant, parent company of T Inc., agreed in letter to provide financial assistance required by T Inc. to maintain certain debt to total capitalization ratio — T Inc. filed for protection of Companies' Creditors Arrangement Act in Ontario after defendant company announced it would withdraw its financial support — Plaintiff alleged that defendant company failed to provide financial assistance agreed to in letter, and that financial statements did not fairly disclose T Inc.'s true state — Plaintiff brought claim for breach of contract and oppression remedy against defendants, former parent company and directors of T Inc., in Ontario — Defendants brought unsuccessful motion to stay action on basis that Ontario was not proper jurisdiction — Motion judge held that defendants did not meet burden of establishing that Quebec was clearly more convenient forum — Defendants appealed — Appeal dismissed — Decisions on issue of convenient forum are discretionary — Motion judge properly exercised his discretion — It was open to him to place considerable weight on existence of related litigation in Ontario — Guiding element in determination of appropriate forum must be principles of order and fairness — Order and fairness overwhelmingly favoured Ontario as place for trial of action because four related proceedings were in Ontario courts.

Cases considered by *M. Rosenberg J.A.*:

ABN Amro Bank N.V. v. BCE Inc. (2003), 2003 CarswellOnt 2890, 44 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — referred to

ABN Amro Bank N.V. v. BCE Inc. (2003), 2003 CarswellOnt 2749, 44 C.B.R. (4th) 25 (Ont. Div. Ct.) — referred to

Amchem Products Inc. v. British Columbia (Workers' Compensation Board) (1993), 1993 CarswellBC 1257, [1993] I.L.Pr. 689, [1993] 3 W.W.R. 441, 14 C.P.C. (3d) 1, [1993] 1 S.C.R. 897, 150 N.R. 321, 23 B.C.A.C. 1, 39 W.A.C. 1, 102 D.L.R. (4th) 96, 77 B.C.L.R. (2d) 62, 1993 CarswellBC 47 (S.C.C.) — referred to

Cortese (Next Friend of) v. Nowsco Well Service Ltd. (2000), 80 Alta. L.R. (3d) 3, 44 C.P.C. (4th) 23, (sub nom. *Cortese v. Nowsco Well Service Ltd.)* 255 A.R. 381, (sub nom. *Cortese v. Nowsco Well Service Ltd.)* 220 W.A.C. 381, 2000 CarswellAlta 406 (Alta. C.A.) — referred to

Cortese (Next Friend of) v. Nowsco Well Service Ltd. (2000), (sub nom. *Cortese v. Nowsco Well Service Ltd.)* 265 N.R. 394 (note), (sub nom. *Cortese v. Nowsco Well Service Ltd.)* 281 A.R. 200 (note), (sub nom. *Cortese v. Nowsco Well Service Ltd.)* 248 W.A.C. 200 (note), 2000 CarswellAlta 1289, 2000 CarswellAlta 1290 (S.C.C.) — referred to

"Eleftheria" (The) (Cargo Owners) v. "Eleftheria" (The) (1969), [1969] 1 Lloyd's Rep. 237, [1969] 2 All E.R. 641, [1969] 2 W.L.R. 1073, 113 Sol. Jo. 407, [1970] P. 94 (Eng. P.D.A.) — considered

Hunt v. T & N plc (1993), 1993 CarswellBC 1271, 1993 CarswellBC 294, (sub nom. *Hunt v. T&N plc)* [1993] 4 S.C.R. 289, [1994] 1 W.W.R. 129, 21 C.P.C. (3d) 269, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 37 B.C.A.C. 161, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 60 W.A.C. 161, (sub nom. *Hunt v. T&N plc)* 109 D.L.R. (4th) 16, 85 B.C.L.R. (2d) 1, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 161 N.R. 81 (S.C.C.) — referred to

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

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

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

Generally — referred to

APPEAL by defendants from judgment reported at *BNP Paribas (Canada) v. BCE Inc.* (2006), 24 C.B.R. (5th) 233, 33 C.P.C. (6th) 180, 2006 CarswellOnt 4982 (Ont. S.C.J.) finding Ontario to be convenient forum for trial of action.

***M. Rosenberg J.A.*:**

1 In this appeal the appellants/defendants argue that the motion judge, Ground J., erred in finding that Ontario

was the convenient forum for trial of a multi-million dollar action arising out of the insolvency of Teleglobe Inc. ("Teleglobe"). The defendants are BCE Inc. ("BCE"), the former parent company of Teleglobe, and several of the former directors of Teleglobe itself. The action by the plaintiff/respondent BNP Paribas (Canada), one of the lenders to Teleglobe, is for damages for breach of contract and a remedy for oppression under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

2 While the appellants submit that the motion judge made several errors, their principle submission is that he misplaced the evidentiary burden by requiring them to show that Ontario was not the convenient forum for the trial of the action. They argue that the motion judge ought to have required the respondent to show why its action should be heard in Ontario given that a clause in the lending agreement between the parties granted exclusive jurisdiction over any disputes to courts in the State of New York or in the Province of Quebec. They submit that by failing to do so, the motion judge misapplied the decision of the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU-Line N.V.* (2003), 224 D.L.R. (4th) 577 (S.C.C.).

3 The appellants also submit that the motion judge erred in principle in placing unreasonable weight on the single factor that other actions arising out of the Teleglobe affair were being tried in Ontario on the Superior Court of Justice Commercial List. They submit that this action has little connection to the other Teleglobe litigation and moreover, that the real substance of this claim concerns a dispute between two Québec-based companies — the respondent BNP and the appellant BCE — over a contract that was made in Québec and is governed by Québec law.

4 For the following reasons, I would dismiss the appeal. Decisions on the issue of convenient forum are discretionary. In my view, the motion judge properly exercised his discretion. He considered all relevant facts and took into account the proper legal principles. Moreover, it was open to him to place considerable weight on the existence of the related litigation in Ontario.

The Facts

5 The action arises from the respondent's participation in one of two loan facilities (Credit Facility A and B) that together advanced, by way of a lending syndicate (the "Syndicate"), $U.S. 1.25 billion to Teleglobe. The respondent was not one of the original members of the Syndicate, but in September 2000 took an assignment of a portion of Credit Facility A which had been established in July 2000 pursuant to a one-year Loan Agreement (Facility A Loan Agreement) with Teleglobe. The Agreement was extended for another year in July 2001. The respondent's share of Facility A was $U.S. 50 million. The action against the appellant BCE turns on a letter from BCE to the Syndicate in which it agreed to provide financial assistance to its subsidiary, Teleglobe, in order to maintain a certain total-debt-to-total capitalization ratio. The respondent claims that BCE breached this agreement. In effect, it is alleged that the appellants caused Teleglobe to adopt a form of accounting that artificially enhanced the company's value by vastly overstating Teleglobe's goodwill. Had the proper accounting methods been used, the respondent argues, BCE would have been required to provide greater financial support in accordance with the letter.

6 The oppression claim against BCE and the individual appellants, former members of the Teleglobe board of directors, focuses on the management and control of Teleglobe by BCE and the directors (three of whom were also directors of BCE) and involves similar issues to those in the breach of contract claim.

7 This and the other actions pending in the Ontario courts were precipitated by Teleglobe's insolvency in April 2002 following BCE's announcement in Toronto on April 24, 2002 that it would no longer provide financial sup-

port to Teleglobe. Teleglobe filed for *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, protection in May 2002 in the Superior Court of Justice Commercial List in Ontario. This action was supported by BCE, which provided debtor-in-possession financing to Teleglobe through an affiliate. BCE has been actively involved in the *CCAA* proceedings.

8 In July 2002, just months after the initiation of the *CCAA* proceedings, the Syndicate members, including the respondent, brought an action (the "Syndicate Action") seeking, *inter alia*, a finding of oppression against BCE (not the individual directors) in relation to the way BCE caused Teleglobe to conduct its affairs. The respondent later withdrew from that action and launched the action that is the subject of this appeal. BCE brought a motion to stay the Syndicate Action on the basis that the Ontario courts lacked jurisdiction to try the case and on the basis of *forum non conveniens*. Farley J. dismissed that motion.[FN1] The Syndicate Action raises issues that are similar to the issues raised by the action involved in this appeal, although the theory of liability is different. In this action, the respondent principally relies upon the BCE letter. In the Syndicate Action, the plaintiffs assert that BCE gave a commitment ensuring that the lenders would be repaid.

9 In addition to the *CCAA* proceedings and the Syndicate Action, two other proceedings are pending on the Ontario Superior Court of Justice Commercial List. In February 2003, Teleglobe's interim receiver commenced an action against the appellant directors (the "Redemption Action"). In that action, the interim receiver alleges that the directors permitted Teleglobe to redeem certain series of preferred shares notwithstanding that Teleglobe did not meet the required solvency tests under the *CBCA*. The appellants and the respondent have a different view of the relationship of the Redemption Action to the action involved in this appeal. The appellants say the Redemption Action has nothing to do with the issues in this action. The respondent submits that the actions raise similar issues in that both concern Teleglobe's true financial state.

10 The Plan Administrator appointed pursuant to the Teleglobe *CCAA* Plan commenced an action in November 2005 against the appellants and two other persons (the "Administrator Action"). That action alleges, among other things, that the defendants arranged BCE's affairs to minimize BCE's exposure in the event of Teleglobe's insolvency, unilaterally withdrew BCE financial support to Teleglobe, and failed to honour a previous financial commitment, and seeks damages for breach of fiduciary duty and oppression. Again, the appellants submit that the issues in that action have nothing to do with the claims in the action involved in this appeal.

11 There are two principal documents that frame the dispute in the action and the *forum non conveniens* issue. The first document is the Facility A Loan Agreement. That agreement contains several clauses concerning jurisdiction and choice of law. Article 12, upon which the appellants rely, provides that "Each party hereto ... irrevocably submits to the jurisdiction of the courts of New York State ... and the provincial and federal courts located in Québec" and "irrevocably agrees that any legal proceeding against any party hereto arising out of or in connection with the Facility A Loan Papers or the obligation shall be brought in one of the aforementioned courts". There is no dispute that as a result of the assignment, the respondent is party to the Facility A Loan Papers. The individual appellants are not. Nor is BCE. BCE, however, submits that it is entitled to the benefit of Article 12. Article 12 also contains a choice of law clause providing that the governing law is that of the Province of Québec and of Canada.

12 Article 10 of the Facility A Loan Agreement applies in the case of default by Teleglobe and provides, *inter alia*, that the Arranger (the Bank of Montreal) or the Determining Lenders may "exercise any and all other legal or equitable rights afforded by the Loan Papers, the Laws of the Province of Quebec and Canada applicable therein, or any other applicable jurisdiction as the Arranger shall deem appropriate". The respondent relies upon

this clause. It submits that this clause gives it the right to bring this action in the court of its choice, i.e. Ontario. "Determining Lenders" is a defined term and in short means those lenders who collectively hold 51 per cent of the debt.

13 The other important document is the BCE letter. It does not contain a jurisdiction clause. The appellants submit, however, that it falls within the definition of "Loan Papers" in the Facility A Loan Agreement. The Agreement defines Loan Papers to mean, *inter alia*, "all agreements, documents, or instruments in favour of Arranger ... or Lenders ... ever delivered pursuant to this Facility A [Loan] Agreement ... or otherwise delivered in connection with all or any part of the Obligation".

14 There is a dispute about whether this action is barred by the applicable limitation period. This action was commenced in December 2004. The appellants submit that under Québec law the applicable limitation period is three years and that for reasons that need not be set out here the cause of action arose before 2001. The respondent submits that even if the three-year limitation period applies, the action is not statute barred because the cause of action did not arise until April or May of 2002, upon the insolvency of Teleglobe and the discovery of BCE's alleged failure to comply with its obligations. The respondent also relies on the civil law doctrine of "impossibility" to extend the limitation period. There is a dispute as the exact meaning of the concept of "impossibility" and its similarity to the common law principle of discoverability.

15 During the course of argument of the motion the respondent commenced a protective action in Québec that is identical to this action. For the purpose of the motion, the appellants undertook to the motion judge that in the event that the action was stayed or dismissed, they would agree that any Québec action in respect of the same matters was deemed to have commenced on the date this action was commenced *i.e.* December 2004. There was conflicting expert evidence before the motion judge as to whether a Québec court would be bound to accept that undertaking.

Reasons of the Motion Judge

16 After accurately setting out the factors to be considered on a motion to stay an action on the basis of *forum non conveniens*, the motion judge dealt with the principal contentious issue: whether the exclusive jurisdiction clause (Article 12) applied. He rejected the respondent's position that this issue had already been determined against the appellants by Farley J. in the Syndicate Action. He did not, however, clearly find that the clause applied. Rather, he took the clause as an indication of the reasonable expectations of the parties. As he said at para. 23:

> Although it may be arguable, in view of the interlocking definitions and other provisions of the relevant Agreements, whether the exclusive jurisdiction provisions of the Agreements would apply to this action which is based upon a breach of the BCE Agreement and allegations of oppression, I accept the submission of the Defendants that the existence of those provisions indicates a reasonable expectation of the parties to the those Agreements that disputes arising under those Agreements would be determined by the Québec courts.

17 The motion judge then moved on to the application of the remaining factors. Accordingly, he concluded that the choice of law and reasonable expectation of the parties as expressed in Article 12 strongly favoured Québec as the more convenient forum. Below is a brief summary of his conclusions regarding these factors:

- **Location of parties:** This is a neutral factor. Notwithstanding that the headquarters of BCE, BNP and

Teleglobe are in Montreal, the companies also maintain offices in Ontario and three of the individual defendants reside in Toronto. In any event, the nature of their business requires these individuals to frequently travel throughout Canada.

• **Location of witnesses**: This factor slightly favours Québec. Although the contract negotiations were carried out in Quebec, the majority of meetings concerning Teleglobe's accounting and finance statements took place in Montreal, and many of the parties' professional advisers reside in Québec, much will depend upon witnesses from the United States about the application of the U.S. Generally Accepted Accounting Principles (GAAP). It would be equally convenient for those witnesses to travel to Québec or Ontario.

• **Location of evidence**: This factor slightly favours Ontario. Although many of the original documents required in this action are in Quebec, their electronic production has been ordered by the Ontario courts in the Syndicate and Redemption Actions. It would be counterproductive to have new, and possibly conflicting, orders made on production issues.

• **Where the contract was negotiated and executed**: This is a neutral factor. Although the contract was negotiated and executed in Montreal and to some extent in New York and Paris, the location is relevant only to accessibility of documents and availability of witnesses.

• **Existence of other proceedings**: This factor strongly militates in favour of Ontario given that the Ontario courts have four years of experience with the related Ontario proceedings, which raise a number of overlapping or common issues.

• **Interest of justice; interest of the parties**: These are neutral factors.

• **Loss of juridical advantage**: This factor strongly favours Québec because the law of Québec will determine the question of the limitation period. Moreover, it would be advantageous to have a Québec court decide the limitation period issue given the difference of opinion about the application of the Québec law.

18 The motion judge held that the onus was on the moving parties to establish that "there is a clearly more appropriate forum than the forum chosen by the Plaintiff." He concluded that the appellants failed to show that Québec was a clearly more convenient forum. The motion judge then appeared to revisit the issue of juridical advantage and held that he would be reluctant to stay the Ontario action on the basis of *forum non conveniens* given the ambiguity/uncertainty concerning the willingness of a Quebec court to accept the appellant's undertaking as to a deemed commencement date of the Québec protection action. An Ontario court would be able to determine that issue with the assistance of expert opinion evidence on Québec law and submissions on the application of Quebec law to the facts of this case. Accordingly, the motion judge dismissed the motion.

Analysis

The Exclusive Jurisdiction Clause

19 The appellants submit that the exclusive jurisdiction clause applies to the claims against BCE. It is unclear whether the clause also applies to any action against the individual directors that arises out of the affairs of Teleglobe. For a variety of reasons, the respondent submits that the clause does not apply. Its principal submission is that since BCE was not a party to the Facility A Loan Agreement, it is not entitled to the benefit of the clause.

20 I am prepared to assume for the purposes of these reasons that BCE, at least, is entitled to the benefit of the

clause and that the principles from *Z.I. Pompey*, *supra*, apply. In that case, the Supreme Court of Canada approved the "strong cause test" laid down in *"Eleftheria" (The) (Cargo Owners) v. "Eleftheria" (The)*, [1969] 1 Lloyd's Rep. 237 (Eng. P.D.A.) at 242. In short, a court is not bound to stay proceedings commenced in breach of a forum selection clause. However, as Bastarche J. said, at para. 20, the plaintiff has the burden of satisfying the court "that there is good reason it should not be bound by the forum selection clause." A forum selection clause is not simply one of several factors that the judge must take into account in deciding a *forum non conveniens* case. Rather, the presence of such a clause reverses the ordinary burden of proof. In the ordinary *forum non conveniens* cases, the burden is on the defendant to show why the stay should be granted. Where a forum selection clause is present, "the starting point is that parties should be held to their bargain, and where the plaintiff has the burden of showing why a stay should not be granted": *Z.I. Pompey*, *supra*, at para. 21.

21 Finally, as Bastarche J. points out, at para. 20, forum selection clauses are to be encouraged "as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law ... In the context of international commerce, order and fairness have been achieved at least in part by application of the 'strong cause' test."

22 On the assumption that the forum selection clause in Article 12 of the Facility A Loan Agreement applied, the motion judge erred in principle in failing to require the respondent to show that there was good cause why the action should not be stayed. In my view, however, if there was an error, it was of no consequence. The "guiding element in the determination of an appropriate forum must be principles of order and fairness": *Hunt v. T & N plc* (1993), 109 D.L.R. (4th) 16 (S.C.C.) at 33. The reasons of the trial judge show that order and fairness overwhelmingly favoured Ontario as the place for trial of this action because the other four proceedings were in the Ontario courts.

23 That finding is consistent with the reasonable expectation of the parties. While Article 12 requires that all proceedings be taken in the courts of Québec or New York, the rules changed upon Teleglobe's insolvency. In accordance with Article 10, the Arranger or the Determining Lenders are entitled to bring an action in any jurisdiction as the Arranger deems appropriate. The respondent does not on its own hold 51 per cent of the debt and is therefore not itself entitled to the benefit of Article 10. That said, it seems to me that the inclusion of this clause is a strong indication that the parties contemplated that a jurisdiction other than Québec or New York could be an appropriate forum for litigation in the case of insolvency. This view is bolstered by the fact that the event that has triggered the selection of forum for this action was the choice by the new Teleglobe directors to use the Ontario courts for their *CCAA* proceedings. At the time Teleglobe was a wholly owned subsidiary of BCE and as indicated BCE was actively engaged in the *CCAA* proceedings.

24 The motion judge could rightly find that once this complex proceeding had been launched in Ontario, to be followed by the other pieces of related litigation, there was every reason to permit this action to also proceed in Ontario. Given the other proceedings, which have provided the Ontario courts with over four years of experience with the Teleglobe litigation, there was good cause to permit this action to proceed in Ontario. The appellants' submission that the other proceedings have nothing to do with the claim asserted in this action does not bear close scrutiny. Either BCE or the individual respondents are involved in all of the actions. The documents ordered produced in the other actions will be required in this action. Many of the same witnesses will be involved. The essence of the claims in all of the proceedings concerns the management of Teleglobe by the defendant directors, several of whom were also directors of BCE, and the alleged failure of BCE to comply with its commitments to its subsidiary and the lenders. In particular, although the theories of liability in the Syndicate Action and this action are different, they are closely related and it would be advantageous for one court to deal

with both of them. BCE and the directors are already in Ontario dealing with the litigation fallout from the insolvency of Teleglobe; they are not seriously disadvantaged by having all of the proceedings in the same court.

25 As the motion judge found, there are some advantages to having a Québec court deal with this action especially because of the choice of law clause. But, these are sophisticated parties and have the means to provide the Ontario court with the necessary evidence: see *Hunt v. T & N plc*, *supra*, at p. 33. Also, I agree with the respondent that the importance of choice of law should not be exaggerated. At least as the action is presently framed, legal issues will be relatively less significant in comparison to the factual issues such as the application of U.S. GAAP.

26 Much time was spent during oral argument about the impact of the limitation period issue and what the appellants submit were inconsistent findings by the motion judge. The limitation period factored into the motion judge's analysis at several points. In finding that the factor of jurisdiction and proper law strongly favours Québec as the more convenient forum, he took into account the advantage of a Québec judge dealing with the limitation period because that issue would be dealt with in accordance with Québec law.

27 The issue also surfaced in the motion judge's consideration of loss of juridical advantage. He appears to have found that loss of juridical advantage favoured Québec because if the Ontario action was stayed, thereby forcing the respondent to commence an action in Québec, the respondent would be outside the three-year limitation period for commencement of a personal action. In considering loss of juridical advantage the motion judge again took into account the advisability of having a Québec judge deal with issues that would turn upon Québec law.

28 Finally, the motion judge considered it significant that the action may be barred by the three year limitation period if the respondent had to commence a new action in Québec or rely upon the protective action. He said, at para. 51, that he would "be reluctant to stay the Ontario action" in those circumstances.

29 I agree with the appellants that these various findings seem inconsistent. In my view, however, the apparent inconsistency does not assist the appellants. Juridical advantage, contrary to the finding by the motion judge, was at worst a neutral factor and should not have been counted as a separate factor favouring Québec. On the record before the motion judge, the applicable limitation period would be decided in accordance with the law of Québec whether the case proceeded in Ontario or Québec. The respondent gained no juridical advantage with respect to the limitation period by commencing the action in Ontario and likewise, the appellants did not lose any legitimate juridical advantage. There is no suggestion that this was a case of forum shopping where a party has sought out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction: see *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (S.C.C.) at 912.

30 The motion judge's comment that he would be reluctant to stay the Ontario action given the uncertainty about whether the protective action in Quebec was statute-barred was made after he had found, for good reason, that Ontario was the convenient forum. In these circumstances, I need not consider the application to this case of the line of authority holding that a plaintiff cannot rely upon a loss of juridical advantage that it has created for itself by suing in one jurisdiction and letting a limitation period run in the appropriate forum: see for example *Cortese (Next Friend of) v. Nowsco Well Service Ltd.* (2000), 255 A.R. 381 (Alta. C.A.) at para. 7, leave to appeal dismissed, [2000] S.C.C.A. No. 286 (S.C.C.).

31 The appellants submit that the motion judge failed to apply the governing principle in *forum non conveniens*

cases: the real substance of the *lis* between the parties must be considered to determine the nature and appropriate forum for trial, that being the one with the closest connection with the action and the parties. They contend that rather than engaging in this form of analysis, the motion judge unreasonably allowed the existence of the other Ontario litigation to trump all other factors, whereas this is essentially a dispute between two Québec companies (BCE and BNP) about a contract made in Québec where the outcome will be determined in accordance with Québec law.

32 In my view, the motion judge did not err in principle. Further, his determination of which factors were to be accorded the greatest weight is entitled to deference, provided that determination was not unreasonable. He made no such error.

33 The motion judge's allocation of weight among the relevant factors cannot be said to be unreasonable. It was not simply that the other actions were in Ontario. There was the fact that because of the choice made by Teleglobe to bring the *CCAA* proceedings in Ontario, the Superior Court of Justice Commercial List now had over four years experience with litigation arising out of the Teleglobe collapse. As he said at para. 38, "rulings have been made and orders issued with respect to matters such as production of documents which may well be relevant to issues in this action and it may be that orders could be made for common production of documents in this action and in related proceedings in this court and possibly, for common discoveries". As well, he noted that this action and the related action could be case managed by the same case management judge. This factor is considerably more important than the physical location of BNP and BCE, especially given BCE's substantial presence throughout Canada, and in particular, in the Province of Ontario. Choice of law to interpret a contract that was made in Québec, where there may be issues of an expired limitation period, was also an important consideration. Review of the motion judge's reasons, however, indicates it was recognized as such and considered accordingly. It is not for this court to second guess his view of the relative weight to be assigned to the factors.

Disposition

34 Accordingly, I would dismiss the appeal with costs fixed in the amount of $30,000 inclusive of G.S.T. and disbursements.

E.E. Gillese J.A.:

I agree.

S.E. Lang J.A.:

I agree.

Appeal dismissed.

FN1 *ABN Amro Bank N.V. v. BCE Inc.*, [2003] O.J. No. 5418 (Ont. S.C.J. [Commercial List]), leave to appeal dismissed, [2003] O.J. No. 2890 (Ont. Div. Ct.).

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Morguard Investments Ltd. v. De Savoye

DE SAVOYE v. MORGUARD INVESTMENTS LIMITED and CREDIT FONCIER TRUST COMPANY

Supreme Court of Canada

Dickson C.J.C.[FN*], La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

Heard: April 23, 1990
Judgment: December 20, 1990
Docket: No. 21116

Counsel: *D.J. Livingstone*, for appellant.

P. Reardon, for respondents.

Subject: Civil Practice and Procedure; Property; International; Insolvency; Family

Conflict of Laws --- Enforcement of foreign judgments — Nature of claim.

Mortgages — Conflict of laws — Mortgagees obtaining Rice orders in foreclosure proceedings in Alberta, including personal judgment against mortgagor for deficiency after sale — Mortgagor residing in British Columbia and taking no part in Alberta proceedings, but being served ex juris — Mortgagees seeking to enforce deficiency judgments in British Columbia — Real and substantial connection existing between damages suffered and Alberta jurisdiction — Alberta court properly exercising jurisdiction — Judgments to be recognized and enforced in British Columbia — Court examining rules of comity and private international law as they apply between provinces.

Conflict of laws — Foreign judgments — Reciprocal enforcement — Provincial reciprocal enforcement of judgments legislation not altering rules of private international law, but providing more convenient form of registration of judgments — Plaintiffs not prevented from bringing action to enforce judgment from other province — Court examining rules of comity and private international law as they apply between provinces.

Conflict of laws — Foreign judgments — Recognition and enforcement — Jurisdiction of foreign court — Mortgages — Conflict of laws — Alberta mortgagees obtaining personal judgment against mortgagor for deficiency after sale of property — Mortgagor resident in British Columbia and taking no part in Alberta proceedings, but being served ex juris — Mortgagees seeking to enforce deficiency judgments in British Columbia — Real and substantial connection existing between damages suffered and Alberta jurisdiction — Alberta court properly exercising jurisdiction — Judgments to be recognized and enforced in British Columbia — Court examining rules of comity and private international law as they apply between provinces.

The plaintiffs were mortgagees of land situated in Alberta. The Alberta mortgagor later moved to British Columbia, where he continued to reside and carry on business. The mortgages fell into default, and the plaintiffs brought action in Alberta. The defendant was served in British Columbia in accordance with the rules for service ex juris of the Alberta Court. He took no steps to appear or defend the action. There was no clause in the mortgages by which he agreed to submit to the jurisdiction of the Alberta court, and he did not attorn to its jurisdiction. In the foreclosure action the plaintiffs obtained Rice orders, under which judicial sale of the properties was carried out and personal judgment was entered against the defendant for the deficiencies. The plaintiffs then commenced separate actions in British Columbia to enforce the Alberta judgment for the deficiencies. Judgment was granted to the plaintiffs, and was upheld on appeal. The defendant appealed further.

Held:

Appeal dismissed.

Comity, the informing principle of private international law, is an idea based not simply on respect for the dictates of a foreign sovereign but on convenience and necessity. The rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner. What must underlie a modern system of private international law are principles of order and fairness that ensure security of transactions with justice. Thus the content of comity must be adjusted in light of a changing world order.

There is no comparison between modern interprovincial relationships and those obtaining between foreign countries in the 19th century. It was a serious error to transpose the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister provinces. The considerations underlying the rules of comity apply with much greater force between the units of a federal state. Moreover the 19th-century English rules fly in the face of the obvious intention of the Canadian Constitution to create a single country.

The rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution. The courts in one province should give "full faith and credit" to the judgments given by a court in another province or territory so long as that court has properly or appropriately exercised jurisdiction in the action. Both order and justice militate in favour of the security of transactions. A person should not be able to avoid legal obligations arising in one province simply by moving to another province. However, fairness to the defendant must also be considered. The taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives. Recognition in other provinces should be dependent on the fact that the court giving judgment exercised jurisdiction "properly" or "appropriately."It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject matter of the action. It hardly accords with principles of order and fairness, however, to permit a person to sue another in any jurisdiction without regard to the relationship which that jurisdiction may have to the defendant or the subject matter of the suit. Fairness to the defendant thus requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction. The approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties.

Here, the most reasonable situs for the action for the deficiencies was Alberta. The property was situate there, and the contract was entered into there by parties then both resident in the province. Moreover, deficiency actions follow upon foreclosure proceedings and the action for the deficiencies should have been consolidated with the foreclosure proceedings in some manner similar to a Rice order. A more "real and substantial" connection between the damages suffered and the jurisdiction did not exist. The Alberta court had jurisdiction, and its judgment was to be recognized and enforceable in British Columbia.

The reciprocal enforcement of judgments Acts in the various provinces were never intended to alter the rules of private international law. They simply provide for the registration of judgments as a more convenient procedure than bringing an action to enforce a judgment given in another province. The Acts do not prevent a plaintiff from bringing such an action and thereby taking advantage of the rules of private international law as they may evolve over time.

Cases Considered:

Aetna Fin. Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2, [1985] 2 W.W.R. 97, 55 C.B.R. (N.S.) 1, 29 B.L.R. 5, 15 D.L.R. (4th) 161, 4 C.P.R. (3d) 145, 32 Man. R. (2d) 241, 56 N.R. 241 — *referred to*

Archambault v. Solloway, B.C.S.C. 18th April 1956 (unreported) — *referred to*

Atlantic Star (The), Re; The Atlantic Star v. The Bona Spes, [1974] A.C. 436, [1973] 2 W.L.R. 795, [1973] 2 All E.R. 175 (H.L.) — *referred to*

Bank of Bermuda Ltd. v. Stutz, [1965] 2 O.R. 121 (H.C.) — *referred to*

Batavia Times Publishing Co. v. Davis (1977), 18 O.R. (2d) 252, 82 D.L.R. (3d) 247, affirmed 26 O.R. (2d) 249, 105 D.L.R. (3d) 192 (C.A.) — *referred to*

Becquet v. MacCarthy (1831), 2 B. & Ad. 951, 109 E.R. 1396 — *referred to*

Black v. Law Soc. of Alta., [1989] 1 S.C.R. 591, [1989] 4 W.W.R. 1, 66 Alta. L.R. (2d) 97, 37 Admin. L.R. 161, 58 D.L.R. (4th) 317, 38 C.R.R. 193, 96 A.R. 352, 93 N.R. 266 — *referred to*

Central Trust Co. v. Rafuse, [1986] 1 S.C.R. 147, 37 C.C.L.T. 117, (sub nom. *Central & Eastern Trust Co. v. Rafuse)* 42 R.P.R. 161, 34 B.L.R. 187, 31 D.L.R. (4th) 481, 75 N.S.R. (2d) 109, 186 A.R. 109, 69 N.R. 321 — *referred to*

Comber v. Leyland, [1898] A.C. 524 (H.L.) — *considered*

Dulles' Settlement, Re; Dulles v. Vidler, [1951] Ch. 842, [1951] 2 All E.R. 69 (C.A.) — *considered*

Dupont v. Taronga Holdings Ltd., [1987] R.J.Q. 124, 49 D.L.R. (4th) 335 (S.C.) — *considered*

Edward v. Edward Estate, [1987] 5 W.W.R. 289, 8 R.F.L. (3d) 370, 27 E.T.R. 152, 39 D.L.R. (4th) 654, 57 Sask. R. 67 (C.A.) — *referred to*

Eggleton v. Broadway Agencies Ltd. (1981), 32 A.R. 61 (Q.B.) — *referred to*

Emanuel v. Symon, [1908] 1 K.B. 302, reversing [1907] 1 K.B. 235 (C.A.) — *considered*

Exchange (The) v. M'Faddon, 11 U.S. (7 Cranch) 116, 3 L. Ed. 287 (1812) — *considered*

First City Capital Ltd. v. Winchester Computer Corp., [1987] 6 W.W.R. 212, 44 D.L.R. (4th) 301, 61 Sask. R. 153 (C.A.) — *referred to*

Harris v. Taylor, [1915] 2 K.B. 580 (C.A.) — *considered*

Hilton v. Guyot, 159 U.S. 113, 40 L. Ed. 95, 16 S. Ct. 139 (1895) — *considered*

Indyka v. Indyka, [1969] 1 A.C. 33, [1967] 3 W.L.R. 510, [1967] 2 All E.R. 689 (H.L.) — *followed*

Int. Shoe Co. v. Washington, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154, 161 A.L.R. 1057 (1945) — *referred to*

Interprov. Co-op. Ltd. v. R., [1976] 1 S.C.R. 477, [1975] 5 W.W.R. 382, 53 D.L.R. (3d) 321, 4 N.R. 231 [Man.] — *referred to*

Libman v. R., [1985] 2 S.C.R. 178, 21 C.C.C. (3d) 206, 21 D.L.R. (4th) 174, 12 O.A.C. 33, 62 N.R. 161 — *referred to*

Lung v. Lee, 63 O.L.R. 194, [1929] 1 D.L.R. 130 (C.A.) — *referred to*

Marcotte v. Megson (1987), 19 B.C.L.R. (2d) 300, 24 C.P.C. (2d) 201 (Co. Ct.) — *considered*

Marshall v. Houghton, 33 Man. R. 166, [1923] 2 W.W.R. 553, (C.A.) — *referred to*

Mattar v. Pub. Trustee, 5 W.W.R. (N.S.) 29, [1952] 3 D.L.R. 399 (Alta. C.A.) — *referred to*

Moran v. Pyle Nat. (Can.) Ltd., [1975] 1 S.C.R. 393, [1974] 2 W.W.R. 586, 43 D.L.R. (3d) 239, 1 N.R. 122 [Sask.] — *considered*

Mulroney and Coates, Re; Re Southam and Mulroney (1986), 54 O.R. (2d) 353, 8 C.P.C. (2d) 109, 27 D.L.R. (4th) 118 (Ont. H.C.) — *referred to*

Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181 [Ont.] — *referred to*

New York (State) v. Fitzgerald, [1983] 5 W.W.R. 458, 46 B.C.L.R. 26, 148 D.L.R. (3d) 176 (S.C.) — *referred to*

N. Amer. Specialty Pipe Ltd. v. Magnum Sales Ltd., B.C.S.C., Selbie L.J.S.C., No. C841410, 11th February 1985 (unreported) — *referred to*

R. v. Crown Zellerbach Can. Ltd., [1988] 1 S.C.R. 401, [1988] 3 W.W.R. 385, 25 B.C.L.R. (2d) 145, 3 C.E.L.R. (N.S.) 1, 40 C.C.C. (3d) 289, 48 D.L.R. (4th) 161, 84 N.R. 1 — *referred to*

Roglass Consultants Inc. v. Kennedy, Lock & Willett Inc. (1984), 65 B.C.L.R. 393 (C.A.) — *referred to*

Schemmer v. Property Resources Ltd., [1975] 1 Ch. 273, [1974] 3 W.L.R. 406, [1974] 3 All E.R. 451 — *referred to*

Schibsby v. Westenholz (1870), L.R. 6 Q.B. 155 — *referred to*

Singh v. Faridkote (Rajah), [1894] A.C. 670 (P.C.) [Punjab] — *referred to*

Spencer v. R., [1985] 2 S.C.R. 278, 48 C.R. (3d) 265, [1985] 2 C.T.C. 311, 85 D.T.C. 5446, 21 C.C.C. (3d) 385, 21 D.L.R. (4th) 756, 11 O.A.C. 207, 62 N.R. 81 — *considered*

Touche Ross Ltd. v. Sorrel Resources Ltd. (1987), 11 B.C.L.R. (2d) 184, 63 C.B.R. (N.S.) 187 (S.C.) — *referred to*

Traders Group Ltd. v. Hopkins (1968), 64 W.W.R. 698, 69 D.L.R. (2d) 250 (N.W.T. Terr. Ct.) [affirmed 66 W.W.R. 573, 1 D.L.R. (3d) 416 (C.A.)] — *referred to*

Travers v. Holley, [1953] P. 246, [1953] 3 W.L.R. 507, [1953] 2 All E.R. 794 (C.A.) — *considered*

Trepca Mines Ltd., Re, [1960] 1 W.L.R. 1273, [1960] 3 All E.R. 304 (C.A.) — *considered*

Walsh v. Herman (1908), 13 B.C.R. 314, 7 W.L.R. 388 (C.A.) — *referred to*

Wedlay v. Quist (1953), 10 W.W.R. (N.S.) 21 (Alta. C.A.) — *referred to*

Weiner v. Singh (1981), 22 C.P.C. 230 (B.C. Co. Ct.) — *referred to*

Whalen and Neal, Re (1982), 31 C.P.C. 1, 40 N.B.R. (2d) 457, 105 A.P.R. 457 (Q.B.) — *referred to*

Wismer v. Javelin Int. Ltd. (1982), 38 O.R. (2d) 26, 136 D.L.R. (3d) 647 (H.C.) — *referred to*

Zingre v. R., [1981] 2 S.C.R. 392, 23 C.P.C. 259, 61 C.C.C. (2d) 465, 127 D.L.R. (3d) 223, 10 Man. R. (2d) 62, 38 N.R. 272 — *considered*

Statutes Considered:

Australian Constitution

Canadian Charter of Rights and Freedoms

s. 6

s. 7

Constitution Act, 1867

s. 91(2), (29)

s. 92(10)

s. 121

Court Order Enforcement Act

s. 31(6)

s. 40

Fatal Accidents Act, R.S.S. 1965, c. 109 [now R.S.S. 1978, c. F-11]

Queen's Bench Act, R.S.S. 1965, c. 73 [now R.S.S. 1978, c. Q-1]

United States Constitution

Rules Considered:

British Columbia Rules of Court

English Rules of Court, R.S.C. 1965

Ord. 11

Authorities Considered:

Black, "Enforcement of Judgments and Judicial Jurisdiction in Canada" (1989), 9 Oxford J. Legal Studied 547.Blom, "Conflict of Laws — Enforcement of Extraprovincial Default Judgment — Reciprocity of Juridiction: *Morguard Investments Ltd. v. De Savoye*" (1989), 68 Can. Bar. Rev. 359, p. 360.Castel, "Recognition and Enforcement of Foreign Judgments in Personam and in Rem in the Common Laws Provinces of Canada" (1971), 17 McGill L.J. 11, p. 47.Edinger, "Discretion in the Assumption and Exercise of Jurisdiction in British Columbia" (1982), 16 Univ. of B.C. L. Rev. 1.European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1968Hogg, Constitutional Law of Canada, 2nd ed. (1985), pp. 278-80.Kennedy, " 'Reciprocity' in the Recognition of Foreign Judgments: The Implications of Travers v. Holley" (1954), 32 Can. Bar Rev. 359.Kennedy, "Recognition of Judgments in Personam: The Meaning of Reciprocity" (1957), 35 Can. Bar Rev. 123.Sharpe, "Enforcement of Foreign Judgments," in Springman and Gertner (eds.), Debtor-Creditor Law: Practice and Doctrine (1985), p. 645.Sharpe, Interprovincial Product Liability Litigation (1982), pp. 19-20.Springman and Gertner, Debtor-Creditor Law: Practice and Doctrine (1985), pp. 645, 691.Swan, "Recognition and Enforcement of Foreign Judgments: A Statement of Principle," in Springman and Gertner (eds.), Debtor-Creditor Law: Practice and Doctrine (1985), p. 691.Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985), 63 Can. Bar Rev. 271.Von Mehren and Trautman, "Recognition of Foreign Adjudications: A Survey and Suggested Approach" (1968), 81 Harvard L. Rev. 1601, p. 1603.Yntema, "The Objectives of Private International Law" (1957), 3 Can. Bar Rev. 721, p. 741.
Appeal from judgment of British Columbia Court of Appeal, [1988] 5 W.W.R. 650, 27 B.C.L.R. (2d) 155, 29 C.P.C. (2d) 52, affirming judgment of Boyd L.J.S.C., [1988] 1 W.W.R. 87, 18 B.C.L.R. (2d) 262, enforcing judgment of Alberta court in foreclosure proceedings.

The judgment of the court was delivered by *La Forest J.*:

1 This appeal [from [1988] 5 W.W.R. 650, 27 B.C.L.R. (2d) 155, 29 C.P.C. (2d) 52, which affirmed [1988] 1 W.W.R. 87, 18 B.C.L.R. (2d) 262] concerns the recognition to be given by the courts in one province to a judgment of the courts in another province in a personal action brought in the latter province at a time when the defendant did not live there. Specifically, the appeal deals with judgments granted in foreclosure proceedings for

deficiencies on sale of mortgaged property.

Facts

2 The respondents, Morguard Investments Limited and Credit Foncier Trust Company, became mortgagees of land in Alberta in 1978. The appellant, Douglas De Savoye, who then resided in Alberta, was originally guarantor but later took title to the land and assumed the obligation of mortgagor. Shortly afterwards he moved to British Columbia, and he has not resided or carried on business in Alberta since. The mortgages fell into default and the respondents brought action in Alberta. The appellant was served with process in the action by double registered mail addressed to his home in British Columbia pursuant to orders for service by the Alberta court in accordance with the rules for service outside its jurisdiction. There are rules to the same effect in British Columbia.

3 The appellant took no steps to appear or to defend the action. There was no clause in the mortgage by which he agreed to submit to the jurisdiction of the Alberta court, and he did not attorn to its jurisdiction.

4 The respondents obtained judgments nisi in the foreclosure action. At the expiry of the redemption period, they obtained "Rice orders" against the appellant. Under these orders, a judicial sale of the mortgaged properties to the respondents took place and judgment was entered against the appellant for the deficiencies between the value of the property and the amount owing on the mortgages. The respondents then each commenced a separate action in the British Columbia Supreme Court to enforce the Alberta judgment for the deficiencies. Judgment was granted to the respondents by the Supreme Court in a decision which was upheld on appeal to the British Columbia Court of Appeal. The appellant then sought and was granted leave to appeal to this court [[1989] 1 S.C.R. viii, 32 B.C.L.R. (2d) xxx, 98 N.R. 319].

The Judgments Below

Supreme Court of British Columbia

5 The appellant argued that the respondents were not entitled to enforce the Alberta judgments because he had never attorned to the jurisdiction of the Alberta court. The chambers judge, Boyd L.J.S.C., noted that the Alberta court clearly had jurisdiction over the subject properties and the foreclosure proceedings. Nothing in the material, she noted, indicated that in granting orders for substitutional service upon the appellant the Alberta court improperly exercised its discretion to assume jurisdiction, or that any other court would have been a more convenient forum in which to adjudicate the matter. She therefore concluded that the Alberta court had jurisdiction to make the orders in question. The judge then reviewed the substance of the orders and ordered that the respondents were entitled to judgment for the deficiencies.

Court of Appeal

6 The Court of Appeal, in reasons given by Seaton J.A., dismissed the appeal. In its view, the Alberta default judgments could be enforced on the basis of reciprocity, more specifically reciprocity of jurisdictional practice in the two provinces. A British Columbia court, it held, should recognize an Alberta judgment if the Alberta court took jurisdiction in circumstances in which, if the facts were transposed to British Columbia, the courts of British Columbia would have taken jurisdiction as well.

7 In reviewing the question of the jurisdiction of the Alberta court, Seaton J.A. concluded that the Alberta

judgments for the deficiency on the mortgage loans were enforceable by action in British Columbia because British Columbia's own courts, faced with a similar case, would have exercised jurisdiction under the British Columbia Rules of Court authorizing service ex juris without leave. He noted that such grounds for exercising jurisdiction over a defendant resident outside the province were long established in England and Canadian law. He referred to *Comber v. Leyland*, [1898] A.C. 524 (H.L.), which held, at p. 527, that:

> ... where the parties have agreed that something is to be done in this country, some part of the subject-matter of the contract is to be executed within this country, it is a sort of consent of the parties that wherever they may be living, or wherever the contract may have been made, that question may be litigated in this country.

8 In Seaton J.A.'s view, this reasoning led logically to the assumption of jurisdiction, and reciprocally to the recognition by other courts. In this context, he cited *Travers v. Holley*, [1953] P. 246, [1953] W.L.R. 507, [1953] 2 All E.R. 794, where the English Court of Appeal had recognized a divorce decree granted in New South Wales on the ground that the English courts would in similar circumstances have exercised jurisdiction in the same way. If that reasoning were to be applied to courts of other provinces, judgments of other provinces should be enforced if the British Columbia courts exercise similar jurisdiction.

9 Seaton J.A. acknowledged, however, that this view has not prevailed in judgments in personam, in which class the judgments concerned here fell. However, he noted that the leading case on the point, *Emanuel v. Symon* , [1908] 1 K.B. 302, reversing [1907] 1 K.B. 235 (C.A.), had been decided at the beginning of the century, when travel from one country to another was impractical (in that case between Western Australia and England). As well, he observed, there was then an unstated assumption that the administration of justice in other countries was inferior.

10 Considerations such as these, Seaton J.A. stated, had no application to the situation here. He favoured acknowledging a difference between foreign judgments and judgments in other provinces, and he observed that such a difference had been accepted for certain purposes, such as in determining the factors to be taken into account in deciding whether to grant a Mareva injunction prohibiting the transfer of goods to a place outside the court's jurisdiction: see *Aetna Fin. Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 at 35, [1985] 2 W.W.R. 97, 55 C.B.R. (N.S.) 1, 29 B.L.R. 5, 15 D.L.R. (4th) 161, 4 C.P.R. (3d) 145, 32 Man. R. (2d) 241, 56 N.R. 241. He also drew support from the fact that all superior court judges are appointed, paid and removed by the same government, and that the Canadian Charter of Rights and Freedoms applies throughout Canada. He further referred to the Australian Constitution, which provides for recognition by each state of judgment of other states in the Commonwealth.

11 He then reviewed the British Columbia decisions which had followed the English position, but found none that was binding, and preferred the view of "reciprocal" recognition of judgments proposed in certain periodical writings: see Gilbert D. Kennedy, " 'Reciprocity' in the Recognition of Foreign Judgments: The Implications of Travers v. Holley" (1954), 32 Can. Bar Rev. 359; Gilbert D. Kennedy, "Recognition of Judgments in Personam: The Meaning of Reciprocity" (1957), 35 Can. Bar Rev. 123; J.-G. Castel, "Recognition and Enforcement of Foreign Judgments in Personam and in Rem in the Common Law Provinces of Canada" (1971), 17 McGill L.J. 11. He then referred to and followed the judgment of Gow Co. Ct. J. (as he then was) in *Marcotte v. Megson* (1987), 19 B.C.L.R. (2d) 300, 24 C.P.C. (2d) 201 (Co. Ct.), which had accepted the jurisdictional reciprocity approach for judgments in personam.

The English Background

12 No one denies the Alberta court's jurisdiction to entertain the action and enforce it there if it can. It would be surprising if they did. It concerns a transaction entered into in Alberta by individuals who were resident in Alberta at the time of the transaction, and involves land situate in that province. Though the defendant appellant was outside Alberta at the time the action was brought and judgment given, the Alberta rules for service outside the jurisdiction permitted him to be served in British Columbia. These rules are similar to those in other provinces, and specifically British Columbia. The validity of such rules does not appear to have been subjected to much questioning, a matter to which I shall, however, return.

13 The issue, then, as already mentioned, is simply whether a personal judgment validly given in Alberta against an absent defendant may be enforced in British Columbia, where he now resides.

14 The law on the matter has remained remarkably constant for many years. It originated in England during the 19th century and, while it has been subjected to considerable refinement, its general structure has not substantially changed. The two cases most commonly relied on, *Singh v. Faridkote (Rajah)*, [1894] A.C. 670 (P.C.) [Punjab], and *Emanuel v. Symon*, supra, date from the turn of the century. I shall confine myself to a discussion of the latter because it is the more frequently cited.

15 In *Symon*, the defendant, while residing and carrying on business in Western Australia, entered into a partnership in 1895 for the working of a gold mine situated in the colony and owned by the partnership. He later ceased to carry on business there, and moved permanently to England in 1899. Two years later, other members of the partnership brought an action in the colony for the dissolution of the partnership, sale of the mine, and an accounting. The writ was served on the defendant in England, but he took no step to defend the action. The colonial court decreed a dissolution of the partnership and sale of the mine, and in taking the accounts found a sum due from the partnership. The plaintiffs paid the sum and brought action in England to recover the portion which they alleged was owed by the defendant. Channell J. gave judgment for the plaintiffs, but a unanimous Court of Appeal reversed the judgment.

16 Buckley L.J.'s summary of the law in that case bears a remarkable resemblance to a code and has been cited repeatedly ever since. He stated, at p. 309:

> In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment: (1.) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2.) where he was resident in the foreign country when the action began; (3.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4.) where he has voluntarily appeared; and (5.) where he has contracted to submit himself to the forum in which the judgment was obtained.

Though the first of these propositions may now be open to doubt (see Robert J. Sharpe, "The Enforcement of Foreign Judgments", in M.A. Springman and E. Gertner (eds.), Debtor-Creditor Law: Practice and Doctrine (1985), at p. 645), Buckley L.J.'s statement of the law, with one qualification to be noted, otherwise accurately represents the common law in England to this day.

17 There had been some earlier attempts to extend the law to a situation relevant to this appeal. Thus from *Becquet v. MacCarthy* (1831), 2 B. & Ad. 951, 109 E.R. 1396, it might have appeared that a sixth class might have been added to Buckley L.J.'s list, namely, "where the defendant has real estate within the foreign jurisdiction in respect of which the cause of action arose whilst he was within that jurisdiction." But that case was ultimately explained on the basis that the defendant there was the holder of a public office in the place where the

judgment was obtained and so "constructively present" there at the time of the judgment: see *Symon* at pp. 310-11. One might also have been permitted to speculate that one who enters into a contract while residing in a given jurisdiction consents to the jurisdiction of the courts there, as Blackburn J. seemed prepared to do in *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155 at 161, but this possibility too was scotched in *Symon*: see per Lord Alverstone C.J. at p. 308.

18 Until the 1950s, then, the various circumstances identified by Buckley L.J. in *Symon* exhausted the possible cases in which a foreign judgment would be recognized in England. A change came, however, with the case of *Travers v. Holley*, supra, in 1953. There the English Court of Appeal had to consider whether they should recognize a divorce granted to a wife in New South Wales pursuant to a statute giving the New South Wales court jurisdiction to grant a divorce to a wife who was domiciled there at the time she was deserted by her husband, even though her husband had later acquired another domicile. A similar statute existed in England, and on this ground of reciprocal jurisdiction the Court of Appeal held that it should grant jurisdiction. As Hodson L.J. put it, at p. 800:

> ... where it is found that the municipal law is not peculiar to the forum of one country, but corresponds with a law of a second country, such municipal law cannot be said to trench on the interests of that other country. I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which mutatis mutandis they claim for themselves.

See also Somervell L.J., at p. 797.

19 It should be noted that England also has a rule of court (R.S.C. Ord. 11) that, like the rule under which Alberta exercised jurisdiction over the defendant here, permits the courts to assume jurisdiction over a non-resident by service where he or she resides. This gives rise to the question whether, on the ground of jurisdictional reciprocity set forth in *Travers v. Holley*, the courts should recognize judgments of a foreign court which has exercised jurisdiction under a similar rule. Encouragement for this approach could be found in dicta by Denning L.J. in the earlier case of *Re Dulles' Settlement; Dulles v. Vidler*, [1951] Ch. 842, [1951] 2 All E.R. 69 (C.A.). At issue there was whether the English courts had jurisdiction to order a father, an American living outside the jurisdiction, to pay maintenance to a child. In discussing the case of *Harris v. Taylor*, [1915] 2 K.B. 580 (C.A.), Denning L.J. had this to say, at pp. 72-73:

> The defendant was not in the island, but the Manx court gave leave to serve him out of the jurisdiction of the Manx court on the ground that the cause of action was founded on a tort committed within their jurisdiction. The defendant entered a conditional appearance in the Manx court and took the point that the cause of action had not arisen within the Manx jurisdiction. That point depended on the facts of the case, and it was decided against him, whence it followed that *he was properly served out of the Manx jurisdiction in accordance with the rules of the Manx court. Those rules correspond with the English rules for service out of the jurisdiction contained in R.S.C., Ord. 11, and I do not doubt that our courts would recognise a judgment properly obtained in the Manx courts for a tort committed there whether the defendant voluntarily submitted to the jurisdiction or not, just as we would expect the Manx courts in a converse case to recognise a judgment obtained in our courts against a resident in the Isle of Man on his being properly served out of our jurisdiction for a tort committed here.* [emphasis added]

20 This possibility of further extending the categories in the *Symon* case was, however, firmly rejected in *Re*

Trepca Mines Ltd., [1960] 1 W.L.R. 1273, [1960] 3 All E.R. 304 (C.A.), where the court stated that *Travers v. Holley* was limited to a judgment in rem in a matter affecting marital status, and that it was unwilling to take the step suggested by Denning L.J. in the *Dulles* case. In short, the English authorities afford no basis for extending the approach in *Travers v. Holley* to a personal obligation such as that existing in the present case: see also *Schemmer v. Property Resources Ltd.*, [1975] 1 Ch. 273, [1974] 3 W.L.R. 406, [1974] 3 All E.R. 451.

21 Before concluding this review of the English background, I should make reference to *Indyka v. Indyka*, [1969] 1 A.C. 33, [1967] 3 W.L.R. 510, [1967] 2 All E.R. 689, in which the House of Lords found another technique for going beyond the strict categories in *Symon*. In that case, Their Lordships held that the English courts would recognize a divorce decree granted in a foreign country to a wife resident there though her husband was then domiciled in England. In the course of his remarks, Lord Wilberforce had this to say, at p. 105:

> In my opinion, it would be in accordance with the developments that I have mentioned and with the trend of legislation — mainly our own but also that of other countries with similar social systems — to recognise divorces given to wives by the courts of their residence wherever a real and substantial connexion is shown between the petitioner and the country, or territory, exercising jurisdiction.

It should be observed, however, that this case too involved matrimonial status and did not extend to an action in personam: see *New York (State) v. Fitzgerald*, [1983] 5 W.W.R. 458, 46 B.C.L.R. 26, 148 D.L.R. (3d) 176 (S.C.), per Sheppard L.J.S.C.

The Canadian Background

22 In Canada, the courts have until recent years unanimously accepted the authority of *Emanuel v. Symon*, supra, in dealing with the recognition of foreign judgments: see, for example, *New York v. Fitzgerald*. This was, of course, inevitable so far as foreign judgments were concerned until 1949, when appeals to the Privy Council were abolished. But the approach was not confined to foreign judgments. It was extended to judgments of other provinces, which for the purposes of the rules of private international law are considered "foreign" countries: see, for example, *Lung v. Lee*, 63 O.L.R. 194, [1929] 1 D.L.R. 130 (C.A.). There is thus a plethora of cases throughout Canada where two persons have entered into a contract in one province, frequently when both were resident there at the time, but have found it impossible to enforce a judgment given in that province because the defendant had moved to another province when the action was brought. These cases include: *Walsh v. Herman* (1908), 13 B.C.R. 314, 7 W.L.R. 388 (C.A.); *Marshall v. Houghton*, 33 Man. R. 166, [1923] 2 W.W.R. 553 (C.A.) ; *Mattar v. Pub. Trustee*, 5 W.W.R. (N.S.) 29, [1952] 3 D.L.R. 399 (Alta. C.A.); *Wedlay v. Quist* (1953), 10 W.W.R. (N.S.) 21 (Alta. C.A.); *Bank of Bermuda Ltd. v. Stutz*, [1965] 2 O.R. 121 (H.C.); *Traders Group Ltd. v. Hopkins* (1968), 64 W.W.R. 698, 69 D.L.R. (2d) 250 (N.W.T. Terr. Ct.); *Batavia Times Publishing Co. v. Davis* (1977), 18 O.R. (2d) 252, 82 D.L.R. (3d) 247, affirmed 26 O.R. (2d) 249, 105 D.L.R. (3d) 192 (C.A.); *Eggleton v. Broadway Agencies Ltd.* (1981), 32 A.R. 61 (Q.B.); *Weiner v. Singh* (1981), 22 C.P.C. 230 (B.C. Co. Ct.); *Re Whalen and Neal* (1982), 31 C.P.C. 1, 40 N.B.R. (2d) 457, 105 A.P.R. 457 (Q.B.); *N. Amer. Specialty Pipe Ltd. v. Magnum Sales Ltd.*, B.C.S.C., Selbie L.J.S.C., No. C841410, 11th February 1985 (unreported) (summarized 31 A.C.W.S. (2d) 320). Essentially, then, recognition by the courts of one province of a personal judgment against a defendant given in another province is dependent on the defendant's presence at the time of the action in the province where the judgment was given, unless the defendant in some way submits to the jurisdiction of the court giving the judgment.

23 Soon after the decision in *Travers v. Holley*, supra, however, Professor Gilbert D. Kennedy began to ar-

gue for the extension of the "reciprocity" approach, adopted in that case, to personal actions, at least in the case of judgments given in other provinces; see " 'Reciprocity' in the Recognition of Foreign Judgments: The Implications of Travers v. Holley". A British Columbia case, *Archambault v. Solloway*, B.C.S.C., 18th April 1956 (unreported), prompted a further article from his pen: "Recognition of Judgments in Personam: The Meaning of Reciprocity." In *Archambault*, Wilson J. of the British Columbia Supreme Court had found the jurisdictional reciprocity approach "highly persuasive" and failed to apply it solely because Quebec (where the judgment sought to be enforced had been given) gave effect to a foreign judgment only after an inquiry on its merits. It was therefore not comparable to the effect given to foreign judgments in cases where these are recognized in common law provinces. Subsequently, Professor Castel joined Kennedy in arguing for the adoption of the reciprocity approach. "There does not," he stated, "seem to be any compelling reason against recognizing a jurisdiction which the forum itself claims" (p. 47).

24 Until 1987, however, no case appears to have adopted that position. But in that year Gow Co. Ct. J., in a forceful judgment, applied the reciprocity approach to an in personam action, in *Marcotte v. Megson*, supra. The [B.C.L.R.] headnote summarizes the case as follows:

> The plaintiff, an Alberta resident, sued the defendant in the court of Queen's Bench of Alberta pursuant to s. 114(1) of the Business Corporations Act of that province which renders directors of a corporation liable to employees of the corporation of all debts not exceeding six months' wages. The plaintiff was granted leave to serve the defendant ex juris in British Columbia. The defendant was served but filed no defence. The plaintiff obtained default judgment against him for $6,307. The plaintiff later sued on that judgment in British Columbia. The defendant defended the action on the grounds that he had done nothing to submit to the jurisdiction of the Alberta court and that the Alberta court was without jurisdiction in the sense that it acted without jurisdiction under the conflict of laws (private international law) rules of the courts of British Columbia.
>
> Held — Judgment for Plaintiff
>
> Reason would suggest that inside the Confederation of Canada the principle of reciprocity of jurisdiction should apply. The action was concerned, and only concerned, with a judgment of a next-door province, not a foreign state but a partner in Confederation, which could not be registered as a domestic judgment because the defendant never submitted to the jurisdiction of the Alberta court. Because the judgment was a default judgment, it could have been opened up on on the merits had the defendant chosen to do so, but he deliberately chose not to do so, preferring to rest his defence on the grounds of "no presence" and "no submission." In those circumstances, there being as between Alberta and British Columbia reciprocity of jurisdiction, it was appropriate to apply the principle that our courts should recognize a jurisdiction which they themselves claim.

The British Columbia Court of Appeal in the present case has now added its support to the call that reason dictates the evolution of the common law to permit the enforcement of in personam judgments given in sister provinces.

25 The plaintiff in this case, of course, relies on the law as stated in *Symon*, supra. The defendant naturally relies on the Court of Appeal's judgment, and particularly the "reciprocity" approach.

26 Before going on, I should observe that academic writers have now engaged the issue on a broader plane than reciprocity: see Robert J. Sharpe, Interprovincial Product Liability Litigation (1982); John Swan, "Recogni-

tion and Enforcement of Foreign Judgments: A Statement of Principle," in Springman and Gertner, c. 16, at pp. 691 et seq.; John Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985), 63 Can. Bar Rev. 271; Vaughan Black, "Enforcement of Judgments and Judicial Jurisdiction in Canada" (1989), 9 Oxford J. Legal Studies 547. Their approaches are not identical, but in a broad sense it may be said that their thesis is that the conditions governing the taking of jurisdiction by the courts of one province and those under which they are enforced by the courts of another province should be viewed as correla tive. If it is fair and reasonable for the courts of one province to exercise jurisdiction over a subject matter, it should as a general principle be reasonable for the courts of another province to enforce the resultant judgment. For a number of these writers there are constitutional overtones to this approach: see also Peter W. Hogg, Constitutional Law of Canada, 2nd ed. (1985), at pp. 278-80. It is fair to say that I have found the work of these writers very helpful in my own analysis of the issues.

27 I should also note that the *Indyka* case, supra, has been followed in Canada: see *Edward v. Edward Estate*, [1987] 5 W.W.R. 289, 8 R.F.L. (3d) 370, 27 E.T.R. 152, 39 D.L.R. (4th) 654, 57 Sask. R. 67 (C.A.).

Analysis

28 The common law regarding the recognition and enforcement of foreign judgments is firmly anchored in the principle of territoriality as interpreted and applied by the English courts in the 19th century: see *Faridkote*, supra. This principle reflects the fact, one of the basic tenets of international law, that sovereign states have exclusive jurisdiction in their own territory. As a concomitant to this, states are hesitant to exercise jurisdiction over matters that may take place in the territory of other states. Jurisdiction being territorial, it follows that a state's law has no binding effect outside its jurisdiction. Great Britain, and specifically its courts, applied that doctrine more rigorously than other states: see *Libman v. R.*, [1985] 2 S.C.R. 178, 21 C.C.C. (3d) 206, 21 D.L.R. (4th) 174, 12 O.A.C. 33, 62 N.R. 161, which deals with the question in its criminal aspect. The English approach, we saw, was unthinkingly adopted by the courts of this country, even in relation to judgments given in sister provinces.

29 Modern states, however, cannot live in splendid isolation, and do give effect to judgments given in other countries in certain circumstances. Thus a judgment in rem, such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given had power over the litigants, the judgments of its courts should be respected.

30 But a state was under no obligation to enforce judgments it deemed to fall outside the jurisdiction of the foreign court. In particular, the English courts refused to enforce judgments on contracts, wherever made, unless the defendant was within the jurisdiction of the foreign court at the time of the action or had submitted to its jurisdiction. And this was so, we saw, even on actions that could most appropriately be tried in the foreign jurisdiction, such as a case like the present, where the personal obligation undertaken in the foreign country was in respect of property located there. Even in the 19th century this approach gave difficulty, a difficulty in my view resulting from a misapprehension of the real nature of the idea of comity, an idea based not simply on respect for

the dictates of a foreign sovereign, but on the convenience, nay necessity, in a world where legal authority is divided among sovereign states, of adopting a doctrine of this kind.

31 For my part, I much prefer the more complete formulation of the idea of comity adopted by the Supreme Court of the United States in *Hilton v. Guyot*, 159 U.S. 113 at 163-64, 40 L. Ed. 95, 16 S. Ct. 139 (1895), in a passage cited by Estey J. in *Spencer v. R.*, [1985] 2 S.C.R. 278 at 283, 48 C.R. (3d) 265, [1985] 2 C.T.C. 311, 85 D.T.C. 5446, 21 C.C.C. (3d) 385, 21 D.L.R. (4th) 756, 11 O.A.C. 207, 62 N.R. 81, as follows:

> " 'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws": *Hilton v. Guyot*, 159 U.S. 113 (1895), at pp. 163-64.

As Dickson J. in *Zingre v. R.*, [1981] 2 S.C.R. 392 at 400, 23 C.P.C. 259, 61 C.C.C. (2d) 465, 127 D.L.R. (3d) 223, 10 Man. R. (2d) 62, 38 N.R. 272, citing Marshall C.J. in *The Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 3 L. Ed. 287 (1812), stated, "common interest impels sovereigns to mutual intercourse" between sovereign states. In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner. Von Mehren and Trautman have observed in "Recognition of Foreign Adjudications: A Survey and A Suggested Approach" (1968), 81 Harvard L. Rev. 1601, at p. 1603:

> The ultimate justification for according some degree of recognition is that if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted.

32 Hessel E. Yntema, in "The Objectives of Private International Law" (1957), 35 Can. Bar Rev. 721 (though speaking more specifically there about choice of law), caught the spirit in which private international law, or conflict of laws, should be approached when he stated at p. 741:

> In a highly integrated world economy, politically organized in a diversity of more or less autonomous legal systems, the function of conflict rules is to select, interpret and apply in each case the particular local law that will best promote suitable conditions of interstate and international commerce, or, in other words, to mediate in the questions arising from such commerce in the application of the local laws.

As is evident throughout his article, what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice.

33 This formulation suggests that the content of comity must be adjusted in the light of a changing world order. The approach adopted by the English courts in the 19th century may well have seemed suitable to Great Britain's situation at the time. One can understand the difficulty in which a defendant in England would find himself in defending an action initiated in a far corner of the world in the then state of travel and communications. The *Symon* case, supra, where the action arose in Western Australia against a defendant in England, affords a good illustration. The approach of course demands that one forget the difficulties of the plaintiff in bringing an action against a defendant who has moved to a distant land. However, this may not have been perceived as too serious a difficulty by English courts at a time when it was predominantly Englishmen who carried on enterprises in faraway lands. As well, there was an exaggerated concern about the quality of justice that might be

meted out to British residents abroad: see Lord Reid in *Re The Atlantic Star; The Atlantic Star v. The Bona Spes*, [1974] A.C. 436, [1973] 2 W.L.R. 795, [1973] 2 All E.R. 175 at 181 (H.L.).

34 The world has changed since the above rules were developed in 19th-century England. Modern means of travel and communications have made many of these 19th-century concerns appear parochial. The business community operates in a world economy, and we correctly speak of a "world community" even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the European Economic Community, have adopted more generous rules for the recognition and enforcement of foreign judgments, to the general advantage of litigants.

35 However that may be, there is really no comparison between the interprovincial relationships of today and those obtaining between foreign countries in the 19th century. Indeed, in my view there never was, and the courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister provinces. The considerations underlying the rules of comity apply with much greater force between the units of a federal state, and I do not think it much matters whether one calls these rules of comity or simply relies directly on the reasons of justice, necessity and convenience to which I have already adverted. Whatever nomenclature is used, our courts have not hesitated to co-operate with courts of other provinces where necessary to meet the ends of justice: see *Wismer v. Javelin Int. Ltd.* (1982), 38 O.R. (2d) 26, 136 D.L.R. (3d) 647 at 654-55 (H.C.); *Re Mulroney and Coates; Re Southam and Mulroney* (1986), 54 O.R. (2d) 353, 8 C.P.C. (2d) 109, 27 D.L.R. (4th) 118 at 128-29 (Ont. H.C.); *Touche Ross Ltd. v. Sorrel Resources Ltd.* (1987), 11 B.C.L.R. (2d) 184 at 189, 63 C.B.R. (N.S.) 187 (S.C.); *Roglass Consultants Inc. v. Kennedy, Lock & Willett Inc.* (1984), 65 B.C.L.R. 393 at 394 (C.A.).

36 In any event, the English rules seem to me to fly in the face of the obvious intention of the Constitution to create a single country. This presupposes a basic goal of stability and unity where many aspects of life are not confined to one jurisdiction. A common citizenship ensured the mobility of Canadians across provincial lines, a position reinforced today by s. 6 of the Canadian Charter of Rights and Freedoms: see *Black v. Law Soc. of Alta.* , [1989] 1 S.C.R. 591, [1989] 4 W.W.R 1, 66 Alta. L.R. (2d) 97, 37 Admin. L.R. 161, 58 D.L.R. (4th) 317, 38 C.R.R. 193, 96 A.R. 352, 93 N.R. 266. In particular, significant steps were taken to foster economic integration. One of the central features of the constitutional arrangements incorporated in the Constitution Act, 1867, was the creation of a common market. Barriers to interprovincial trade were removed by s. 121. Generally, trade and commerce between the provinces was seen to be a matter of concern to the country as a whole: see the Constitution Act, 1867, s. 91(2). The "Peace, Order and good Government" clause gives the federal Parliament powers to deal with interprovincial activities: see *Interprov. Co-op. Ltd. v. R.*, [1976] 1 S.C.R. 477, [1975] 5 W.W.R. 382, 53 D.L.R. (3d) 321, 4 N.R. 231 [Man.], as well as my reasons in *R. v. Crown Zellerbach Can. Ltd.*, [1988] 1 S.C.R. 401, [1988] 3 W.W.R. 385, 25 B.C.L.R. (2d) 145, 3 C.E.L.R. (N.S.) 1, 40 C.C.C. (3d) 289, 48 D.L.R. (4th) 161, 84 N.R. 1 (dissenting, but not on this point); see also *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181 [Ont.]. And the combined effect of s. 91(29) and s. 92(10) does the same for interprovincial works and undertakings.

37 These arrangements themselves speak to the strong need for the enforcement throughout the country of judgments given in one province. But that is not all. The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges — who also have superintending control over other provincial courts and tribunals — are appointed and

paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada, which can determine when the courts of one province have appropriately exercised jurisdiction in an action and the circumstances under which the courts of another province should recognize such judgments. Any danger resulting from unfair procedure is further avoided by sub-constitutional factors, such as for example the fact that Canadian lawyers adhere to the same code of ethics throughout Canada. In fact, since *Black v. Law Soc. of Alta.*, supra, we have seen a proliferation of interprovincial law firms.

38 These various constitutional and sub-constitutional arrangements and practices make unnecessary a "full faith and credit" clause such as exists in other federations, such as the United States and Australia. The existence of these clauses, however, does indicate that a régime of mutual recognition of judgments across the country is inherent in a federation. Indeed, the European Economic Community has determined that such a feature flows naturally from a common market, even without political integration. To that end its members have entered into the 1968 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

39 The integrating character of our constitutional arrangements as they apply to interprovincial mobility is such that some writers have suggested that a "full faith and credit" clause must be read into the Constitution and that the federal Parliament is, under the "Peace, Order and good Government" clause, empowered to legislate respecting the recognition and enforcement of judgments throughout Canada: see, for example, Black and Hogg. The present case was not, however, argued on that basis, and I need not go that far. For present purposes it is sufficient to say that, in my view, the application of the underlying principles of comity and private international law must be adapted to the situations where they are applied, and that in a federation this implies a fuller and more generous acceptance of the judgments of the courts of other constituent units of the federation. In short, the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution.

40 This court has, in other areas of the law having extraterritorial implications, recognized the need for adapting the law to the exigencies of a federation. Thus in *Aetna Fin. Services Ltd. v. Feigelman*, supra, the court set aside a court order, a Mareva injunction, issued against a federally incorporated company with its head office in Montreal and offices in Toronto, enjoining it from transferring certain assets in Manitoba to one of its offices outside the province. There, this court clearly expressed the different considerations that distinguished that case from the English situations where it was sought to prevent the transfer of assets to other countries. Estey J. had this to say, at pp. 34-35 [S.C.R.]:

> *All the foregoing considerations, while important to an understanding of the operation of this type of injunction, leave untouched the underlying and basic question: do the principles, as developed in the United Kingdom courts, survive intact a transplantation from that unitary state to the federal state of Canada*? The question in its simplest form arises in the principles enunciated in the earliest *Mareva* cases where the wrong to be prevented was the removal from "the jurisdiction" of assets of the respondent with a view to defeating the claim of a creditor. It has been found by the courts below that there was no such wrongdoing here. *An initial question, therefore, must be answered, namely, what is meant by "jurisdiction" in a federal context*? It at least means the jurisdiction of the Manitoba court. But is the bare removal of assets from the Province of Manitoba sufficient? The appellant is a federally incorporated company with authority to carry on business throughout Canada. In the course of so doing, it moves assets in and out of the provinces of Manitoba, Quebec and Ontario. No breach of law is asserted by the respondent. No improper purpose has been exposed. It is simply a clash of rights: the respondents' right to protect their position under any judgment which might hereafter be obtained, and the appellant's right to exercise its undoubted corporate capa-

city, federally confirmed (and the constitutionality of which is not challenged), to carry on business throughout Canada. The appellant does not seek to remove the assets in question from the national jurisdiction in which its corporate existence is maintained. The writ of the Manitoba court runs through judgment, founded on service of initiating process on the appellant within Manitoba, into Ontario under reciprocal provincial legislation, and into Quebec by reason of the laws of that province, *supra. None of these vital considerations was present in the United Kingdom where Mareva was conceived to fend off the depradations of shady mariners operating out of far away havens, usually on the fringe of legally organized commerce.* In the Canadian federal system, the appellant is not a foreigner, nor even a non-resident in the ordinary sense of the word. It is capable of "residing" throughout Canada and did so in Manitoba. It is subject to execution under any Manitoba judgment in every part of Canada. There was no clandestine transfer of assets designed to defraud the legal process of the courts of Manitoba. There is no evidence that this federal entity has arranged its affairs so as to defraud Manitoba creditors. *The terminology and trappings of Mareva must be examined in the federal setting.* In some ways, "jurisdiction" extends to the national boundaries, or, in any case, beyond the provincial boundary of Manitoba. For other purposes, jurisdiction no doubt can be confined to the reach of the writ of the Manitoba courts. [emphasis added]

41 A similar approach should, in my view, be adopted in relation to the recognition and enforcement of judgments within Canada. As I see it, the courts in one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action. I referred earlier to the principles of order and fairness that should obtain in this area of the law. Both order and justice militate in favour of the security of transactions. It seems anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province. Why should a plaintiff be compelled to begin an action in the province where the defendant now resides whatever the inconvenience and costs this may bring and whatever degree of connection the relevant transaction may have with another province? And why should the availability of local enforcement be the decisive element in the plaintiff's choice of forum?

42 These concerns, however, must be weighed against fairness to the defendant. I noted earlier that the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives, and I added that recognition in other provinces should be dependent on the fact that the court giving judgment "properly" or "appropriately" exercised jurisdiction. It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the greatest, or at least significant, contacts with the subject matter of the action. But it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject matter of the suit: see Joost Blom, "Conflict of Laws — Enforcement of Extraprovincial Default Judgment — Reciprocity of Jurisdiction: *Morguard Investments Ltd. v. De Savoye*" (1989), 68 Can. Bar Rev. 359, at p. 360. Thus fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly-restrained jurisdiction.

43 As discussed, fair process is not an issue within the Canadian federation. The question that remains, then, is: When has a court exercised its jurisdiction appropriately for the purposes of recognition by a court in another province? This poses no difficulty where the court has acted on the basis of the accepted grounds traditionally accepted by courts as permitting the recognition and enforcement of foreign judgments — in the case of judgments in personam, where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment, whether by agreement of by attornment. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement. No injustice results.

44 The difficulty, of course, arises where, as here, the defendant was outside the jurisdiction of that court and he was served ex juris. To what extent may a court of a province properly exercise jurisdiction over a defendant in another province? The rules for service ex juris in all the provinces are broad — in some provinces, Nova Scotia and Prince Edward Island, very broad indeed. It is clear, however, that, if the courts of one province are to be expected to give effect to judgments given in another province, there must be some limits to the exercise of jurisdiction against persons outside the province.

45 It will be obvious from the manner in which I approach the problem that I do not see the "reciprocity approach" as providing an answer to the difficulty regarding in personam judgments, whatever utility it may have on the international plane. Even there, I am more comfortable with the approach taken by the House of Lords in *Indyka v. Indyka*, supra, where the question posed in a matrimonial case was whether there was a real and substantial connection between the petitioner and the country or territory exercising jurisdiction. I should observe, however, that in a case involving matrimonial status the subject matter of the action and the petitioner are obviously at the same place. That is not necessarily so of a personal action, where a nexus may have to be sought between the subject matter of the action and the territory where the action is brought.

46 A case in this court, *Moran v. Pyle Nat. (Can.) Ltd.*, [1975] 1 S.C.R. 393, [1974] 2 W.W.R. 586, 43 D.L.R. (3d) 239, 1 N.R. 122 [Sask.], though a tort action, is instructive as to the manner in which a court may properly exercise jurisdiction in actions in contracts as well. In that case, an electrician was fatally injured in Saskatchewan while removing a spent light bulb manufactured in Ontario by a company that neither carried on business nor held any property in Saskatchewan. The company sold all its products to distributors and none to consumers. It had no salesmen or agents in Saskatchewan. The electrician's wife and children brought action against the company under the Fatal Accidents Act of Saskatchewan, claiming that the company had been negligent in the manufacture of the light bulb and in failing to provide an adequate safety system to prevent unsafe bulbs from leaving the plant and being sold or used. On a chambers motion, the trial judge held that any negligence would have occurred in Ontario, and so the tort was committed out of Saskatchewan. However, he, granted special leave under a provision of the Queen's Bench Act to commence an action in Saskatchewan, and made an order allowing service of the statement of claim and a writ of summons in Ontario. The company successfully appealed to the Saskatchewan Court of Appeal, but the Court of Appeal's judgment was reversed by this court.

47 Dickson J. gave the reasons of the court. The location of a tort, he noted, was a matter of some difficulty. A plaintiff, he observed, could be sued on the theory that the court where the defendant happened to be had physical power over the defendant. But, he added, that suit could also be brought where the tort had been committed. Where the situs of the tort was, however, was not an easy question. One theory was that it was situated where the wrongful action took place (there, Ontario). Another would have it that it is the place where the damage occurred. But, as he noted, at p. 398:

> Logically, it would seem that if a tort is to be divided and one part occurs in state A and another in state B, the tort could reasonably for jurisidictional purposes be said to have occurred in both states or, on a more restrictive approach, in neither state. It is difficult to understand how it can properly be said to have occurred only in state A.

At the end of the day, he rejected any rigid or mechanical theory for determining the situs of the tort. Rather, he adopted "a more flexible, qualitative and quantitative test" [p. 407], posing the question, as had some English cases there cited, in terms of whether it was "inherently reasonable" [p. 408] for the action to be brought in a particular jurisdiction, or whether, to adopt another expression, there was a "real and substantial connection" [p.

408] between the jurisdiction and the wrong-doing. Dickson J. thus summarized his view, at pp. 408-409:

> Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence. In the *Distillers'* case and again in the *Cordova* case a real and substantial connection test was hinted at. Cheshire, 8th ed., 1970, p. 281, has suggested a test very similar to this; the author says that it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties. Applying this test to a case of careless manufacture, the following rule can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. *By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.* [emphasis added]

48 Before going on I should observe that, if this courts thinks it inherently reasonable for a court to exercise jurisdiction under circumstances like those described, it would be odd indeed if it did not also consider it reasonable for the courts of another province to recognize and enforce that court's judgment. This is obvious from the fact that in *Moran* Dickson J. derived the reasonableness of his approach from the "normal distributive channels" of products [p. 409], and in particular the "interprovincial flow of commerce" [p. 409]. If, as I stated, it is reasonable to support the exercise of jurisdiction in one province, it would seem equally reasonable that the judgment be recognized in other provinces. This is supported by the statement of Dickson J. in *Zingre*, supra, that comity is based on the common interest of both the jurisdiction giving judgment and the recognizing jurisdiction. Indeed, it is in the interest of the whole country, an interest recognized in the Constitution itself.

49 The above rationale is not, as I see it, limited to torts. It is interesting to observe the close parallel in the reasoning in *Moran* with that adopted by this court in dealing with jurisdiction for the purposes of the criminal law: see *Libman*, supra. In particular, barring express or implied agreement, the reasoning in *Moran* is obviously relevant to contracts; indeed, the same activity can often give rise to an action for breach of contract and one in negligence: see *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, 37 C.C.L.T. 117, (sub nom. *Central & Eastern Trust Co. v. Rafuse)* 42 R.P.R. 161, 34 B.L.R. 187, 31 D.L.R. (4th) 481, 75 N.S.R. (2d) 109, 186 A.R. 109, 69 N.R. 321. As Professor Sharpe, in Interprovincial Product Liability Litigation, observes, at pp. 19-20:

> It is inconsistent to permit jurisdiction in tort claims on the basis that the defendant should reasonably have foreseen that his goods would reach the plaintiff and cause damage within the jurisdiction and, on the other hand, to refuse service out of the jurisdiction in contractual actions where the defendant clearly knows that his goods are going to the foreign jurisdiction.

50 Turning to the present case, it is difficult to imagine a more reasonable place for the action for the defi-

ciencies to take place than Alberta. As noted earlier, the property is situate there, and the contract was entered into there by parties then both resident in the province. Moreover, deficiency actions follow upon foreclosure proceedings, which should obviously take place in Alberta, and the action for the deficiencies cries out for consolidation with the foreclosure proceedings in some manner similar to a Rice order. A more "real and substantial" connection between the damages suffered and the jurisdiction can scarcely be imagined. In my view, the Alberta court had jurisdiction, and its judgment should be recognized and be enforceable in British Columbia.

51 I am aware, of course, that the possibility of being sued outside the province of his residence may pose a problem for a defendant. But that can occur in relation to actions in rem now. In any event, this consideration must be weighed against the fact that the plaintiff, under the English rules, may often find himself subjected to the inconvenience of having to pursue his debtor to another province, however just, efficient or convenient it may be to pursue an action where the contract took place or the damage occurred. It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties. In a world where even the most familiar things we buy and sell originate or are manufactured elsewhere, and where people are constantly moving from province to province, it is simply anachronistic to uphold a "power theory" or a single situs for torts or contracts for the proper exercise of jurisdiction.

52 The private international law rule requiring substantial connection with the jurisdiction where the action took place is supported by the constitutional restriction of legislative power "in the province." As Guérin J. observed in *Dupont v. Taronga Holdings Ltd.*, [1987] R.J.Q. 124, 49 D.L.R. (4th) 335 at 339 (S.C.), "[TRANSLATION] In the case of service outside of the issuing province, service ex juris must measure up to constitutional rules." The restriction to the province would certainly require at least minimal contact with the province, and there is authority for the view that the contact required by the Constitution for the purposes of territoriality is the same as required by the rule of private international law between sister provinces. That was the view taken by Guérin J. in *Taronga*, where, at p. 340, he cites Professor Hogg at p. 278, as follows:

> In *Moran v. Pyle*, Dickson J. emphasized that the "sole issue" was whether Saskatchewan's rules regarding jurisdiction based on service *ex juris* had been complied with. He did not consider whether there were constitutional limits on the jurisdiction which could be conferred by the Saskatchewan Legislature on the Saskatchewan courts. But the rule which he announced could serve satisfactorily as a statement of the constitutional limits of provincial-court jurisdiction over defendants outside the province, requiring as it does a substantial connection between the defendant and the forum province of a kind which makes it reasonable to infer that the defendant has voluntarily submitted himself to the risk of litigation in the courts of the forum province.

I must confess to finding this approach attractive, but, as I noted earlier, the case was not argued in constitutional terms and it is unnecessary to pronounce definitively on the issue. In another passage cited by Guérin J. (at p. 341), Professor Hogg (at pp. 278-79) observes that this is similar to the position taken in the United States through the instrumentality of the due process clause of the Constitution of the United States: see *Int. Shoe Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154, 161 A.L.R. 1057 (1945). Whether the Canadian counterpart to the due process clause, s. 7 of the Charter, though not made expressly applicable to property, might, at least in certain circumstances, play a role is also unnecessary to determine.

53 There are as well other discretionary techniques that have been used by courts for refusing to grant juris-

diction to plaintiffs whose contact with the jurisdiction is tenuous or where entertaining the proceedings would create injustice, notably the doctrine of forum non conveniens or the power of a court to prevent an abuse of its process: for a recent discussion, see Elizabeth Edinger, "Discretion in the Assumption and Exercise of Jurisdiction in British Columbia" (1982), 16 Univ. of B.C. L. Rev. 1.

54 There may also be remedies available to the recognizing court that may afford redress to the defendant in certain cases such as fraud or conflict with the law or public policy of the recognizing jurisdiction. Here too there may be room for the operation of s. 7 of the Charter. None of these questions, however, are relevant to the facts of the present case, and I have not given them consideration.

Relevance of Reciprocal Enforcement Litigation

55 I turn finally to an argument faintly pressed by the appellants, namely, that the legislature of British Columbia, like that of other provinces, appears to have recognized the judicial rules as adopted in *Symon*, supra, in the Court Order Enforcement Act, R.S.B.C. 1979, c. 75, and no addition can therefore properly be made to the grounds there stated. In particular, counsel drew attention to s. 31(6), and especially para. (*b*) thereof. Section 31(6) reads as follows:

> (6) No order for registration shall be made if the court to which application for registration is made is satisfied that
>
> (*a*) the original court acted either
>
> (i) without jurisdiction under the conflict of laws rules of the court to which application is made; or ...
>
> (*b*) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident in the state of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court ...

56 There is a short answer to this argument. The reciprocal enforcement of judgments Acts in the various provinces were never intended to alter the rules of private international law. They simply provided for the registration of judgments as a more convenient procedure than was formerly available, i.e., by bringing an action to enforce a judgment given in another province: see *First City Capital Ltd. v. Winchester Computer Corp.*, [1987] 6 W.W.R. 212, 44 D.L.R. (4th) 301, 61 Sask. R. 153 (C.A.) This is in fact made clear by s. 40 of the British Columbia Act [the Court Order Enforcement Act], which provides that nothing in the Act prevents a judgment creditor from bringing an action for enforcement of a judgment. There is nothing, then, to prevent a plaintiff from bringing such an action, thereby taking advantage of the rules of private international law as they may evolve over time.

Disposition

57 I would dismiss the appeal with costs.

Appeal dismissed.

FN* Chief Justice at the time of hearing.

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ABN Amro Bank N.V. v. BCE Inc.

ABN AMRO BANK N.V., BANK OF MONTREAL, BANK OF TOKYO-MITSUBISHI (CANADA), BAYERISCHE LANDESBANK GIROZENTRALE, BNP PARIBAS (CANADA), LA CAISSE CENTRALE DESJARDINS DU QUEBEC, CANADIAN IMPERIAL BANK OF COMMERCE, CANADIAN IMPERIAL BANK OF COMMERCE, N.Y. AGENCY, CITIBANK, N.A., CREDIT SUISSE FIRST BOSTON CANADA, CREDIT SUISSE FIRST BOSTON EXPORT DEVELOPMENT CANADA, HSBC BANK CANADA, JPMORGAN CHASE BANK, LAURENTIAN BANK OF CANADA, MERRILL LYNCH CAPITAL (CANADA) INC., MERRILL LYNCH CAPITAL CORPORATION, NATIONAL BANK OF CANADA, ROYAL BANK OF CANADA, SOCIÉTÉ GÉNÉRALE, THE BANK OF NOVA SCOTIA and THE TORONTO-DOMINION BANK, Plaintiffs and BCE INC., Defendant

Ontario Superior Court of Justice [Commercial List]

Farley J.

Heard: November 28, 29, 2002
Judgment: April 30, 2003[FN*]
Docket: 02-CL-4652

Proceedings: refused leave to appeal (2003), 2003 CarswellOnt 2749 (Ont. Div. Ct.)

Counsel: B. Zarnett, J. Kimmel for Plaintiffs/Responding Parties

Thomas G. Heintzman, Q.C., R. Paul Steep, Darryl R. Ferguson for Defendant/Moving Party

Subject: International; Contracts; Torts; Corporate and Commercial; Civil Practice and Procedure; Insolvency

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

Plaintiff banks funded credit facility for subsidiary of defendant and were unsecured creditors in subsidiary's subsequent insolvency proceedings in Ontario under Companies' Creditors Arrangement Act — Subsidiary and defendant had their corporate headquarters in Quebec and agreements between subsidiary and plaintiffs in connection with provision of credit facility specified that governing law was that of Quebec or State of New York — Plaintiffs brought action against defendant in Ontario seeking to recover amounts advanced to subsidiary on ground that defendant was subsidiary's alter ego and on basis of alleged quasi-guarantee, misrepresentation and oppression — Defendant brought motion to dismiss or stay plaintiffs' action on basis that Ontario court did not have jurisdiction and/or that Ontario was not convenient forum — Motion dismissed — It was not clear that Quebec was more appropriate forum — Defendant had direct physical presence in Ontario and through its subsidiaries had cross-Canada business with very heavily weighted indirect Ontario presence.

Conflict of laws --- Torts — Choice of law — Forum conveniens — General

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Corporations --- Foreign and extra-provincial corporations — Jurisdiction of courts

Plaintiff banks funded credit facility for subsidiary of defendant and were unsecured creditors in subsidiary's subsequent insolvency proceedings in Ontario under Companies' Creditors Arrangement Act — Subsidiary and defendant had their corporate headquarters in Quebec and agreements between subsidiary and plaintiffs in connection with provision of credit facility specified that governing law was that of Quebec or State of New York — Plaintiffs brought action against defendant in Ontario seeking to recover amounts advanced to subsidiary on ground that defendant was subsidiary's alter ego and on basis of alleged quasi-guarantee, misrepresentation and oppression — Defendant brought motion to dismiss or stay plaintiffs' action on basis that Ontario court did not have jurisdiction — Motion dismissed — Defendant had presence in Ontario sufficient to conclude that there was presence-based jurisdiction over action — Defendant was registered as extraprovincial corporation in Ontario and had office in Toronto employing 8 of its 104 employees — Defendant had held substantial number of its annual shareholder meetings and board of directors meetings in Ontario — Defendant had box suite at Toronto, Ontario Skydome which it used to promote its business interests by entertaining customers, suppliers and business associates — Defendant had more than fleeting physical presence in Ontario — Ontario court also had jurisdiction based on test for assumed jurisdiction on basis of real and substantial connection.

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Plaintiff banks funded credit facility for subsidiary of defendant and were unsecured creditors in subsidiary's subsequent insolvency proceedings in Ontario under Companies' Creditors Arrangement Act — Subsidiary and defendant had their corporate headquarters in Quebec and agreements between subsidiary and plaintiffs in connection with provision of credit facility specified that governing law was that of Quebec or State of New York — Plaintiffs brought action against defendant in Ontario seeking to recover amounts advanced to subsidiary on ground that defendant was subsidiary's alter ego and on basis of alleged quasi-guarantee, misrepresentation and oppression — Defendant brought motion to dismiss or stay plaintiffs' action on basis that Ontario court did not have jurisdiction and/or that Ontario was not convenient forum — Motion dismissed — Defendant had presence in Ontario sufficient to conclude that there was presence-based jurisdiction over action — Defendant was registered as extraprovincial corporation in Ontario and had office in Toronto employing 8 of its 104 employees — Defendant had held substantial number of its annual shareholder meetings and board of directors meetings in Ontario — Defendant had box suite at Toronto, Ontario Skydome which it used to promote its business interests by entertaining customers, suppliers and business associates — Defendant had more than fleeting physical presence in Ontario — Ontario court also had jurisdiction based on test for assumed jurisdiction on basis of real and substantial connection — It was not clear that Quebec was more appropriate forum — Defendant had direct physical presence in Ontario and through its subsidiaries had cross-Canada business with very heavily weighted indirect Ontario presence — With respect to oppression claim, defendant was under control and guidance of its board of directors and Ontario had largest single number of directors on board.

Practice --- Disposition without trial — Stay or dismissal of action — Grounds — Lack of jurisdiction

Plaintiff banks funded credit facility for subsidiary of defendant and were unsecured creditors in subsidiary's subsequent insolvency proceedings in Ontario under Companies' Creditors Arrangement Act — Subsidiary and defendant had their corporate headquarters in Quebec and agreements between subsidiary and plaintiffs in connection with provision of credit facility specified that governing law was that of Quebec or State of New York — Plaintiffs brought action against defendant in Ontario seeking to recover amounts advanced to subsidiary on ground that defendant was subsidiary's alter ego and on basis of alleged quasi-guarantee, misrepresentation and oppression — Defendant brought motion to dismiss or stay plaintiffs' action on basis that Ontario court did not have jurisdiction — Motion dismissed — Defendant had presence in Ontario sufficient to conclude that there was presence-based jurisdiction over action — Defendant was registered as extraprovincial corporation in Ontario and had office in Toronto employing 8 of its 104 employees — Defendant had held substantial number of its annual shareholder meetings and board of directors meetings in Ontario — Defendant had box suite at Toronto, Ontario Skydome which it used to promote its business interests by entertaining customers, suppliers and business associates — Defendant had more than fleeting physical presence in Ontario — Ontario court also had jurisdiction based on test for assumed jurisdiction on basis of real and substantial connection.

Cases considered by *Farley J.*:

Amchem Products Inc. v. British Columbia (Workers' Compensation Board) (1993), [1993] 3 W.W.R. 441, 14 C.P.C. (3d) 1, [1993] 1 S.C.R. 897, 150 N.R. 321, 23 B.C.A.C. 1, 39 W.A.C. 1, 102 D.L.R. (4th) 96, 77 B.C.L.R. (2d) 62, 1993 CarswellBC 47, 1993 CarswellBC 1257, [1993] I.L.Pr. 689 (S.C.C.) — considered

Ash v. Corp. of Lloyd's (1991), (sub nom. *Ash v. Lloyd's Corp.)* 6 O.R. (3d) 235, 87 D.L.R. (4th) 65, 7 C.P.C. (3d) 343, 1991 CarswellOnt 475 (Ont. Gen. Div.) — referred to

Ash v. Corp. of Lloyd's (1992), 7 C.P.C. (3d) 364, (sub nom. *Ash v. Lloyd's Corp.)* 9 O.R. (3d) 755, 94 D.L.R. (4th) 378, 1992 CarswellOnt 449, 60 O.A.C. 241, [1993] I.L.Pr. 330 (Ont. C.A.) — referred to

Ash v. Corp. of Lloyd's (1992), 94 D.L.R. (4th) vii, (sub nom. *Ash v. Lloyd's Corp.)* 10 O.R. (3d) xvn, [1992] 3 S.C.R. v (S.C.C.) — referred to

Bank of Nova Scotia v. Wassef (2000), 2000 CarswellOnt 5000, 11 C.P.C. (5th) 338 (Ont. S.C.J.) — referred to

BCE Inc., Re (2000), 2000 CarswellOnt 1448 (Ont. S.C.J. [Commercial List]) — referred to

Bushell v. T & N plc (1992), 67 B.C.L.R. (2d) 330, 14 B.C.A.C. 36, 26 W.A.C. 36, 9 C.P.C. (3d) 59, 92 D.L.R. (4th) 228, 1992 CarswellBC 147 (B.C. C.A.) — referred to

Cadillac Fairview Inc., Re (1995), 1995 CarswellOnt 2883 (Ont. Gen. Div. [Commercial List]) — considered

Canadian Commercial Bank v. Carpenter (1989), 39 B.C.L.R. (2d) 312, [1990] 1 W.W.R. 323, 62 D.L.R. (4th) 734, 1989 CarswellBC 167 (B.C. C.A.) — referred to

Fidelity Management & Research Co. v. Gulf Canada Resources Ltd. (1995), 42 C.P.C. (3d) 93, 25 O.R. (3d) 548, 1995 CarswellOnt 1128 (Ont. Gen. Div. [Commercial List]) — considered

Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd. (1999), 1999 CarswellBC 1927, 1999 CarswellBC 1928, [1999] 9 W.W.R. 380, 11 C.C.L.I. (3d) 1, 176 D.L.R. (4th) 257, 245 N.R. 88, [1999] I.L.R. I-3717, 67 B.C.L.R. (3d) 213, 47 C.C.L.T. (2d) 1, 127 B.C.A.C. 287, 207 W.A.C. 287, [1999] 3 S.C.R. 108, 50 B.L.R. (2d) 169, [2000] 1 Lloyd's Rep. 199 (S.C.C.) — considered

Gauthier v. Dow Jones Markets Canada Inc. (1998), 1998 CarswellOnt 4992, 41 C.C.E.L. (2d) 10 (Ont. Gen. Div.) — considered

Gold v. Reinblatt (1928), [1929] S.C.R. 74, [1929] 1 D.L.R. 959, 1928 CarswellQue 58 (S.C.C.) — referred to

Gottardo Properties (Dome) Inc. v. Toronto (City) (1994), 20 M.P.L.R. (2d) 230, 75 O.A.C. 46, 1994 CarswellOnt 606, 116 D.L.R. (4th) 533 (Ont. Div. Ct.) — considered

Gottardo Properties (Dome) Inc. v. Toronto (City) (1998), 1998 CarswellOnt 3004, (sub nom. *Gottardo Properties (Dome) Inc. v. Regional Assessment Commissioner, Region No. 9)* 111 O.A.C. 272, 162 D.L.R. (4th) 574, 46 M.P.L.R. (2d) 309 (Ont. C.A.) — referred to

Hunt v. T & N plc (1993), [1994] 1 W.W.R. 129, 21 C.P.C. (3d) 269, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 37 B.C.A.C. 161, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 60 W.A.C. 161, (sub nom. *Hunt v. T&N plc)* 109 D.L.R. (4th) 16, 85 B.C.L.R. (2d) 1, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 161 N.R. 81, (sub nom. *Hunt v. T&N plc)* [1993] 4 S.C.R. 289, 1993 CarswellBC 1271, 1993 CarswellBC 294 (S.C.C.) — considered

Hyundai Auto Canada v. Bordeleau (2002), 2002 CarswellOnt 2714, 60 O.R. (3d) 641, 24 C.P.C. (5th) 81 (Ont. Master) — referred to

Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp. (2003), 2003 CarswellOnt 601, 223 D.L.R. (4th) 627, 31 B.L.R. (3d) 161, 63 O.R. (3d) 431, 30 C.P.C. (5th) 282, 169 O.A.C. 1 (Ont. C.A.) — followed

London Drugs Ltd. v. Kuehne & Nagel International Ltd. (1992), [1993] 1 W.W.R. 1, [1992] 3 S.C.R. 299, (sub nom. *London Drugs Ltd. v. Brassart)* 143 N.R. 1, 73 B.C.L.R. (2d) 1, 43 C.C.E.L. 1, 13 C.C.L.T. (2d) 1, (sub nom. *London Drugs Ltd. v. Brassart)* 18 B.C.A.C. 1, (sub nom. *London Drugs Ltd. v. Brassart)* 31 W.A.C. 1, 97 D.L.R. (4th) 261, 1992 CarswellBC 913, 1992 CarswellBC 315 (S.C.C.) — considered

Morguard Investments Ltd. v. De Savoye (1990), 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, [1990] 3 S.C.R. 1077, 1990 CarswellBC 283, 1990 CarswellBC 767 (S.C.C.) — referred to

Muscutt v. Courcelles (2002), 2002 CarswellOnt 1756, 213 D.L.R. (4th) 577, 160 O.A.C. 1, 60 O.R. (3d) 20, 13 C.C.L.T. (3d) 161, 26 C.P.C. (5th) 206 (Ont. C.A.) — followed

Spar Aerospace Ltd. v. American Mobile Satellite Corp. (2002), [2002] 4 S.C.R. 205, 220 D.L.R. (4th) 54, 297 N.R. 83, 2002 SCC 78, 2002 CarswellQue 2593, 2002 CarswellQue 2594, 28 C.P.C. (5th) 201 (S.C.C.) — followed

VitaPharm Canada Ltd. v. F. Hoffman-LaRoche Ltd. (2002), 2002 CarswellOnt 235, 20 C.P.C. (5th) 351 (Ont. S.C.J.) — considered

Zeldin v. Goldis (2000), 2000 CarswellOnt 2792 (Ont. S.C.J.) — referred to

Statutes considered:

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

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

Generally — referred to

MOTION by defendant to dismiss or stay plaintiffs' action.

***Farley J.*:**

1 The defendant, BCE Inc. ("BCE"), moved to dismiss, or in the alternative, to stay the action of the plaintiffs ("Banks"), part of the lending syndicate which funded the July 2000 credit facility of $1 $^{1}/_{4}$ billion U.S. to Teleglobe Inc. ("Teleglobe") and certain of its subsidiaries, which credit facility was further extended in July 2001 for a further 364 period. The Banks were unsecured creditors in the subsequent *Companies' Creditors Arrangement Act* ("CCAA") insolvency proceedings of Teleglobe in 2002.

2 In the subject action commenced July 12, 2002, the Banks seek to recover from BCE the amounts advanced by them under the Teleglobe credit facilities, asserting *inter alia* that BCE should repay such loans on the basis that BCE was Teleglobe's *alter ego*. In an overview summary in its factum BCE states as follows:

3. BCE submits that the courts of the Province of Québec have jurisdiction over the claims asserted in this action, and that the Ontario courts do not have jurisdiction, or ought to decline jurisdiction. BCE further submits that the courts of Québec are the convenient and natural forum, and that Ontario is *forum non conveniens* for the disposition of the plaintiffs' claims.

4. With respect to the jurisdiction of this court, BCE relies principally upon two submissions:

(a) In the Teleglobe Credit Facilities, the plaintiffs irrevocably agreed that the governing law was that of the Province of Québec or the State of New York, and that the courts of the Province of Québec and the State of New York have exclusive jurisdiction with respect to legal proceedings relating thereto. The plaintiffs waived their entitlement to proceed otherwise concerning "any and all disputes that may be filed in any court" relating to the "subject matter of the transaction". Accordingly, the plaintiffs are precluded by the terms of the Teleglobe Credit Facilities from invoking the jurisdiction of the Ontario court.

(b) The real and substantial connection of the claims in this action is to the Province of Québec, not Ontario. Accordingly, the courts of the Province of Québec have subject matter jurisdiction over these claims, and the courts of the Province of Ontario do not.

5. In its submissions that Québec is the convenient forum and that Ontario is *forum non conveniens*, BCE makes two submissions:

(a) The natural forum for the determination of the claims asserted in this action is the Province of Québec. It is in Québec that the Teleglobe Credit Facilities were negotiated, where the loan documents were delivered and where Teleglobe and BCE are headquartered. Accordingly, the claims in this action ought to be tried in the courts of the Province of Quebec.

(b) The other connecting factors relating to convenience of trial (i.e. location of witnesses, location of documents, governing law, location of plaintiffs' offices) establish that Québec is clearly the more convenient forum for the trial of the claims in this action.

6. In summary, the substance and essence of the plaintiffs' claims concern the Teleglobe Credit Facilities and the documents delivered in connection therewith which were negotiated, delivered and closed in Québec. The Teleglobe Credit Facilities are governed by the laws of Québec or New York; and the plaintiffs have explicitly agreed the courts of the Province of Québec or the courts of the State of New York shall have exclusive jurisdiction over any and all disputes that may be filed in any court. Accordingly, these claims should be tried in Quebec.

3 The Banks have responded in their factum as follows:

1. The Defendant, BCE Inc. ("BCE"), moves to stay or dismiss this action on the basis that the Ontario Superior Court of Justice does not have jurisdiction over it. The plaintiffs ask this court to reject that submission. BCE's presence and activities in Ontario both directly and through its operating subsidiaries, its voluntary initiation of, or participation in, other proceedings before the Ontario Superior Court of Justice, and its activities in Ontario directly connected to this action, clearly establish the jurisdiction of this court.

2. BCE asserts that the plaintiffs are subject to provisions of agreements which BCE can rely upon to litigate only in Quebec. The plaintiffs ask this court to reject that submission because:

(a) BCE asserts that it is not a party to, or bound by, the very agreements it seeks to rely on, yet the very provision of the agreements BCE relies on is limited to proceedings by a party against a party.

(b) BCE ignores another specific provision of the agreements it purports to rely on which contemplates the right, in the event of a default in repayment to the plaintiffs (which has occurred), to invoke the laws of any jurisdiction and to sue in any jurisdiction.

(c) Teleglobe Inc. ("Teleglobe"), the named party to the agreements on which BCE purports to rely, has brought proceedings in Ontario, with the knowledge, support and active participation of BCE, concerning and affecting Teleglobe's obligations under the very agreements BCE purports to rely upon, clearly establishing, evidencing its connection to, and attorning to the jurisdiction of the Ontario court - BCE cannot assert an objection to the very jurisdiction which Teleglobe, with BCE's support, has chosen; and

(d) most importantly, in the actual dealings, correspondence and documents between BCE and the plaintiffs upon which the plaintiffs base their claims giving rise to this action, there was no evidence or agreement between BCE and the plaintiffs about the jurisdiction of any action being other than in Ontario.

3. BCE's suggestion that there is no "real and substantial connection" between Ontario and the matters raised in this action should also be rejected. BCE's connections to Ontario, the plaintiffs' connections to Ontario, BCE's dealings with the plaintiffs in Ontario, the plaintiffs' own dealings in Ontario and Teleglobe's and BCE's initiation of, and participation in, proceedings in Ontario, all in respect of the very matters at issue in this action, clearly displace any suggestion of a lack of a real and substantial connection.

4. BCE is also asking the Ontario court to decline jurisdiction on the basis that Ontario is not the convenient forum for the disposition of the plaintiffs' claims and submits that the courts of Quebec are the convenient and natural forum for so doing.

5. The plaintiffs ask that the court reject this submission. The factors that the court will examine in determining whether to decline jurisdiction on the basis of convenient forum clearly establish Ontario as the convenient forum and do not in any event establish Quebec as the more appropriate forum. BCE has not demonstrated any inconvenience to BCE to this case being determined in Ontario, and the connecting factors, and convenience for the plaintiffs, of having the action in Ontario are substantial.

6. BCE's position both on jurisdiction and convenient forum is all the more difficult to understand since the event that triggered this action was an announcement made by BCE on April 24, 2002, in Toronto, Ontario; the plaintiffs' demands to BCE after the announcement were responded to by Ontario counsel for BCE; and BCE participated and supported Teleglobe in bringing a proceeding in Ontario in which all of the parties to this action are involved.

7. BCE has clearly not met its burden to establishing that the Ontario court lacks jurisdiction nor the existence of a more appropriate forum in which to try this action. BCE has:

(a) misconstrued and misrepresented the claims against it in this action to be claims under certain credit facility agreements between the plaintiffs and Teleglobe made in July of 2000 and renewed in July of 2001 (the "Credit Facility Agreements") and related documents;

(b) relied upon evidence in support of its motion which, even if accepted, would not justify the relief it claims, and that is significantly deficient, as BCE has alleged facts not properly in evidence by:

(i) referring to gratuitous statements made by its own counsel in the course of cross-examinations which were not affirmed by the witnesses, relating to business dealings between BCE and some of the plaintiffs unrelated to the transactions in issue in this action, as though the statements were evidence;

(ii) referring to the "law" of Quebec and New York without providing it as evidence through experts;

(iii) putting forth the evidence of an individual not involved in the matters at issue whose Affidavit (a) does not distinguish between his own knowledge and that deposed to on information and belief; and (b) does not identify the source of information on contentious matters that through cross-examination were demonstrated to be outside of his personal knowledge.

Jurisdiction

4 In *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577 (Ont. C.A.) at p. 586, it was pointed out that there are any one of three ways in which jurisdiction of this court may be established as to a defendant:

(a) presence-based jurisdiction;

(b) consent-based jurisdiction; and

(c) assumed jurisdiction (where there is established a real and substantial connection).

Sharpe J.A. stated at pp. 586-7:

> 19. There are three ways in which jurisdiction may be asserted against an out-of-province defendant: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction. Presence-based jurisdiction permits jurisdiction over an extraprovincial defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over an extraprovincial defendant who consents, whether by voluntary submission, attornment by appearance and defence, or prior agreement to submit disputes to the jurisdiction of the domestic court. Both bases of jurisdiction also provide bases for the recognition and enforcement of extraprovincial judgments.
>
> 20. This appeal raises the issues of assumed jurisdiction. Assumed jurisdiction is initiated by service of the court's process out of the jurisdiction pursuant to rule 17.02. Unlike presence-based jurisdiction and consent-based jurisdiction, prior to *Morguard* and *Hunt*, assumed jurisdiction did not provide a basis for recognition and enforcement.

5 He then went on at pp. 587-591 to discuss the development of the law as to recognition and enforcement of judgments as that related to assumed jurisdiction which culminated in the decision of *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.). Sharpe J.A. stated at pp. 590-1:

> 33. La Forest J. concluded that although Canada's Constitution does not include a "full faith and credit" clause such as those of the United States or Australia, where a court in one province has properly exercised jurisdiction in an action, the courts of another province should accord the judgment full faith and credit.
>
> 34. *Morguard* establishes that the proper exercise of jurisdiction depends upon two principles. First, there is a need for "order and fairness" and jurisdictional restraint. Second, there must be a "real and substantial connection". This test was mentioned as a basis for assume jurisdiction by Dickson J. in *Moran v. Pyle* and was derived from *Indyka v. Indyka*, [1969] 1 A.C. 33 (H.L.) at 105, where the court held that a foreign divorce decree should be recognized where a "real and substantial connection is shown between the petitioner and the country, or territory, exercising jurisdiction".

He concluded at p. 591:

36. The language that the Supreme Court has used to describe the real and substantial connection test is deliberately general to allow for flexibility in the application of the test. In *Morguard*, at pp. 1104-1109, the Court variously described a real and substantial connection as a connection "between the *subject-matter of the action* and the territory where the action is brought", "between the jurisdiction and the *wrongdoing*", "between the *damages suffered* and the jurisdiction", "'between the *defendant* and the forum province'", "with the *transaction or the parties*", and "with the *action*" (emphasis added). In *Tolofson*, at p. 1049, the Court described a real and substantial connection as "a term not yet fully defined" [para. 40].

37. In *Hunt*, at p. 325, the Court held:

> The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined [in *Morguard*], and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these.
>
> The Court also held that the real and substantial connection test "was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction" and that "the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections" [p. 326]....

6 Does BCE have a presence in Ontario which meets the presence-based jurisdiction requirement? I am of the view that it does. While its head office is registered in Quebec, it is registered as an extraprovincial corporation in Ontario with an office in Toronto as to which 8 of its 104 employees report to work on a regular basis. In *Gottardo Properties (Dome) Inc. v. Toronto (City)*, [1994] O.J. No. 1387 (Ont. Div. Ct.) affirmed at [1998] O.J. No. 3048 (Ont. C.A.), in the agreed statement of facts BCE represented to the court that it used its Skybox suite at the Toronto Skydome for the purpose of promoting its business interests by entertaining customers, suppliers, and other business associates at that Ontario location. It is clear that BCE has more than a fleeting physical presence in Ontario even if as a holding company, it is considered separate and apart from its operating subsidiaries. In addition, I note that it has held a substantial number of its annual shareholders meetings and its meetings of the board of directors in Ontario. I do not think that the evidence here is sufficient to reach the same conclusion as Cumming J. did in *Gauthier v. Dow Jones Markets Canada Inc.*, [1998] O.J. No. 5403 (Ont. Gen. Div.) at para. 26 where he stated:

> 26. DJM Canada carries on business in Canada. DJM carries on business in the United States and Latin America. It is uncertain where DJ & Company carries on business but as the holding corporation for the markets subsidiaries it could be said that it indirectly carries on its overall business enterprise throughout the Americas. While separate corporate entities are employed, the evidence on this motion establishes a single Dow Jones enterprise with business carried on, *inter alia*, in Ontario, Quebec, New York and Florida.

I also do not see that BCE would have a presence sufficient for jurisdiction purposes based solely on the fact that its shares are listed on the Toronto Stock Exchange; that five of its directors (out of 13) have residences in Ontario; or that there is a two office tower (which it previously owned) which is still named "BCE Place". However for the first reviewed considerations, I find that BCE has a presence in Ontario sufficient to conclude that there is presence-based jurisdiction for BCE in this lawsuit.

7 While this is sufficient since the jurisdiction tests are disjunctive and any one of the three being met is sufficient to give this court jurisdiction, I shall deal with the other two tests as well.

8 Is there consent-based jurisdiction? I do not place any weight in the fact that BCE in several previous non-related cases has sought the aid of the Ontario court. However the present situation is somewhat unusual in the sense that Teleglobe brought its CCAA proceedings in the Toronto Commercial List. While Teleglobe was at that time a subsidiary of BCE and the Teleglobe debt to the Banks was a material amount of Teleglobe's total indebtedness, BCE asserts that (i) the decision of Teleglobe to come to Ontario for its CCAA filing was the result of a decision of independent board members of Teleglobe and (ii) BCE had no involvement in that decision. BEC certainly had advance notice from Teleglobe as to this filing in Ontario. It should also be noted that BCE aside from being the shareholder of Teleglobe was also the proposed DIP lender (debtor in possession financer)

for Teleglobe as it recognized that it was extremely unlikely there would be any other source for such financing. In addition, BCE at least through its operating subsidiaries had been and continued to be a major customer and supplier of Teleglobe.

9 However in my view, there was no evidence presented by the Banks to rebut the assertion of BCE that it did not take part in the Teleglobe decision to do its CCAA filing in Ontario but rather that was a decision of the independent portion of the Teleglobe board. While it is fair to observe that BCE could have vetoed that decision in a practical sense by withdrawing its DIP loan facility. I do not see that its acquiescence to the Teleglobe decision made by its independent board is sufficient to grant consent-based jurisdiction.

10 Lastly, do the circumstances prevailing in this case give rise to assumed jurisdiction by the Ontario Court?

11 See *Muscutt*, *supra* at p. 591 where Sharpe J.A. concludes that: "The language that the Supreme Court has used to describe the real and substantial connection test is general to allow flexibility in the application of the test". He went on at the same page to note that in *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 (S.C.C.) the Supreme Court held:

> ...that the real and substantial connection test "was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction" and that "the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contracts or connections" [p. 326].

Holmested and Watson: *Ontario Civil Procedure* (Scarborough: Carswell, 1993, 1s1f 2001) at pp. 17-19 states: "the connections to the forum required to pass the real and substantial connection test constitute a very low threshold."

12 In *Muscutt* at p. 592, Sharpe J.A. drew the distinction between assumed jurisdiction and *forum non conveniens*. Commenting at p. 604, he then went on to consider and analyze the eight following factors which have emerged from the case law as to assumed jurisdiction. They are as follows:

1. The connection between the forum and the plaintiff's claim.

2. The connection between the forum and the defendant.

3. Unfairness to the defendant in assuming jurisdiction.

4. Unfairness to the plaintiff in not assuming jurisdiction.

5. The involvement of other parties to the suit.

6. The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis.

7. Whether the case is interprovincial or international in nature.

8. Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

Sharpe J.A. at p. 604 also stated that:

76. But clarity and certainty are also important. As such, it is useful to identify the factors emerging from the case law that are relevant in assessing whether a court should assume jurisdiction against an out-of-province defendant on the basis of damage sustained in Ontario as a result of a tort committed elsewhere. No factor is determinative. Rather, all relevant factors should be considered and weighed together....

He also observed at p. 594:

44. ...The residual discretion to decline jurisdiction where the real and substantial connection test is met assumes that the forum in question is not the only one that has jurisdiction over the case. The real and substantial connection test requires only a real and substantial connection, ... (emphasis added)

13 Dealing with the above points *seratim*:

1. The connection between the forum of Ontario and the claims of the Banks as plaintiffs: Many of the Banks are Ontario headquartered and it is at these headquarters where the decisions to invest in the subject loans were made. The representations said to be relied on by the Banks so as to fix BCE with liability would have been received outside Quebec and in many cases in Ontario by the Banks. BCE made its announcement from Toronto on April 24, 2002 after its board meeting in that Ontario location, the announcement being that BCE would not be providing Teleglobe with any further funding and support as to the debt obligation to, among others, the Banks. BCE had its Ontario counsel respond to the demands of the Banks following such announcement. It is asserted that BCE's letter to HSBC Bank Canada in Toronto memorialized the BCE commitment to stand behind Teleglobe; that standing behind in effect becoming an *alter ego* status.

2. The connection between the forum of Ontario and the defendant BCE: See the discussion above as to presence-based of jurisdiction.

3. Unfairness to the defendant BCE in the Ontario Court assuming jurisdiction: Even if one ignores the operating subsidiaries of BCE which regularly have resorted to the courts of Ontario, BCE has from time to time also resorted to the courts of Ontario (see *Gottardo, supra*; *BCE Inc., Re* (2000), [2002] O.J. No. 1542 (Ont. S.C.J. [Commercial List]), in this latter case it was suggested that this case involving Nortel Networks Corporation ("Nortel") was brought in Ontario because "Nortel was, and is, an Ontario corporation with its head office in Brampton, Ontario", however it was conceded on cross-examination that this was incorrect as Nortel's head office was registered in Montreal and it was a Canadian corporation as opposed to an Ontario corporation). While BCE asserts that the interpretation of the Loan Documents/Papers would require the application of Quebec law vis-à-vis any BCE liability (or as the case may be, the law of New York); BCE did not provide any evidence that the law of Ontario was different from that of Quebec (or New York) in that respect. Absent proof of the foreign law by expert evidence, the foreign law is presumed to be identical to the Ontario law: see *Bank of Nova Scotia v. Wassef* (2000), 11 C.P.C. (5th) 338 (Ont. S.C.J.) at para. 17; *Gold v. Reinblatt* (1928), [1929] 1 D.L.R. 959 (S.C.C.) at p. 961; J.G. Castel and J. Walber, *Canadian Conflict of Laws*, 5th ed. (Markham, Butterworths, 2002 lslf) at p. 7.1-7.5). Even if, for the purposes of this motion, one were to assume that the law of Quebec were different from the law of Ontario in respect to any element of the claim of the banks which would be governed by Quebec law, then it would be open for BCE to prove Quebec law as a fact in the Ontario court. While it may be preferable, all other things being equal, for a case to be tried in the jurisdiction which is able to apply Quebec law (without it having to be proven) as opposed to foreign law (which does have to be proven, or in default of such proof, it is assumed to be the same as the domestic law), I do not see any inherent unfairness to BCE in having to prove Quebec law which is applicable in this case. Conceivably it (the law of Quebec) would be

something as to which the Banks and BCE would be able to agree; or failing agreement, perhaps they could agree upon a single expert to be retained by the court (and whose fees would be paid jointly by the parties pending the award of costs); or failing that one would presume that these parties would retain experts of unquestionable quality, objectivity and neutrality that there should be no true dispute as to what the applicable Quebec law is as a fact. Given the financial capacity of BCE (and the Banks) and the amount of the potential damages, one would not think that the payment of a retainer to such an expert would be of any material moment as to a financial burden. Similarly one would not think that there would be any material burden upon any of the fact witnesses, most of whom are anything but strangers to being away from their ordinary place of business for multiple and extended periods in the ordinary course of business.

4. Unfairness to the Banks as plaintiffs if the Ontario Court does not assume jurisdiction: The Banks rely on the "principle" that a plaintiff ought not lightly be denied its chance of forum. See *Bushell v. T & N plc* (1992), 92 D.L.R. (4th) 228 (B.C. C.A.) at p. 240, leave to appeal to Supreme Court of Canada refused. One would think that this factor would carry more weight if the Banks were able to demonstrate that their choice of Ontario was as a result of careful consideration including some factor as to the question of limited financial capacity, the expense of one jurisdiction or another and/or inconvenience or unavailability of key witnesses if the proceedings were to be conducted in Quebec. I am of the view that the most that can be said here is that there is a connection between the Teleglobe CCAA proceedings and the subject case. However, as to Teleglobe's involvement, see below at consideration 5.

5. The involvement of other parties to the suit: The Banks suggest that Teleglobe is a potential party to this litigation and that it could only participate as a party with leave of this court granted in the Teleglobe CCAA proceedings. However, the Banks have not "conditionally" made Teleglobe a party, nor have they sought leave to have Teleglobe made a party. However, the Ontario court in the CCAA proceedings has declared that certain investigations be made and reviews conducted by the Monitor, which investigations and reviews may have some bearing upon the issues in this litigation.

6. The Ontario Court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis: The Ontario Court has a long history of recognition and enforcement generally of extra-provincial judgments, especially following the pronouncements of *Morguard* and *Hunt*, *supra*. I do not see any basis for believing that a judgment of the Quebec court, if granted in the case, assuming the Quebec court were given the opportunity to try this case, would not be recognized and enforced.

7. Whether the subject litigation is interprovincial or international in nature: To the extent that any of the Banks are outside Ontario, they have attorned to the jurisdiction of the Ontario Court by bringing this action. The other Banks are clearly Ontario based and BCE has a material presence in Ontario as per the discussion of presence-based jurisdiction above. To the extent that BCE is not Ontario related, it is Quebec related. As Sharpe J.A. stated at p. 608 of *Muscutt*:

> 95. The decisions in *Morguard, Tolofson* and *Hunt* suggest that the assumption of jurisdiction is more easily justified in interprovincial cases than in international cases. The jurisdictional standards developed in *Morguard* and *Hunt* were strongly influenced by the need to adapt the rules of private international law to the demands of the Canadian federation.

8. Comity and the standards of jurisdiction recognition and enforcement proceedings elsewhere: As Sharpe J.A. stated at p. 610 of *Muscutt*: "...In interprovincial cases, this consideration is unnecessary, since the

same standard necessarily applies to assumed jurisdiction, recognition and enforcement within Canada."

14 Allow me to deal with the element which BCE raised as to jurisdiction, namely that the expectations of the parties to the Loan Agreements/Papers was that the litigation would be conducted in Quebec (or alternatively in New York as the case may be) and not in Ontario which was not specified as to law or jurisdiction in the Loan Agreements/Papers at s.12.10. BCE contends that the letters of June 29, 2000 and July 23, 2001 are Loan Papers. However, there is some ambiguity here as the Loan Agreements/Papers specify "each party hereto" which would on initial inspection not explicitly include BCE. Further, does the definition of "obligation" include the BCE commitment as per these two letters? There may be an instant attractiveness to such an argument. However, on reflection, it appears to me to suffer from various defects. Firstly, BCE chose not to lead any evidence as to what it actually contemplated or expected in its dealings with the plaintiff Banks as to the forum for any claims (which claims are not restricted to payment under the Loan Agreement/Papers) and there is no provision for addressing this multiple issue in question in any document as to which BCE acknowledges that it is a party. Indeed the Banks are suing BCE not just on the *alter ego* basis, but also on what they say is a separate agreement between them and BCE (in essence a guarantee or quasi-guarantee), misrepresentation and oppression. Section 12.10 limits its application to cases between the parties to the credit facilities, which appear to be Teleglobe and the lending institutions, but not appear to include BCE. Moreover, s.10.1 appears to allow action in any jurisdiction once Teleglobe has defaulted. It is indeed unfortunate that the documentation which surrounds this credit facility and BCE's relationship or involvement with Teleglobe and the lending institutions is somewhat ambiguous, particularly when the amount at stake would easily have justified a careful review analysis on a "what if" basis which could have pointed out the need for clarification. Perhaps the problem stems from the customary procedure of taking a precedent and grafting on additional clauses or modifying some original clauses without considering how these changes affect the situation on an overall basis.

15 BCE further argued that common law doctrines would allow it to take advantage of provisions in the Loan Agreements/Papers relating to the credit facility. Query though when BCE asserts that it is the Quebec courts which have jurisdiction, and that the Ontario Courts have no jurisdiction that the Quebec courts which adhere to the *Civil Code* would recognize common law doctrines in these circumstances? In any event the principle of the common law is that a party which is not privy to a contract is disentitled from relying on any provision of that contract, except in the case of specified exceptions. The traditional exceptions to that principle, namely trust and agency, have been somewhat augmented by the Supreme Court of Canada in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.) and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 (S.C.C.). In *London Drugs*, the Supreme Court held that a limitation of liability clause in favour of the employer was extended by implication to the employees who were necessary to carry out the work of the employer. In *Fraser River*, the Supreme Court held that the contract at issue was explicitly intended to cover the party seeking to rely on it (*Zeldin v. Goldis*, [2000] O.J. No. 3001 (Ont. S.C.J.) appears to be an even stranger case as there was an express provision in favour of the defendant and the plaintiff and the defendant were both signatories to the agreement). It does not appear to me that BCE comes within any of the traditional or newly augmented exceptions so as to allow it to take advantage of s.12.10.

16 Fairly weighing the above factors, it is my view that it would be appropriate in these circumstances to conclude that the test of a real and substantial connection has been met such that an Ontario Court could assume jurisdiction in the subject case.

17 Thus as to whether the Ontario Court has jurisdiction to try the subject case, I would conclude that it does so have jurisdiction based upon either (a) presence-based test or (b) the test for assumed jurisdiction on the basis of

a real and substantial connection. Either conclusion is sufficient to give the Ontario Court jurisdiction in my view.

Forum Conveniens - Forum Non Conveniens

18 Both sides rely upon *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (S.C.C.). In that case, Sopinka J. for the court stated at p. 912:

> Frequently, there is no single forum that is clearly the most convenient or appropriate for the trial of the action but rather several which are equally suitable alternatives. In some jurisdictions, novel principles requiring joinder of all who have participated in a field of commercial activity have been developed for determining how liability should be apportioned among defendants. In this climate, courts have had to become more tolerant of the systems of other countries. The parochial attitude exemplified by *Bushby v. Munday* (1821), 5 Madd. 297, 56 E.R. 908, at p. 308 and p.913, that "[t]he substantial ends of justice would require that this Court should pursue its own better means of determining both the law and the fact of the case" is no longer appropriate.
>
> This does not mean, however, that "forum shopping" is now to be encouraged. The choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate. I recognize that there will be cases in which the best that can be achieved is to select an appropriate forum. Often, there is no one forum that is clearly more appropriate than others.

He went on to observe at pp. 916-7:

In *Spiliada, supra*, the House of Lords restated the rule and elaborated on its application. In particular, the court dealt with its application in what is considered two different circumstances. In the "as of right" cases in which the defendant was served in the jurisdiction, the burden of proof that a stay should be granted was on the defendant who was required to show the there is another forum which is clearly more appropriate for the trial of the action. This so-called "natural forum" is the one with which the action has the most real and substantial connection. If this first condition is established, a stay will be granted unless the plaintiff establishes special circumstances by reason of which justice requires that the trial take place in England. Mere loss of a judicial advantage will not amount to an injustice if the court is satisfied that substantial justice will be done in the appropriate forum. In cases in which service is effected *ex juris*, the burden is on the plaintiff throughout and is the obverse of that applicable in cases as of right; that is, the plaintiff must show that England is clearly the appropriate forum. Lord Goff provided some guidance with respect to the relevant factors that determine the appropriate forum. While not intending to provide an exhaustive list, His Lordship referred to the principal factors in his reasons at p. 478:

> So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see *Crédit Chimique v. James Scott Engineering Group Ltd.*, 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.

He concluded at p. 921:

The burden of proof should not play a significant role in these matters as it only applies in cases in which the judge cannot come to a determinate decision on the basis of the material presented by the parties. While the standard of proof remains that applicable in civil cases, I agree with the English authorities that the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff. This was the position adopted by McLachlin J.A. (as she then was) in *Avenue Properties Ltd. v. First City Dev. Corp.* (1986), 7 B.C.L.R. (2d) 45. She emphasized that this had particular application where there were no parallel foreign proceedings pending.

19 Rosenberg J.A. for the Ontario Court of Appeal in *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.*, [(2003), 223 D.L.R. (4th) 627 (Ont. C.A.)], released February 24, 2003, stated at para. 72 in dealing with the appropriate forum between the choices of Manitoba and Ontario:

72. It would seem to me that looking at all the factors, they slightly favour Manitoba as the more convenient forum. But is that enough to displace the plaintiffs' right to choose the forum? While the burden was on the defendants to show that Manitoba was "clearly" a more convenient forum, as held in *Frymer* at p. 79, the "choice of the appropriate forum is designed to ensure that the action is tried in the jurisdiction that has the closest connection with the action and the parties". The underlying principle is, as La Forest J. said in *Morguard* at p. 1098, rooted in "reasons of justice, necessity and convenience" or as he said in *Hunt* at p. 326, "the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contracts or connections". Viewed in this way, Manitoba is clearly the more convenient forum. The factors concerning the location of the dispute and the jurisdiction in which the factual matters arose, which both favour Manitoba, are considerably more important than factors such as location of the parties. After all the counting of contacts and connections is done, this case is about the dissatisfaction of minority shareholders with the way they were and are treated by two companies based in Manitoba. One company, Broadcasting, is a Manitoba corporation governed by the *Manitoba Corporations Act*. The other CanWest Global, although a federal corporation carrying on business throughout Canada, is resident in Manitoba. Reasons of justice, necessity and convenience not to mention the requirements of order and fairness call for this matter to be sorted out by the Manitoba Court of Queen's Bench.

20 LeBel J. for the Supreme Court of Canada in *Spar Aerospace Ltd v. American Mobile Satellite Corp.* (2002), 220 D.L.R. (4th) 54 (S.C.C.) observed at p. 77:

57. Next, from my examination of the system of rules found in Book Ten, it seems that the "real and substantial connection" criterion is captured in other provisions, to safeguard against the improper assumption of jurisdiction. In particular, it is my opinion that the doctrine of *forum non conveniens*, as codified at art. 3135, serves as an important counterweight to the broad basis for jurisdiction as set out in art. 3148. In this way, it is open to the appellants to demonstrate, pursuant to art. 3135, that although there is a link to the Quebec authorities, another forum is, in the interests of justice, better suited to take jurisdiction.

He went on to state at pp. 81-2:

69. Aside from the requirement that the party relying on the doctrine must bring an application for dismissal, the two key parts of art. 3135 include its exceptional nature and the requirement that another country be in a better position to decide (see: E. Groffier, *La réforme du droit international privé québécois: supplement au Précis de droit international privé québécois* (1993), at p. 130).

70. These two features of the *forum non conveniens* doctrine set out in art. 3135 are consistent with the common

law requirements set out by the House of Lords in the seminal case, *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] 1 A.C. 460, at p. 476, as well as this Court in *Amchen, supra*, at pp. 919-921, and *Holt Cargo, supra*, at para. 89. In *Holt Cargo*, this Court interpreted s. 50 of the *Federal Court Act*, R.S.C. 1985, c. F-7, which essentially includes the same two requirements. It reads as follows:

50(1) The Court may, in its discretion, stay proceedings in any case or matter,

(a) on the ground that the claim is being proceeded with in another court or jurisdiction; or

(b) where for any other reason it is in the interest of justice that the proceedings be stayed.

In the case at bar, I agree with the respondent's submissions that the motions judge did not err in finding that no other jurisdiction was clearly more appropriate than Québec and that no exceptional exercise of this power was warranted.

71. With respect to the first requirement, a number of cases have set out the relevant factors to consider when deciding whether or not the authorities of another country must be in a better position to decide the matter. The motions judge (at para. 18) referred to the 10 factors listed by the Quebec Court of Appeal in the recent case, *Lexus Maritime inc. v. Oppenheim Forfait GmbH*, [1998] Q.J. No. 2059 (QL) [summarized 82 A.C.W.S. (3d) 46], at para. 18, none of which are individually determinant:

[Translation]

(1) The parties' residence, that of witnesses and experts;

(2) the location of the material evidence;

(3) the place where the contract was negotiated and executed;

(4) the existence of proceedings pending between the parties in another jurisdiction;

(5) the location of Defendant's assets;

(6) the applicable law;

(7) advantages conferred upon Plaintiff by its choice of forum, if any;

(8) the interests of justice;

(9) the interests of the parties;

(10) the need to have the judgment recognized in another jurisdiction.

73. In this case, I agree with the motions judge that since all the witnesses and parties are from different places, there is not one single preferable location in this respect. The evidence of the tortuous act and its immediate consequences is likely to be found in either Virginia or California. The assets of the defendants are all located in the United States. It is not yet known which law will be applicable to the action, so this factor is not determinant. Since the defendants' assets are likely to be found in several different jurisdictions in the United States, recovery by the respondent of any damages that it is awarded will require potentially more

> than one jurisdiction to recognize the judgment. I also note that the respondent's witness, Gerald Bush, testified that Motient sent representatives to stay at the Ste-Anne-de-Bellevue facility for more than a year (A.R., at pp. 92-94). In my opinion, the apparent willingness of Motient to displace some of its staff to conduct business with the respondent in Quebec seems at odds with its current complaint of *forum non conveniens*.

See also *Muscutt supra* at p. 543.

21 Keeping in mind that the Banks have also pleaded oppression by BCE, then additional factors may be considered. See *Fidelity Management & Research Co. v Gulf Canada Resources Ltd.* (1995), 25 O.R. (3d) 548 (Ont. Gen. Div.) at pp. 555-8 where Blair J. considered:

(a) residence of directors;

(b) maintenance of an office in the jurisdiction;

(c) whether the corporation is multi-national;

(d) location of shareholders;

(e) registration as an extra-provincial corporation;

(f) principal trading market; and

(g) location of directors' meetings.

However in the subject case, it is not shareholders who are engaged in an active trading market who all complain of oppression but rather financial institutions which have lent money in what appears to have been a "lend and hold" operation. I do not see that the registration as an extra-provincial corporation has much weight in this question.

22 Dealing with the aforesaid factors, I would make the following observations and findings while noting that again it is not a mathematical or mechanical exercise of counting up the points of contact or connections:

1. The parties' residence, that of witnesses and experts: While BCE has a presence in Ontario and there are strong and real connections in this case to Ontario, I think it is fair to observe that BCE is Quebec centered. However, while the Banks individually appear for the most part to have some connection with and presence in Quebec, in fact they invariably have a much stronger presence and connection with Ontario, such that on balance one would conclude that the Banks are Ontario centred. Because of the number of Banks involved as plaintiffs, by virtual necessity, they have considerably more witnesses than the single defendant BCE has; of those Bank witnesses, some two thirds are Ontario based although one has always to be leery of count inflation in such circumstances. With respect to expert witnesses, to the extent that any are necessary in this litigation, they would appear to be of the true objective mercenary type who would have no aversion to going to either Toronto or Montreal so long as they were paid for their time and expenses. This may be contrasted with medical experts in a personal injury case where their other professional responsibilities may dictate that they not spend any unnecessary time in court or involved in transportation to and from court or receiving instructions and reviewing opinions. In my view the Banks would have a marginal advantage over BCE in this category.

2. The location of the material evidence: Each side will have written materials located at their respective offices; BCE in Montreal and many of the Banks in Ontario, but certainly outside Quebec. However, given the circumstances of this case, the financial obligation of the various parties and the amount at issue, I do not see this as a meaningful factor.

3. The place where the contract was negotiated and executed: This of course is relevant to a straight contract case. Only part of this case contract related. To the extent that the Loan Agreement/Papers are at issue vis-à-vis BCE, then it appears that these were executed in Quebec, but while there were discussions which BCE asserts took the form of negotiations in Quebec, the Banks have made the point that the representatives who attended those material meetings for the various Banks were not those who had authority to negotiate but rather they acted as communication conduits for those who had decision authority back at "head office" outside Quebec and that BCE was aware of that circumstance. Causes of action involving a transmission of information (such as misrepresentation) occur in the jurisdiction where the information was received and acted (or relied) upon. For the great majority of Banks, this happened outside Quebec and in the majority of cases, in Ontario. See *Canadian Commercial Bank v. Carpenter* (1989), 62 D.L.R. (4th) 734 (B.C. C.A.) at p. 741. The law governing a tort is the *lex loci delicti*: Where the transmission of information gives rise to reasonable expectations which would form the base for an oppression remedy claim, then the location of the cause of action would be governed by similar principles. See *Tolofsun, supra*. The Banks also assert that the BCE Commitment was a direct contract between BCE and the Banks. The Banks say that the communications giving rise to the BCE Commitment and its consideration and acceptance all have strong connections to Ontario. The proper law which governs that contract involves a multi-faceted test to determine the jurisdiction to which the contract is most connected: see J.G. McLeod, the *Conflict of Laws* (1983) at pp. 482-5. The Banks point out that BCE crystallized their causes of action by its announcement of non-support given April 24, 2002 in Toronto and secondly, that the location of the primary offices of the Banks in this respect were in Ontario. See the discussion above in the jurisdiction issue as to the undecided aspect of whether, vis-à-vis the *alter ego* question, s.12.10 or s.10.1 is a governing clause. It is to be acknowledged that BCE and Teleglobe have their head office in Quebec and that they negotiated and executed any documentation with respect to papering the credit facility in Montreal, and further that BCE's major direct physical presence is in Quebec. While it appears that the Banks each have some physical presence in Quebec, it further appears that for most of them, their major physical presence is outside Quebec and for their Canadian presence, the major physical presence would be in Ontario for the bulk of them. As discussed in *VitaPharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.*, [2002] O.J. No. 298 (Ont. S.C.J.) at paras. 109-110, the location of witnesses and evidence should not be of major import given modern technology and means of transportation (it seems to me implicit that Cumming J. was cognizant in making these observations that, as was the case in the *Cadillac Fairview Inc., Re*, [1995] O.J. No. 138 (Ont. Gen. Div. [Commercial List]), due consideration ought to be given to the fact that multiple millions are at stake and the witnesses would be veteran travellers in their ordinary course of life). BCE retained Ontario counsel to forthwith respond to the April 18, 2002 letter from the Bank of Montreal; such Ontario counsel was qualified to practice in Ontario (not in Quebec).

4. The existence of proceedings pending between the parties in another jurisdiction: There does not appear to be any other litigation among the parties, at least any peripherally touching upon the issue of the unpaid and default loans of the Banks in which BCE has any role, except for the Teleglobe CCAA proceedings which were initiated in the Toronto Commercial List as opposed to any other location in Canada and specifically such filing was not made by Teleglobe in Quebec. See the above discussion in the jurisdiction issue as to BCE being the parent company of Teleglobe, but as to this must be balanced the aspect of the filing apparently being made at the direction of the independent (of BCE) directors of Teleglobe. However, BCE was in essence in the position to veto

that selection of form if it had any concern since it was providing what appeared to be indispensable DIP financing to Teleglobe, which financing would not likely to have been readily available to Teleglobe under any foreseeable circumstances.

5. The location of the assets of BCE as defendant: I do not see this as a material consideration. While it would seem that the great bulk of BCE's assets would likely be the shares of its operating subsidiaries, not all of these subsidiaries are Quebec or federal companies with headquarters in Quebec - see for example CTV. If BCE were to be found liable in this action, it would not seem to me that there would be any question of BCE honouring a final judgment; execution against assets in this jurisdiction of Ontario would not appear to me to be in the consideration of any party.

6. The applicable law: See the above discussion in the Jurisdiction issue as to the other causes of action aside from the *alter ego* questions, and especially misrepresentation and oppression.

7. The advantages conferred upon the Banks as plaintiffs by their choice of forum. The Banks point to the existence of the Toronto Commercial List in that: "This matter would be heard by a judge well-versed in the intricacies of commercial law, as well as sophisticated and expedition case management". See *Hyundai Auto Canada v. Bordeleau*, [2002] O.J. No. 3195 (Ont. Master); *Vitapharm Canada, supra.* While one should not look a gift horse in the mouth and while this may be an advantage, if true, for both sides to this litigation, I would point out that the Toronto Commercial List has no monopoly in this regard. Moreover, I would observe, where parties have so much at stake, it is possibly a quirk of human nature and skilled lawyering, that litigation tends not only to be hard fought, but long fought as every possible tactical advantage is sought on both sides, even where the chances of success is obviously a long shot.

8. The interest of justice:

9. The interest of the parties:

10. The need to have the judgment recognized in another jurisdiction:

I have lumped these last three factors together as it seems to me that whether this case is based in Ontario or in Quebec, these concerns are in essence neutral.

23 With respect to any further consideration as to the oppressive claim over and above the foregoing considerations, I note that BCE is under the control and guidance of its board of directors and that Ontario has the single most number of directors on the board. As discussed above, the location of shareholders in this concern is not at issue, but rather the location of the creditors (the Banks) who claim oppression. Not only does BCE have a direct physical presence in Ontario as discussed in the Jurisdiction issue, but through subsidiaries it has a cross-Canada series of business with a very heavily weighted indirect Ontario presence.

24 Further, I would note that even where there is a strong exclusive jurisdiction clause in a contract, that clause is not determinative. See *Ash v. Corp. of Lloyd's* (1991), 6 O.R. (3d) 235 (Ont. Gen. Div.) at pp. 244-5, affirmed (1992), 9 O.R. (3d) 755 (Ont. C.A.), leave to appeal refused [[1992] 3 S.C.R. v (S.C.C.)].

25 In considering this action overall, I do not see that it is confined to the issue of the Loan Agreements/Papers and whether BCE is an *alter ego* in that respect of Teleglobe. I noted there are these other material causes of action, each of which can be said to be neither frivolous or minor. Rather judgment as to any of these three causes

of action would be essentially remedied by judgment to the same amount as claimed under the *alter ego* cause of action. This is not a case which is easily distilled into one jurisdiction as was the case in *Incorporated Broadcasters supra* where Rosenberg J.A. for the Court stated at para. 77:

> The factors concerning the location of the dispute and the jurisdiction in which the factual matters arose, which both favour Manitoba, are considerably more important than factors such as location of the parties. After all the counting of contracts and connections is done, this case is about the dissatisfaction of minority shareholders with the way they were and are treated by two companies based in Manitoba.

Rather this case is more akin to that in *Spar Aerospace, supra*; see LeBel J.'s analysis of the factors in that case at pp. 82-3 (paras. 72-74). He went on to note at p. 83:

> 75. The appellants Motient and Viacom nonetheless contend that the courts should not apply reasoning to the effect that the applicant must point to the existence of the one "most appropriate forum", since this makes it nearly impossible to displace the forum asserted by the plaintiff. I cannot agree with the premise of the appellants' argument. In *Amchen, supra*, at pp. 911-12, Sopinka J. recognized that in international commerce, frequently there is no single forum that is clearly the most convenient or appropriate for the trial of the action, but rather several which are equally suitable alternatives. He appeared at p. 931 to endorse the idea that in such cases there is a presumption in favour of the forum selected by the plaintiff, which wins by default if there is no clearly preferable alternative.

26 I would conclude that when all the factors are taken into consideration and weighted, it is not clear that Quebec is the more appropriate forum. Indeed, there are strong factors which would in a weighing (in my view when one looks at their essence) result in the scales being slightly tipped in favour of Ontario. Even if I were wrong in this last conclusion, BCE has not demonstrated that Quebec is clearly the more appropriate forum. Therefore, the Banks' choice of forum ought not to be displaced. I refer to the salutory words of LeBel J. in *Spar Aerospace* at p. 85 where he made a special point about avoiding uncertainty and inefficiency:

> 81. I emphasize the exceptional quality of the *forum non conveniens* doctrine. As the authors J. Talpis and S.L. Kath point out in their article "The Exceptional as Commonplace in Quebec *Forum Non Conveniens* Law: *Cambior*, a Case in Point" (2000), 34 R.J.T. 761, by ignoring the "exceptionality" requirement, courts may unwittingly create uncertainty and inefficiency in cases involving private international law issues, resulting in greater costs for the parties. In my opinion, such uncertainty could seriously compromise the principles of comity, order and fairness, the very principles the rules of private international law are set out to promote.

27 BCE's motion to dismiss or stay this Ontario action of the Banks is dismissed. The parties were agreed as to the amount of costs in this two motion hearing at $50,000. However, I already awarded BCE $15,000 as to the conflict motion, I would award the Banks $35,000 costs in this action.

Motion dismissed.

FN* Leave to appeal refused 2003 CarswellOnt 2749, 44 C.B.R. (4th) 25 (Ont. Div. Ct.).

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

IN THE MATTER OF THE A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC. et al.

Court File No. CV-09-8247-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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#1004780

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: W.C. WOOD CORPORATION, LTD., *et al.*, Foreign Applicants in Foreign Proceedings.	Chapter 15 Case No. 09-11893 (KG) Jointly Administered **Re: Docket No. 6**

ORDER FOR PROVISIONAL RELIEF

Upon the motion of BDO Dunwoody Limited, the court-appointed monitor (the "**Monitor**") and authorized foreign representative of W.C. Wood Holdings, Inc, W.C. Wood Corporation, Inc., and W.C. Wood Corporation, Ltd. (together, the "**Applicants**" or "**W.C. Wood**"), in proceedings (the "**Canadian Proceedings**") under Canada's Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), pending before the Ontario Superior Court of Justice (Commercial List) (the "**Ontario Court**") styled *Monitor's Motion for (I) Ex Parte Emergency Relief and (II) Provisional Relief* (the "**Motion**"); and the Court having entered the Temporary Restraining Order And Interim Order Authorizing DIP Financing (the "**Emergency Order**") on June 1, 2009; the Court having further considered and reviewed the Verified Petitions filed by the Monitor under chapter 15 for each of the Applicants and the Transmittal Affidavit of Russell C. Silberglied sworn to May 29, 2009 and the exhibits thereto, the Memorandum of Law and the Motion (collectively the "**Supporting Papers**"), and the Initial Orders of the Ontario Court dated May 19, 2009, as extended by order dated May 25, 2009 (collectively, the "**Initial Orders**"); and the Court having considered the objections to the Motion, if any; and good cause having been demonstrated for granting the provisional relief sought in the Motion;

Based on the foregoing, this Court finds and concludes as follows:

Docket No. 26
Filed: 6-10-09

(A) This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P). Venue is proper in this District pursuant to 28 U.S.C. § 1410 (1) and (3).

(B) Notice of the hearing on the Motion was sufficient under the circumstances and no further notice of, or hearing on, the Motion is necessary or required.

(C) The relief sought by the Monitor is authorized under sections 1519(a)(1) and (3), and 1521(a)(7).

(D) The entry of this Order is in the best interest of the Applicants, their estates, and the creditors and other parties in interest.

(E) The Monitor has demonstrated that the relief sought is justified pursuant to section 1519(e) because:

(i) the Monitor has demonstrated a reasonable probability that the Canadian Proceeding will be recognized as a foreign main proceeding;

(ii) the Monitor has demonstrated that the Applicants will be irreparably harmed in the absence of the relief requested in that:

The Stay

1. The Monitor has demonstrated that unless the temporary restraining order is extended, there is a material risk that one or more parties in interest will take action against the Applicants or their assets, thereby interfering with the jurisdictional mandate of this Court under chapter 15 of the Bankruptcy Code and interfering with and causing harm to the Monitor's efforts to administer the Applicants' estates pursuant to the Canadian Proceeding. As a result, the Monitor and the Applicants will suffer immediate and irreparable harm for which they will have no adequate remedy at law;

__The Financing__

2. The Monitor has demonstrated that entry into the DIP financing facility and the incurrence of post-petition indebtedness authorized by the Initial Orders is necessary to prevent irreparable harm to the Applicants because without such financing, the Applicants will be unable to continue operations which will significantly impair the value of their assets; and

3. The Monitor has demonstrated that the terms of the financing are fair and reasonable and were entered into in good faith by CIT Business Credit Canada Inc. ("CIT"), as defined in the Motion, and CIT would not extend financing without the protection provided by section 364(e) of the Bankruptcy Code as made applicable by section 1519 of the Bankruptcy Code.

(iii) The Monitor has demonstrated that the relief will not cause or create an undue hardship to a party in interest that is not outweighed by the benefit to the Applicants.

(iv) The Monitor has demonstrated that entry of this Order is in the public interest because it will further the public policy of the United States as articulated in, *inter alia*, section 1501 of the Bankruptcy Code.

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. The Provisional Relief is granted.

2. The Initial Orders are hereby given full force and effect in the United States.

3. Nothing herein shall enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding.

4. CIT is hereby granted a first priority lien on all the Applicants' U.S. assets, subject to the terms and conditions set forth in the Initial Orders.

5. Pursuant to sections 1519(a)(3), 1521(a)(7), 364(e) and 105(a) of the Bankruptcy Code, the validity of the indebtedness, and the priority of the liens authorized by the Initial Orders and made enforceable in the United States by this Order, shall not be affected by any reversal or modification of this Order on appeal or the entry of an order denying recognition to the Canadian Proceeding pursuant to section 1517 of the Bankruptcy Code.

6. The security provisions of Rule 65(c) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7065 of the Federal Rules of Bankruptcy Procedure, are hereby waived.

7. Notice of this Order shall be served in the form attached hereto as **Exhibit 1** on or before JUNE 17, 2009, in accordance with this Court's *Order Specifying Form and Manner of Service and Related Relief* dated June 1, 2009 (Docket No. 17), which service shall constitute adequate and sufficient service and notice.

8. This Court shall retain jurisdiction with respect to the enforcement, amendment or modification of this Order, any request for additional relief or any adversary proceeding brought in and through these chapter 15 cases, and any request by an entity for relief from the provisions of this Order, for cause shown, that is properly commenced and within the jurisdiction of this Court.

Dated: June 10, 2009
Wilmington, Delaware

Kevin Gross

THE HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE

RLF1-3404114-1

Exhibit 1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 15
W.C. WOOD CORPORATION, LTD., *et al.*,	Case No. 09-11893 (KG)
Foreign Applicants in Foreign Proceedings.	Jointly Administered

NOTICE OF ORDER GRANTING PROVISIONAL RELIEF

PLEASE TAKE NOTICE that on [____] [__], 2009, the Bankruptcy Court entered an *Order Granting Provisional Relief* (the "**Relief Order**") in connection with the above-captioned chapter 15 cases (the "**Chapter 15 Cases**"). The Relief Order, among other things, enforces the Initial Order[s] entered by the Ontario Superior Court of Justice (Commercial List) (the "**Ontario Court**") in foreign proceedings (the "**Canadian Proceedings**") involving the Applicants and pending under Canada's *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), in which BDO Dunwoody Limited is the court-appointed monitor (the "**Monitor**") and authorized foreign representative of W.C. Wood Holdings, Inc., W.C. Wood Corporation, Inc., and W.C. Wood Corporation, Ltd. (together, the "**Applicants**" or "**W.C. Wood**") in the United States and thereby: (A) authorizing W.C. Wood to borrow the post-petition DIP financing authorized by the Initial Orders, subject to the Monitor's supervision and control; and (B) extending the stay to the full extent set forth in the Initial Orders and thereby enjoin, beginning on the date the Court enters such Provisional Order and continuing for so long as the Canadian stay remains in effect, any proceeding or enforcement process in any court against or in respect of the Monitor, W.C. Wood, their businesses and property and their former, current and future directors and officers.

Copies of the Relief Order and other filings in these Chapter 15 Cases are available: (1) on the Bankruptcy Court's Electronic Case Filing System, which can be accessed from the Bankruptcy Court's website at https://ecf.deb.uscourts.gov (a PACER login and a password are required to retrieve a document) and/or (2) upon written request to the Monitor's counsel (by facsimile or email) addressed to:

RICHARDS, LAYTON & FINGER
Attention: Russell C. Silberglied
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
Fax: (302) 651-7700
Email: Silberglied@rlf.com

-AND-

AIRD & BERLIS LLP
Barristers & Solicitors
Attention: Robb English
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181 Bay Street
Toronto ON M5J 2T9
Fax: (416) 863-1515
Email: renglish@airdberlis.com

Dated: June __, 2009
Wilmington, Delaware

Russell C. Silberglied (No. 3462)
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 15
W.C. WOOD CORPORATION, LTD., *et al.*,	Case No. 09-11893 (KG)
Foreign Applicants in Foreign Proceedings.	Jointly Administered Re: D.I. No. 61

ORDER GRANTING RECOGNITION OF ORDER OF ONTARIO
<u>COURT OF JUSTICE DATED NOVEMBER 16, 2009</u>

Upon consideration of the *Monitor's Motion for Recognition of Prospective Order of Ontario Court of Justice Either (i) Approving Sale of W.C. Wood's Assets as a Going Concern or (ii) Appointing Monitor as Receiver to Liquidate W.C. Wood's Estate* (the "**Motion**");[1] and it appearing that (i) the Court has jurisdiction over the matter pursuant to 28 U.S.C. §§ 157 and 1334 and section 1501 of the Bankruptcy Code; (ii) this proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(N), (O), and (P); (iii) notice of this Motion and the opportunity for a hearing on this Motion was appropriate and no other further notice need be given; (iv) the relief requested is appropriate and necessary to effectuate the purposes of Chapter 15 and to protect the assets of W.C. Wood and the interests of their creditors; and (v) after due deliberation and sufficient cause appearing therefore,

IT IS HEREBY ORDERED AS FOLLOWS:

1. The "Receivership Order" entered by the Ontario Court on November 16, 2009, attached hereto as <u>Exhibit 1</u>, is hereby granted recognition and is given full force and effect in the United States.

[1] All capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

2. The Court recognizes BDO Dunwoody, Limited as the Receiver (the "Receiver") for W.C. Wood Corporation, Ltd., W.C. Wood Corporation Inc. and W.C. Wood Holdings Inc. (collectively, "WC Wood") and, in that capacity, as the new foreign representative of WC Wood.

3. To the extent that the Receiver sells, conveys, transfers, leases or assigns any property located with the United States pursuant to paragraph 4 or 5(k)(i) of the Receivership Order, no approval or recognition of this Court need be sought or obtained.

4. The liquidation procedures outlined in paragraphs 3, 4 and 6 of the Receivership Order are hereby recognized within the United States.

Dated: November 17, 2009
Wilmington, Delaware

Kevin Gross

THE HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE

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