

**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
CLOVER LEAF HOLDINGS COMPANY, CONNORS BROS. CLOVER LEAF
SEAFOODS COMPANY, K.C.R. FISHERIES LTD., 6162410 CANADA LIMITED,
CONNORS BROS. HOLDING COMPANY AND CONNOR BROS. SEAFOODS
COMPANY**

Applicants

APPLICANTS' BOOK OF AUTHORITIES
(Motion returnable December 20, 2019)

December 16, 2019

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS
LIMITED, NORTEL NETWORKS GLOBAL CORPORATION,
NORTEL NETWORKS INTERNATIONAL CORPORATION AND
NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

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

Morawetz J.

Heard: June 29, 2009
Written reasons: July 23, 2009
Docket: 09-CL-7950

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Bankruptcy and insolvency

XIV Administration of estate

XIV.6 Sale of assets

XIV.6.f Jurisdiction of court to approve sale

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.1 General principles

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Headnote

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

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

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Statutes considered:

Bankruptcy Code, 11 U.S.C.

s. 363 — referred to

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

Generally — referred to

s. 11 — referred to

s. 11(4) — considered

Morawetz J.:

Introduction

1 On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

2 I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

3 An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

4 The following are my reasons for granting these orders.

5 The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

6 The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

7 The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is \$650 million.

Background

8 The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

9 At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

10 The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

11 In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

12 On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

13 In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

- (a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and

- (b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

14 Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

- (a) the Business operates in a highly competitive environment;

- (b) full value cannot be realized by continuing to operate the Business through a restructuring; and

- (c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

15 Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

16 In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

17 The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

18 The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

19 The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

20 The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

21 Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

22 Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

23 The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

Issues and Discussion

24 The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

25 The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

26 Counsel to the Applicants submitted a detailed factum which covered both issues.

27 Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

28 The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

29 The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] S.C.C.A. No. 337 (S.C.C.). ("ATB Financial").

30 The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and

(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 43; *PSINET Ltd., Re* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J. [Commercial List]) at para. 5, *ATB Financial, supra*, at paras. 43-52.

31 However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

32 In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Residential Warranty Co. of Canada Inc., Re* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

33 Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

34 Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

35 Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re, supra, Re PSINet, supra, Consumers Packaging Inc., Re* [2001 CarswellOnt 3482 (Ont. C.A.)], *supra, Stelco Inc., Re* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) at para. 1, *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), *Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co.* (2008), 45 C.B.R. (5th) 87 (Ont. S.C.J.) and *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3^d) 24 (Ont. Gen. Div. [Commercial List]).

36 In *Re Consumers Packaging, supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes 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.

...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 of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

37 Similarly, in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re, supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re, supra*, at paras. 43, 45.

38 Similarly, in *PSINet Limited, supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

[If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited, supra*, at para. 3.

39 In *Re Stelco Inc., supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring - and if a restructuring of the "old company" is not feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

40 I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining

factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

41 Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Boutiques San Francisco Inc., Re* (2004), 7 C.B.R. (5th) 189 (C.S. Que.), *Winnipeg Motor Express Inc., Re* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Calpine Canada Energy Ltd., Re* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.) at para. 75.

42 Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale...be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C. C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

43 In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

44 I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

45 The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership*, 2009 BCCA 319 (B.C. C.A.).

46 At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting

of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"...Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in *Meridian Developments Inc. v. Toronto Dominion Bank* (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal - thus it could not be said the purposes of the statute would be engaged...

26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary...

47 It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

48 I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

49 I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

- (a) is a sale transaction warranted at this time?
- (b) will the sale benefit the whole "economic community"?
- (c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
- (d) is there a better viable alternative?

I accept this submission.

50 It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

51 Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

- (a) Nortel has been working diligently for many months on a plan to reorganize its business;
- (b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;
- (c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;
- (d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;
- (e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;
- (f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and
- (g) the value of the Business is likely to decline over time.

52 The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

53 Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 16.

Disposition

54 The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

55 Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

56 I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

57 Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

58 In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

59 Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

Motion granted.

TAB 2

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.

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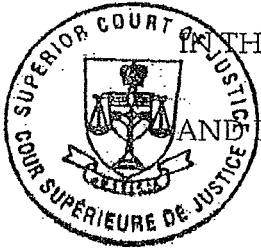
WEDNESDAY, THE 10TH

JUSTICE DUNPHY

)

DAY OF OCTOBER, 2018

)



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 ARALEZ PHARMACEUTICALS INC. AND
ARALEZ PHARMACEUTICALS CANADA INC.

(Applicants)

ORDER
(Re Bidding Procedures Approval)

THIS MOTION, made by Aralez Pharmaceuticals Inc. ("API") and Aralez Pharmaceuticals Canada Inc. (together the "Applicants"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") for an order approving the bidding procedures (the "Bidding Procedures"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Adrian Adams sworn October 1, 2018 and the Exhibits attached thereto, the affidavit of Kathryn Esaw sworn October 10, 2018 and Exhibits attached thereto, and the Second Report of Richter Advisory Group Inc., in its capacity as the Court-appointed Monitor (the "Monitor") and on hearing the submissions of counsel for the Applicants, the Monitor, the DIP Lender, Nuvo

Pharmaceuticals Inc., the Official Committee of the Unsecured Creditors and counsel for those other parties appearing as indicated by the counsel sheet, no one else appearing although properly served, as appears from the affidavits of Nicholas Avis, sworn October 2, October 5 and October 10, 2018 and filed:

DEFINITIONS

1. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined shall have the meanings ascribed to them in the bidding procedures attached as Schedule "A" hereto (the "**Bidding Procedures**").

SERVICE

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

BIDDING PROCEDURES

3. **THIS COURT ORDERS** that the Bidding Procedures attached as Schedule "A" hereto are hereby approved.

4. **THIS COURT ORDERS** that the Applicants and their advisors, and the Monitor and its advisors, are authorized and directed to commence the Bidding Procedures in accordance with its terms. The Applicants and the Monitor are hereby authorized and directed to perform their respective obligations under the Bidding Procedures and to do all things reasonably necessary in relation to such obligations, subject to the terms of the Bidding Procedures.

5. **THIS COURT ORDERS** that each of the Applicants and the Monitor and their respective affiliates, partners, directors, employees, advisors, agents and controlling

persons shall have no liability with respect to any and all losses, claims, damages or liability of any nature or kind to any person in connection with or as a result of the Bidding Procedures, except to the extent of such losses, claims, damages or liabilities resulting from the gross negligence or willful misconduct of the Applicants or the Monitor, as applicable, in performing their obligations under the Bidding Procedures, as determined by this Court. For the avoidance of doubt, nothing in this paragraph 5 shall limit any liability of the Applicants pursuant to or in connection with the Canadian Share Purchase Agreement.

STALKING HORSE AGREEMENT AND BID PROTECTIONS

6. **THIS COURT ORDERS** that the Applicants are hereby authorized to execute the Canadian Share Purchase Agreement *nunc pro tunc*, provided that nothing herein approves the sale and the vesting of the assets to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement and that the approval of the sale and vesting of such assets shall be considered by this Court on a subsequent motion made to this Court following completion of the sale process pursuant to the terms of the Bidding Procedures, and further that nothing in the Canadian Share Purchase Agreement or any other sale agreement presented to this Court for approval shall be determinative of the issue of allocation of sale proceeds or prejudice the rights of parties in interest related thereto.

7. **THIS COURT ORDERS** that the payment and priority of the Canadian Termination Fee and the Canadian Expense Reimbursement (together, the "**Bid Protections**") on the terms contemplated by the Canadian Share Purchase Agreement are hereby approved.

8. **THIS COURT ORDERS** that the Canadian Purchaser shall be and is hereby entitled to a charge (the "**Bid Protections Charge**") on the Property (as that term is defined in the Initial Order dated August 10, 2018 (as amended and restated, the "**Initial Order**"), made in the within proceedings) of the Applicants as security for payment of the Bid Protections. The Bid Protections Charge shall have the benefit of paragraphs 50-55 of

the Initial Order and shall rank in priority to all other Encumbrances and Charges (as those terms are defined in the Initial Order) other than the Administration Charge and the DIP Lenders' Charge, each as defined in the Initial Order.

APPROVAL OF GENUS AMENDING AGREEMENT

9. **THIS COURT ORDERS** that the Amendment to Purchase Agreement among API, Pozen, Inc. and Genus Lifesciences, Inc. ("**Genus**") dated September 17, 2018 (the "**Genus Amendment**") is hereby approved nunc pro tunc.
10. **THIS COURT ORDERS** that the transactions as contemplated by the Genus Amendment are hereby approved, and the execution of the Genus Amendment is hereby authorized and approved with such amendments, additions and corrections as may be negotiated between the parties thereto, with the consent of the Monitor. The Applicants are authorized to perform the Genus Amendment, and the original Purchase Agreement dated July 10, 2018 (the "**Genus APA**"), and perform all obligations of the Applicants set forth thereunder. The Applicants shall not disclaim, resiliate or reject the Genus Amendment, or the Genus APA, without the written approval of Genus.
11. **THIS COURT ORDERS** that any bidder submitting a bid for the Vimovo Assets, including any patent related to a Licensed Product (as such term is defined in the Genus Amendment), shall include a provision in its bid pursuant to which the bidder affirmatively assumes the Assumed Obligations (as such term is defined in the Genus Amendment).

PIPEDA

12. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Applicants and the Monitor may disclose personal information of identifiable individuals to prospective purchasers or

bidders for the Purchased Assets and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete a sale of the Purchased Assets (the "Sale"). Each prospective purchaser and or bidder (and their respective advisors) to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information solely to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Applicants, or in the alternative destroy all such information. The purchaser of the Purchased Assets shall be entitled to continue to use the personal information provided to it, and related to the Purchased Assets, in a manner that is in all material respects identical to the prior use of such information by the Applicants, and shall return all other personal information to the Applicants, or ensure that all other personal information is destroyed.

GENERAL

13. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States or any other jurisdiction to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order, including the United States Bankruptcy Court for the Southern District of New York. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

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LE / DANS LE REGISTRE NO:

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SCHEDULE "A"

BID PROCEDURES

Set forth below are the bid procedures (the "**Bid Procedures**") to be used by Aralez Pharmaceuticals Trading DAC (the "**Toprol Seller**"), POZEN Inc. and Aralez Pharmaceuticals Trading DAC (collectively, the "**Vimovo Seller**" and together with the Toprol Seller, the "**U.S. Sellers**"), and Aralez Pharmaceuticals Inc. (the "**Canadian Seller**" and together with the Toprol Seller and Vimovo Seller, the "**Sellers**" and each a "**Seller**") for the proposed sales of certain assets (collectively, the "**Purchased Assets**") and assumption of certain liabilities, in the Toprol Seller's and Vimovo Seller's jointly administered chapter 11 cases pending in the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**"), lead case number 18-12425 (MG), and the Canadian Seller's restructuring proceedings pending in the Ontario Superior Court of Justice (Commercial List) (the "**Canadian Court**"), and collectively with the Bankruptcy Court, the "**Courts**") commenced under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended ("**CCAA**"), Court File No. CV-18-603054-00CL, pursuant to those certain:

- (I) Asset Purchase Agreement, dated September 18, 2018 (together with the schedules and related documents thereto, and as may be amended, supplemented or otherwise modified from time to time, the "**Toprol APA**"), regarding those assets defined in Section 2.1 of the Toprol APA (the "**Toprol Assets**") by and among the Toprol Seller and Toprol Acquisition LLC (the "**Toprol Purchaser**");
- (II) Asset Purchase Agreement, dated September 18, 2018 (together with the schedules and related documents thereto, and as may be amended, supplemented or otherwise modified from time to time, the "**Vimovo APA**") regarding those assets defined in Section 2.1 of the Vimovo APA (the "**Vimovo Assets**") by and among the Vimovo Seller and Nuvo Pharmaceuticals (Ireland) Limited (the "**Vimovo Purchaser**"); and
- (III) Share Purchase Agreement, dated September 18, 2018 (together with the schedules and related documents thereto, and as may be amended, supplemented or otherwise modified from time to time, the "**Canadian Share Purchase Agreement**") regarding the shares (the "**Canadian Assets**") of Aralez Pharmaceuticals Canada Inc. ("**AP Canada**") by and among the Canadian Seller and Nuvo Pharmaceuticals Inc. (the "**Canadian Purchaser**"),

The Toprol APA, the Vimovo APA and the Canadian Share Purchase Agreement are collectively referred to herein as the "**Stalking Horse Agreements**" and each as a "**Stalking Horse Agreement**", and the Toprol Purchaser, the Vimovo Purchaser and the Canadian Purchaser are collectively referred to herein as the "**Stalking Horse Purchasers**" and each as a "**Stalking Horse Purchaser**").

The Toprol Purchaser has submitted a Qualified Bid (as defined below) for the Toprol Assets consisting of a credit bid in an aggregate amount equal to \$130,000,000 (the "Toprol Stalking Horse Bid") with such credit bid allocated as follows: (i) first, a credit in the amount of the obligations outstanding under that certain Senior Secured Super-Priority Debtor-In-Possession Credit Agreement, dated as of August 10, 2018 (as may be amended, supplemented or otherwise modified from time to time, the "DIP Loan Agreement"), by and among the Debtors, Deerfield Management Company, L.P., as administrative agent (in such capacity, the "DIP Agent"), Deerfield Private Design Fund III, L.P., as lender, and Deerfield Partners, L.P., as lender (in such capacity, the "DIP Lenders"), as of the Closing Date (the "DIP Credit") and (ii) second, for any amount remaining after crediting the DIP Credit, a dollar-for-dollar credit on account of the Pre-Petition First Lien Obligations in the amount of the remainder.

The Vimovo Purchaser has submitted a Qualified Bid (as defined below) for the Vimovo Assets consisting of an all cash purchase price of \$47,500,000 (the "Vimovo Stalking Horse Bid").

The Canadian Purchaser has submitted a Qualified Bid (as defined below) for the Canadian Assets consisting of an all cash purchase price of \$62,500,000 (the "Canadian Stalking Horse Bid", collectively with the Toprol Stalking Horse Bid and the Vimovo Stalking Horse Bid, the "Stalking Horse Bids" and each a "Stalking Horse Bid").

On [____], 2018, the Courts entered orders, which, among other things, authorized each of the Sellers to determine the highest or otherwise best offers for the Purchased Assets through the Bid Procedures (the "Bidding Procedures Orders").

The sale transactions pursuant to the Stalking Horse Agreements are subject to competitive bidding as set forth herein.

A. ASSETS TO BE SOLD

The Sellers seek to complete sales of the Purchased Assets and the assumption of the Assumed Liabilities described in Sections 2.1 and 2.2 of the Toprol APA and Sections 2.1 and 2.2 of the Vimovo APA and the sale of the Purchased Shares described in Section 2.1 of the Canadian Share Purchase Agreement.

All of each Seller's respective right, title and interest in and to the Toprol Assets, the Vimovo Assets and the Canadian Assets to be acquired shall be, to the fullest extent permitted by law, sold free and clear of all liens, claims, interests, charges, restrictions and encumbrances of any kind or nature thereon (collectively, the "Liens"), except for permitted encumbrances and assumed liabilities as may be specified in the applicable Stalking Horse Agreement or such other approved purchase agreement of the Successful

Bidder(s) (defined below), and with any such Liens to attach solely to the net proceeds of the sale of each applicable Purchased Asset.¹

A party may participate in the Bidding Process by submitting a Qualified Bid (as defined below) for any or all of (a) the Toprol Assets, (b) the Vimovo Assets, (c) the Canadian Assets, and/or (d) any asset of Aralez Canada that would be transferred to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement.

B. THE BID PROCEDURES

To ensure that each Seller receives the maximum value for the applicable Purchased Asset, the Stalking Horse Agreements are subject to higher or otherwise better offers at the Auction in accordance with these Bid Procedures, and, as such, the Toprol APA will serve as the “stalking horse” bid for the Toprol Assets, the Vimovo APA will serve as the “stalking horse” bid for the Vimovo Assets and the Canadian Share Purchase Agreement will serve as the “stalking horse” bid for the Canadian Assets.

1. Key Dates

The key dates for the process contemplated herein are as follows:²

Sale Timeline	
Bid Deadline	November 26, 2018 at 5:00 p.m. prevailing ET
Deadline to Notify Qualified Bidders	November 28, 2018 at 5:00 p.m. prevailing ET
Auction (if required)	November 29, 2018 at 1:00 p.m. prevailing ET
Notice of Successful Bidders	December 3, 2018 at 5:00 p.m. prevailing ET
Sale Hearing	December 4, 2018 at 11:00 a.m. prevailing ET (Bankruptcy Court) The earliest date available after December 4, 2018 (Canadian Court)

¹ Any order submitted to the Bankruptcy Court for purposes of approving either Stalking Horse Agreement or other approved purchase agreement of the Successful Bidder(s) (as defined below) shall likewise provide that any free and clear sale shall be “to the fullest extent permitted by law”.

² These dates are subject to extension or adjournment as provided for herein and in consultation with the Consultation Parties (as defined below).

2. Confidentiality

In order to participate in the Bidding Process, each person other than a Stalking Horse Purchaser who wishes to participate in the Bidding Process (a "**Potential Bidder**") must provide an executed confidentiality agreement (to be delivered prior to the distribution of any confidential information by any Seller to any Potential Bidder) in form and substance satisfactory to the applicable Seller, on terms substantially similar to those contained in the confidentiality agreement signed by the applicable Stalking Horse Purchaser.

3. Due Diligence

The Sellers will afford any Potential Bidder that signs an executed confidentiality agreement in accordance with paragraph 2 above such due diligence access or additional information as the Sellers, in consultation with their advisors, deem appropriate, in their discretion and within their reasonable business judgment. The Sellers will use good faith efforts to provide to the Stalking Horse Purchasers access to written information made available to any Qualified Bidder, as applicable to the respective assets, business and/or shares being purchased, if not previously made available to the Stalking Horse Purchaser(s).

The due diligence period shall end on the Bid Deadline, and none of the Sellers nor any of their representatives shall be obligated to furnish any due diligence information to any Qualified Bidder (as defined below) (other than a Successful Bidder (as defined below)) after the Bid Deadline. For the avoidance of doubt, none of the Sellers nor any of their representatives shall be obligated to furnish any due diligence information to any person other than a Qualified Bidder as provided above.

4. Provisions Governing Qualified Bids

A bid submitted will be considered a "**Qualified Bid**" only if the bid complies with all of the following, in which case the party submitting the bid shall be a "**Qualified Bidder**":

- a. it discloses whether the bid is for some or all of each of the Toprol Assets, the Vimovo Assets, the Canadian Assets, and/or any asset of Aralez Canada that would be transferred to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement;
- b. it fully discloses the identity of each entity that will be bidding for or purchasing some or all of each of the Toprol Assets, the Vimovo Assets, the Canadian Assets, and/or any asset of Aralez Canada that would be transferred to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement, including any equity holders in the case of a Potential Bidder which is an entity specially formed for the purpose of effectuating the contemplated transaction, or otherwise participating in connection with such bid (including any co-bidder or

team bidder), and the complete terms of any such participation, including any agreements, arrangements or understandings concerning a collaborative or joint bid or any other combination concerning the proposed bid. A bid must also fully disclose any connections or agreements with the Sellers, the Stalking Horse Purchasers or any other known bidders, Potential Bidder or Qualified Bidder, and/or any officer, director or equity security holder of the Sellers;

- c. it states that the applicable Qualified Bidder offers to purchase, and has a bona fide interest in purchasing, in cash, some or all of each of the Toprol Assets, the Vimovo Assets, the Canadian Assets, and/or any asset of Aralez Canada that would be transferred to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement, upon terms and conditions that the applicable Seller(s) reasonably determines, after consultation with the Consultation Parties (defined below), is at least as favorable to the applicable Seller(s) as those set forth in the applicable Stalking Horse Agreement(s) (or pursuant to an alternative structure that the Seller(s) reasonably determines, after consultation with the Consultation Parties (defined below), is no less favorable to the Seller(s) than the terms and conditions of the applicable Stalking Horse Agreement(s)). For the avoidance of doubt, any Qualified Bid must, either on its own or when considered together with other Qualified Bid(s), provide value in excess of the applicable Stalking Horse Agreement(s) plus the applicable Termination Fee, Expense Reimbursement (each as defined below) and minimum overbid requirements detailed below in Sections 4(k)-(m);
- d. it provides a description of any anticipated regulatory or governmental approvals necessary to consummate the bid;
- e. it includes a commitment to close the transactions within the timeframe contemplated by the applicable Stalking Horse Agreement;
- f. it includes a signed writing that the Qualified Bidder's offer is irrevocable unless and until the applicable Seller(s) accept a higher or otherwise better bid and such Qualified Bidder is not selected as a Back-Up Bidder (as defined below); provided that if such Qualified Bidder is selected as the Successful Bidder (as defined below), its offer shall remain irrevocable until the earlier of one (1) month after the designation of the Successful Bid (as defined below) at the Auction or the closing of the Sale(s) to the Successful Bidder(s). Such writing shall guarantee performance of the Qualified Bidder by its parent entities, if any, or provide such other guarantee of performance acceptable to the Seller(s);

- g. it shall be accompanied by a deposit into escrow with the applicable Seller(s) of an amount in cash equal to 4% of the purchase price (the "Good Faith Deposit");
- h. it includes confirmation that all necessary internal and shareholder approvals have been obtained prior to the bid;
- i. it includes a duly authorized and executed copy of an asset purchase agreement, including the purchase price for the specific Toprol Assets, the Vimovo Assets, the Canadian Assets, and/or any asset of Aralez Canada that would be transferred to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement, or a combination thereof, expressed in U.S. Dollars, together with all exhibits and schedules thereto, together with copies marked to show any amendments and modifications to the applicable Stalking Horse Agreement(s) (collectively, the "Proposed Asset Purchase Agreement") and proposed forms of orders to approve the sale by each of the applicable Courts, together with a copy marked to show amendments and modifications to the proposed form(s) of sale approval order(s) attached to the motions approving the sale of the respective Purchased Assets to the applicable Stalking Horse Purchaser; provided, however, that such Proposed Asset Purchase Agreement shall not include any financing or diligence conditions, or any other conditions that are less favorable to the Seller(s) than the conditions in the applicable Stalking Horse Agreement;
- j. if such bid is for the Vimovo Assets, including any patent related to a Licensed Product (as such term is defined in the Genus Amendment), the Proposed Asset Purchase Agreement includes a provision pursuant to which the bidder affirmatively assumes the Assumed Obligations (as such term is defined in the Genus Amendment);
- k. it includes written evidence of (i) sufficient cash on hand to fund the purchase price or (ii) sources of immediately available funds that are not conditioned on third-party approvals or commitments, in each case, that will allow the Seller(s) to make a reasonable determination as to the Qualified Bidder's financial and other capabilities to consummate the transaction contemplated by the Proposed Asset Purchase Agreement. Such written evidence shall include the most current audited and the most current unaudited financial statements, or such other financial information of the Qualified Bidder as may be acceptable to the Seller(s), in consultation with the Consultation Parties (as defined below) (collectively, the "Financials"), or, if the Qualified Bidder is an entity formed for the purpose of acquiring some

or all of each of the Toprol Assets, the Vimovo Assets, the Canadian Assets, and/or any asset of Aralez Canada that would be transferred to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement, the Financials of the Qualified Bidder's equity holder(s) or other financial backer(s) that are guaranteeing the Qualified Bidder's performance; provided that if a Potential Bidder is unable to provide Financials, the Seller(s) may accept such other information sufficient to demonstrate to each Seller's reasonable satisfaction, after consultation with the Consultation Parties (as defined below), that such Potential Bidder has the financial wherewithal to consummate the applicable sale transaction. The Potential Bidder also must establish that it has the financial ability to consummate its proposed transaction within the timeframe contemplated for consummation of the applicable Stalking Horse Agreement.

- l. with respect to the Toprol Assets, it (in combination with any other bids for some or all of such assets) provides for a cash purchase price that exceeds the aggregate cash consideration to be paid to or for the benefit of the Toprol Seller's estate set forth in the Toprol APA by at least \$500,000, and otherwise has a value to the Toprol Seller, in its exercise of its reasonable business judgment, after consultation with its advisors and the Consultation Parties (as defined below), that is greater or otherwise better than the value offered under the Toprol APA (including impact of any liabilities assumed in the Toprol APA);
- iii. with respect to the Vimovo Assets, it (in combination with any other bids for some or all of such assets) provides for a cash purchase price that exceeds the aggregate cash consideration to be paid to or for the benefit of the Vimovo Seller's estates set forth in the Vimovo APA by at least \$2,350,000, which represents the sum of: (i) the Vimovo Termination Fee (as defined below) of \$1,425,000, plus (ii) the Vimovo Expense Reimbursement (as defined below) (not to exceed \$425,000), plus (iii) \$500,000 and otherwise has a value to the Vimovo Seller, in its exercise of its reasonable business judgment, after consultation with its advisors and the Consultation Parties (as defined below), that is greater or otherwise better than the value offered under the Vimovo APA (including impact of any liabilities assumed in the Vimovo APA);
- n. with respect to the Canadian Assets, it (in combination with any other bids for some or all of such assets) provides for a cash purchase price that exceeds the aggregate cash consideration to be paid to or for the benefit of the Canadian Seller's estates set forth in the Canadian Share Purchase Agreement by at least \$3,262,500, which represents the sum

of: (i) the amount of the Canadian Termination Fee (as defined below) of \$2,187,500, plus (ii) the Canadian Expense Reimbursement (as defined below) (not to exceed \$575,000), plus (iii) \$500,000 and otherwise has a value to the Canadian Seller, in its exercise of its reasonable business judgment, after consultation with its advisors and the Consultation Parties (as defined below), that is greater or otherwise better than the value offered under the Canadian Share Purchase Agreement (including impact of any liabilities assumed in the Canadian Share Purchase Agreement);

- o. it identifies with particularity which Executory Contracts and Unexpired Leases the Qualified Bidder wishes to assume and provides details of the Qualified Bidder's proposal for the treatment of related Cure Amounts, and contains sufficient information concerning the Qualified Bidder's ability to provide adequate assurance of performance with respect to Executory Contracts and Unexpired Leases to be assumed and assigned, including the legal name of any proposed assignee of a proposed assumed Executory Contract and the proposed use of any leased premises, in a form that will permit immediate dissemination to the Consultation Parties (as defined below) and the counterparties to such contracts and leases;
- p. it includes an acknowledgement and representation that the Qualified Bidder: (i) has had an opportunity to conduct any and all required due diligence regarding acquiring the applicable Toprol Assets, the Vimovo Assets, the Canadian Assets, and/or any asset of Aralez Canada that would be transferred to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement, prior to making its offer; (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Toprol Assets, the Vimovo Assets, the Canadian Assets, and/or any asset of Aralez Canada that would be transferred to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement, in making its bid; (iii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the Toprol Assets, the Vimovo Assets, the Canadian Assets, and/or any asset of Aralez Canada that would be transferred to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement, or the completeness of any information provided in connection therewith or with the Auction (defined below), except as expressly stated in the Proposed Asset Purchase Agreement; and (iv) is not entitled to any expense reimbursement, break-up fee, termination fee, or similar type of payment in connection with its bid;

- q. it includes evidence, in form and substance satisfactory to the applicable Seller(s), of authorization and approval from the Qualified Bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the Proposed Asset Purchase Agreement;
- r. it provides such other guarantee of performance or assurance acceptable to the applicable Seller(s) in their discretion;
- s. it states that the Qualified Bidder consents to the jurisdiction of the Courts, as applicable;
- t. it contains such other information reasonably requested by the applicable Seller(s);
- u. it does not contain any condition to closing of the proposed sale on the receipt of any third party approvals not already required in any applicable Stalking Horse Agreement (excluding court approval and any applicable required governmental and/or regulatory approval) or which the Sellers, after consultation with the Consultation Parties, determine, in their reasonable business judgment, would be a material impediment to a timely closing of such transaction;
- v. it expressly states that the prospective bidder agrees to serve as a Back-Up Bidder if such bidder's Qualified Bid is selected as the next highest and best bid after the Successful Bid pursuant to Section B(4)(f) of these Bid Procedures; and
- w. it is received by the applicable Notice Parties (as defined in, and in accordance with, Section B.5) on or prior to the 5:00 p.m. (prevailing Eastern Time) on November 26, 2018 (the "**Bid Deadline**"), and such Bid Deadline may be extended by the Sellers after consultation with the Consultation Parties (as defined below), with the consent of the Stalking Horse Purchasers or by order of the Courts.

Non-Conforming Bids; Non-Solicitation. Notwithstanding anything to the contrary in these Bid Procedures, the Sellers, in consultation with the Consultation Parties (as defined below), shall have the right to entertain any bid that does not conform to one or more of the requirements herein and deem such bid a Qualified Bid (a "**Non-Conforming Bid**"); provided, however, that such Non-Conforming Bid so entertained by the Sellers must nevertheless meet each of the following: (a) the Good Faith Deposit must be made in the amount specified above; (b) the bid must meet the minimum overbid requirements set forth in Sections 4(k)-(m) above in respect to the specific assets which it would encompass; (c) any subsequent bid must meet the requirements set forth in Section 8(g) below in respect to the specific assets which it would encompass; and (d) any

condition to closing set forth in the applicable Proposed Asset Purchase Agreement cannot be more onerous (in any material respect) to the applicable Seller(s) than any similar conditions set forth in the Toprol APA, Vimovo APA, and/or Canadian Share Purchase Agreement, as applicable. For the avoidance of doubt, any Non-Conforming Bid may be for the purchase of any combination of some or all of the Toprol Assets, the Vimovo Assets, the Canadian Assets and/or any asset of Aralez Canada that would be transferred to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement.

Notwithstanding anything in these Bid Procedures to the contrary, the Toprol Purchaser is deemed to be a Qualified Bidder with respect to the Toprol Assets, the Vimovo Purchaser is deemed to be a Qualified Bidder with respect to the Vimovo Assets, the Canadian Purchaser is deemed to be a Qualified Bidder with respect to the Canadian Assets, the respective Stalking Horse Bids are deemed to be Qualified Bids in respect to the assets subject to each such Bid for all purposes in connection with the Bid Procedures, the Auction, and the respective sales, and the Stalking Horse Purchasers shall not be required to take any further action in order to attend and participate in the Auction (if any) or, if a Stalking Horse Purchaser is a Successful Bidder (as defined below), to be named a Successful Bidder at the Sale Hearing (as defined below).

The DIP Agent, on behalf of the DIP Lenders and the Prepetition Lenders, shall, at its sole discretion, also be a Qualified Bidder and may submit such bid and/or Subsequent Bids (as defined below) in cash, cash equivalents or other forms of consideration, including a credit bid, either in whole or in part, to the extent permitted under and consistent with section 363(k) of the Bankruptcy Code or the CCAA, as applicable, up to the full allowed amount of their claims, which credit bid(s) shall be deemed as a part of a Qualified Bid and/or Subsequent Bid in connection with the Bidding Process, the Auction, and the respective sales regarding the Toprol Assets, the Vimovo Assets, the Canadian Assets and/or any asset of Aralez Canada that would be transferred to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement.

Any credit bid for the U.S. Sellers' assets shall be subject to the challenge rights established pursuant to the *Final Order (I) Authorizing Debtors to Obtain Postpetition Financing; (II) Granting Liens, Security Interests and Superpriority Status; (III) Authorizing Use of Cash Collateral; (IV) Affording Adequate Protection; (V) Modifying the Automatic Stay; and (VI) Granting Related Relief* [Docket No. 98] (the "**DIP Financing Order**").

The Sellers, after consultation with the Consultation Parties (as defined below), will make a determination regarding which bids qualify as Qualified Bids. The Sellers shall promptly notify each Qualified Bidder in writing as to whether or not their bid constitutes a Qualified Bid. The Sellers shall also notify the Stalking Horse Purchasers and all other Qualified Bidders in writing (which may be an email) as to whether or not any bids constitute Qualified Bids no later than one day after the notification to any Qualified

Bidder that its bid constitutes a Qualified Bid and provide a copy of all Qualified Bids (excluding the Stalking Horse Agreements). The notices described in this paragraph shall not be given later than two (2) business days following the expiration of the Bid Deadline.

Consultation Parties. The "**Consultation Parties**" are (a) the DIP Agent, (b) Richter Advisory Group Inc., in its capacity as Monitor to the Canadian Seller (the "**Monitor**"), with respect to the Canadian Assets and Vimovo Assets, or any other assets proposed to be purchased that are conditioned upon the purchase of the Canadian Assets, (c) counsel to the Monitor, with respect to the Canadian Assets and Vimovo Assets, or any other assets proposed to be purchased that are conditioned upon the purchase of the Canadian Assets; and (d) counsel to the Official Committee of Unsecured Creditors (the "**Committee**") appointed in the Sellers' bankruptcy cases, and each of their respective counsel and advisors, ~~with respect to the Toprol Assets, the Vimovo Assets and the Canadian Assets.~~ Notwithstanding anything herein to the contrary, the Sellers shall not be required to consult with any Consultation Party during the bidding and Auction process to the extent such Consultation Party is a Potential Bidder, a Qualified Bidder, or a financing source for a bidder, including, if the Sellers determine, in their reasonable business judgment (after consultation with the Committee with respect to the U.S. Sellers), that consulting with such Consultation Party regarding any issue, selection or determination would be likely to have a chilling effect on potential bidding or otherwise be contrary to goal of maximizing value for the applicable Seller's estate from the sale process (and the Committee shall be permitted to report to the Bankruptcy Court on an emergency basis if it determines the Debtors are consulting with a Consultation Party in a manner that is inconsistent with the goal of maximizing value).

Subject to the terms of any orders entered by the Courts, after consultation with the Consultation Parties, each Seller shall have the right and obligation to make all decisions regarding the applicable Bids and the Auction as provided herein as it determines to be in the best interest of its estate, whether or not the Consultation Parties agree with that decision.

5. Bid Deadline

A Qualified Bidder that desires to make a bid regarding some or all of each of the Toprol Assets and/or the Vimovo Assets must deliver written copies of its bid, so as to be received on or before the Bid Deadline, to each of the following parties (the "**U.S. Notice Parties**"):

(a) counsel to the Sellers: Willkie Farr & Gallagher LLP, 787 Seventh Avenue, New York, New York 10019 (Attn: Paul V. Shalhoub, Esq. (pshalhoub@willkie.com) and Robin Spigel, Esq. (rspigel@willkie.com)); and

(b) proposed counsel to the Committee: Brown Rudnick LLP, 7 Times Square, New York, New York 10036 (Attn: Robert J. Stark, Esq.

(rstark@brownrudnick.com) and Howard S. Steel, Esq.
(hsteel@brownrudnick.com)).

A Qualified Bidder that desires to make a bid regarding some or all of each of the Canadian Assets must deliver written copies of its bid, so as to be received on or before the Bid Deadline, to each of the following parties (the “Canadian Notice Parties”, collectively with the U.S. Notice Parties, the “Notice Parties”):

(a) counsel to the Canadian Seller: Stikeman Elliott LLP, 5300 Commerce Court West, 199 Bay Street, Toronto, Ontario M5T 1B9 Canada (Attn: Ashley Taylor (ataylor@stikeman.com) and Jonah Mann (jmann@stikeman.com));

(b) the Monitor: Richter Advisory Group, 3320 Bay Wellington Tower, 181 Bay Street, Toronto, Ontario M5J 2T3 (Attn: Paul Van Eyk (pvaneyk@richter.ca)), and its counsel, Torys LLP, 3000 TD South Tower, 79 Wellington Street West, Toronto, Ontario M5K 1N2 (Attn: David Bish (dbish@torys.com));

(c) proposed counsel to the Official Committee of Unsecured Creditors: Brown Rudnick LLP, 7 Times Square, New York, NY 10036 (Attn: Robert J. Stark, Esq. (rstark@brownrudnick.com) and Howard S. Steel, Esq. (hsteel@brownrudnick.com)); and

(d) proposed Canadian counsel to the Official Committee of Unsecured Creditors, McMillan LLP, 181 Bay Street, Suite 4400, Toronto, ON, Canada M5J 2T3 (Attn: Andrew Kent (andrew.kent@mcmillan.ca) and Jeffrey Levine (jeffrey.levine@mcmillan.ca)).

6. Evaluation of Competing Bids

A Qualified Bid will be valued based upon several factors including, without limitation: (a) the amount of such bid (including value provided by the assumption of liabilities); (b) the risks and timing associated with consummating such bid; (c) any proposed revisions to the applicable Stalking Horse Agreement (including any additional conditions to closing); (d) any assets included or excluded from the Qualified Bid, including any Executory Contracts and Unexpired Leases; (e) the likelihood of the bidders’ ability to close a transaction, the conditions thereof and the timing thereof; (f) any purchase-price adjustments; (g) indemnification or similar provisions; (h) the net economic effect of any changes to the value to be received by the applicable Seller’s estate from the transaction contemplated by the bid; (h) whether the Bid is a bid for all or some of the Toprol Assets, the Vimovo Assets, the Canadian Assets, and/or any asset of Aralez Canada that would be transferred to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement; and (i) any other factors deemed relevant by the applicable Seller(s) in consultation with the Consultation Parties.

7. No Qualified Bids

If a Seller does not receive a Qualified Bid with respect to any of the Toprol Assets, Vimovo Assets or Canadian Assets other than the applicable Stalking Horse Bid, such Seller, after consultation with the Consultation Parties, will not hold an Auction (as defined below) with respect to such Purchased Assets and the applicable Stalking Horse Purchaser will be deemed the Successful Bidder on the Bid Deadline with respect to such Purchased Assets.

8. Auction Process

If one or more Seller receives one or more Qualified Bids with respect to any of the Toprol Assets, Vimovo Assets or Canadian Assets in addition to the applicable Stalking Horse Bid, such Seller(s) will conduct auction(s) (the "Auction") of the applicable Purchased Assets (which the Sellers intend to transcribe) at 1:00 p.m. (prevailing Eastern Time) on November 29, 2018, at the offices of Willkie Farr & Gallagher LLP, 787 Seventh Avenue, New York, NY 10019, or such other location as shall be timely communicated by the Sellers to all entities entitled to attend the Auction. The Auction shall be conducted in accordance with the following procedures:

- a. only the Sellers, the Notice Parties, the DIP Lenders, the Stalking Horse Purchasers, any other Qualified Bidders, and the Consultation Parties, in each case along with their representatives and advisors, shall be entitled to attend the Auction (such attendance to be in person);
- b. only the Stalking Horse Purchasers and such other Qualified Bidders will be entitled to participate as bidders in, or make any subsequent bids at, the Auction; provided that all such Qualified Bidders wishing to attend the Auction must have at least one individual representative with authority to bind such Qualified Bidder attending the Auction in person;
- c. each Qualified Bidder shall be required to confirm that it has not engaged in any collusion with respect to the bidding or the sale;
- d. at least one (1) business day prior to the Auction, each Qualified Bidder must inform the applicable Seller(s) whether it intends to attend the Auction; provided that in the event a Qualified Bidder elects not to attend the Auction, such Qualified Bidder's Qualified Bid shall, subject to the terms of the Stalking Horse Agreements, nevertheless remain fully enforceable against such Qualified Bidder until (i) the date of the selection of the applicable Successful Bidder (as defined below) at the conclusion of the Auction, or (ii) if selected as the

Successful Bidder, until the earlier of one (1) month after the designation of the Successful Bid (as defined below) at the Auction or the closing of the Sale(s) to the Successful Bidder(s). No later than one (1) day prior to the start of the Auction, the Sellers will provide copies of the Qualified Bid or Qualified Bids which the applicable Seller, after consultation with the Consultation Parties, believes is the highest or otherwise best offer for the Toprol Assets (the "Toprol Starting Bid"), the Vimovo Assets (the "Vimovo Starting Bid") and the Canadian Assets (the "Canadian Starting Bid", collectively, the "Starting Bids" and each a "Starting Bid") to the Stalking Horse Purchasers and all other Qualified Bidders;

- e. all Qualified Bidders who have timely submitted Qualified Bids will be entitled to be present for all Subsequent Bids (as defined below) at the Auction and the actual identity of each Qualified Bidder will be disclosed on the record at the Auction;
- f. the Sellers, after consultation with their advisors and the Consultation Parties, may employ and announce at the Auction additional procedural rules that are reasonable under the circumstances for conducting the Auction, provided that such rules are: (i) not inconsistent with these Bid Procedures, title 11 of the United States Code (the "Bankruptcy Code") as to the Toprol Assets and Vimovo Assets and the CCAA as to the assets and liabilities of the Canadian Assets, any order of the Bankruptcy Court or Canadian Court, as applicable, entered in connection herewith or the Stalking Horse Agreements; (ii) provide that bids be made and received on an open basis, with all material terms of each bid to be fully disclosed to all other Qualified Bidders at the Auction; and (iii) are disclosed to each Qualified Bidder at the Auction;
- g. bidding at the Auction will begin with the Starting Bids and continue in bidding increments (each a "Subsequent Bid") providing a net value to the applicable estate of at least an additional: (i) \$1,000,000 above the prior bid for the Toprol Assets, (ii) \$500,000 above the prior bid for the Vimovo Assets and (iii) \$500,000 above the prior bid for the Canadian Assets. After the first round of bidding and between each subsequent round of bidding, the Sellers shall announce the bid (including the identity of the bidder or bidders and the value of such bid(s)) that they believe to be the highest or otherwise best offer for the Toprol Assets, the Vimovo Assets, the Canadian Assets, and/or any asset of Aralez Canada that would be transferred to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement (individually or collectively, as applicable, the "Highest Bid"). A

round of bidding will conclude after each participating Qualified Bidder has had the opportunity to submit a Subsequent Bid with full knowledge of the then Highest Bid. For the purpose of evaluating the value of the consideration provided by the Subsequent Bids (including any Subsequent Bid by any Stalking Horse Purchaser), the Sellers will give effect (on a dollar for dollar basis) to any applicable Termination Fee (as defined below) and any applicable Expense Reimbursement (as defined below) payable to the respective Stalking Horse Purchaser under the applicable Stalking Horse Agreement as well as any additional liabilities to be assumed by a Qualified Bidder and any additional costs which may be imposed on the applicable Seller(s). If a Stalking Horse Purchaser bids at the Auction, a Stalking Horse Purchaser will be entitled to credit bid on a dollar for dollar basis for any applicable Termination Fee and any applicable Expense Reimbursement. To the extent a Subsequent Bid has been accepted entirely or in part because of the addition, deletion or modification of a provision or provisions in the applicable Proposed Asset Purchase Agreement or the applicable Stalking Horse Agreement, the applicable Seller(s) will identify such added, deleted or modified provision or provisions and the applicable Qualified Bidders shall be given the opportunity to modify the applicable Stalking Horse Agreement in a manner that materially provides any additional value that factored into selecting a Subsequent Bid from another Qualified Bidder. The Sellers shall, in consultation with the Consultation Parties, determine whether an addition, deletion or modification of the Stalking Horse Agreement meets the standard of materially providing additional value. For the avoidance of doubt, a Stalking Horse Purchaser shall be entitled to submit additional bids and make modifications to the Stalking Horse Agreement at the Auction consistent with these Bid Procedures.

- h. With respect to Qualified Bids that bid on two or more of any of the Toprol Assets, the Vimovo Assets, the Canadian Assets, and/or any asset of Aralez Canada that would be transferred to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement, the applicable Sellers, after consultation with the Consultation Parties, reserve the right to require those Qualified Bidders at or before the Auction to allocate the purchase price between and/or among the Toprol Assets, the Vimovo Assets, the Canadian Assets, and/or any asset of Aralez Canada that would be transferred to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement, as applicable.

- i. The Auction may be adjourned as the Sellers, in consultation with the Consultation Parties, deem appropriate. Reasonable notice of such adjournment and the time and place (which shall be in New York City) for the resumption of the Auction shall be given to the Stalking Horse Purchasers, all other Qualified Bidders, the United States Trustee and the Consultation Parties.

9. Selection of Successful Bid

Prior to the conclusion of the Auction, each Seller, in consultation with its advisors and the applicable Consultation Parties, will review and evaluate each applicable Qualified Bid in accordance with the procedures set forth herein and determine which offer or group of offers is the highest or otherwise best offer or offers from among the applicable Qualified Bidders (including the applicable Stalking Horse Purchaser) submitted at or prior to the Auction by a Qualified Bidder (such bid or bids, as applicable, the "**Successful Bid(s)**") and the bidder(s) making such bid, the "**Successful Bidder(s)**") and communicate to the applicable Stalking Horse Purchaser(s) and the other applicable Qualified Bidders the identity of the Successful Bidder(s) and the material terms of the Successful Bid(s). The determination of the Successful Bid(s) by each Seller at the conclusion of the Auction shall be final, subject only to approval by the Bankruptcy Court as to Toprol Assets and Vimovo Assets and the Canadian Court as to the Canadian Assets.

Within two (2) business days after conclusion of the Auction, the Successful Bidder(s) shall complete and execute all agreements, contracts, instruments and other documents evidencing and containing the terms and conditions upon which the Successful Bid(s) was made. Within one (1) business day after conclusion of the Auction, the Sellers shall file a notice identifying the Successful Bidder(s) with the applicable Courts.

The applicable Sellers will sell the applicable Purchased Assets to the applicable Successful Bidder(s) pursuant to the terms of the applicable Successful Bid(s) upon the approval of such Successful Bid(s) by the Bankruptcy Court as to Toprol Assets and Vimovo Assets and the Canadian Court as to the Canadian Assets at the respective Sale Hearings.

10. Designation of Back-Up Bidder

Notwithstanding anything in the Bid Procedures to the contrary, if an Auction is conducted, the Qualified Bidder with the next highest or otherwise best bid at the Auction for the Toprol Assets, the Vimovo Assets, the Canadian Assets, and/or any asset of Aralez Canada that would be transferred to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement, as determined by the applicable Sellers, in the exercise of their business judgment, shall be deemed to have submitted the next highest or otherwise best bid (the "**Back-Up Bidder**") at the conclusion of the Auction and announced at the time to all Qualified Bidders participating therein. If there is more than

one Successful Bid, the Sellers shall have the ability to designate a Back-Up Bidder for each Successful Bid.

If for any reason a Successful Bidder fails to consummate its Successful Bid within the time permitted after the entry of the Sale Orders, then the Sellers may deem the Back-Up Bidder for the applicable sale transaction to have the new Successful Bid, and the Sellers will be authorized, without further orders of the Courts, to consummate the transaction with such Back-Up Bidder on the terms of its last bid; provided, that the applicable Sellers will file a written notice of the applicable transaction(s) with the Courts at least 24 hours in advance of the consummation of such transaction(s). Such applicable Back-Up Bidder will be deemed to be the Successful Bidder and the applicable Sellers will be authorized, but not directed, to effectuate a sale to such applicable Back-Up Bidder subject to the terms of the applicable Back-Up Bid without further orders of the Courts.

The applicable Back-Up Bid must remain open until the earlier of one (1) month after the designation of the Successful Bid (as defined below) at the Auction or the closing of the Sale(s) to the Successful Bidder(s) (the "Outside Back-Up Date"); provided, however, that in no event shall any Stalking Horse Bidder be required to keep their Stalking Horse Bid open except as specified in the applicable Stalking Horse Agreement. Notwithstanding any provision hereof, the Stalking Horse Purchasers obligation to act as a Back-Up Bidder shall be exclusively governed by the terms of the applicable Stalking Horse Agreement.

11. Good Faith Deposit

Except as otherwise provided in this paragraph with respect to any Successful Bid and any Back-Up Bid, if any, the Good Faith Deposits of all Qualified Bidders that submitted such a deposit under the Bid Procedures shall be returned upon or within three (3) business days after the Auction. The Good Faith Deposit of a Successful Bidder shall be held until the closing of the sale of the applicable Purchased Assets and applied in accordance with the Successful Bid. The Good Faith Deposit of any Back-Up Bidder shall be returned within three (3) business days after the applicable Outside Back-Up Date. If a Successful Bidder fails to consummate an approved sale because of a breach or failure to perform on the part of such Successful Bidder, the applicable Seller(s) will not have any obligation to return the applicable Good Faith Deposit deposited by such Successful Bidder, which may be retained by the applicable Seller(s) as liquidated damages, in addition to any and all rights, remedies and/or causes of action that may be available to the applicable Seller(s) at law or in equity, and, the applicable Seller(s) shall be free to consummate the proposed transaction at the next highest price bid at the Auction by a Qualified Bidder, without the need for an additional hearings or orders of the Courts. Notwithstanding any provision hereof, the terms pertaining to any good faith deposit submitted by a Stalking Horse Purchaser pursuant to a Stalking Horse Agreement (including, without limitation, the entitlements of the Stalking Horse Purchaser and any Seller to such good faith deposit and the timing of return of any good faith deposit to a

Stalking Horse Purchaser) shall be exclusively governed by the terms of the applicable Stalking Horse Agreement.

12. Sale Is As Is/Where Is

Except as otherwise provided in any Stalking Horse Agreement, any Successful Bid or any order by the Courts approving any sale of the Toprol Assets, the Vimovo Assets, the Canadian Assets, and/or any asset of Aralez Canada that would be transferred to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement, the Purchased Assets sold pursuant to these Bid Procedures shall be conveyed at the closing of the applicable purchase and sale in their then-present condition, "AS IS, WITH ALL FAULTS, AND WITHOUT ANY WARRANTY WHATSOEVER, EXPRESS OR IMPLIED."

C. THE BID PROTECTIONS

In recognition of the expenditure of time, energy, and resources, and because the agreement to make payment thereof is necessary to preserve the value of each of the Sellers' estates, the Sellers have agreed that, among other triggering events, if the: (i) Vimovo Purchaser is not the Successful Bidder with respect to the Vimovo Assets, the Vimovo Seller will pay the Vimovo Purchaser (a) an aggregate fee of approximately \$1,425,000, as more fully described in the Vimovo APA (as defined therein, the "Vimovo Termination Fee"), and (b) an amount in cash equal to the Expense Reimbursement (as such term is defined in the Vimovo APA (the "Vimovo Expense Reimbursement"), which is not to exceed \$425,000 whether incurred prior to or after August 10, 2018; and (ii) Canadian Purchaser is not the Successful Bidder with respect to the Canadian Assets, the Canadian Seller will pay the Canadian Purchaser (a) an aggregate fee of approximately \$2,187,500 as more fully described in the Canadian Share Purchase Agreement (as defined therein, the "Canadian Termination Fee", collectively with the Vimovo Termination Fee, the "Termination Fees"), and (b) an amount in cash equal to the Expense Reimbursement (as such term is defined in the Canadian Share Purchase Agreement (the "Canadian Expense Reimbursement," and collectively with the Vimovo Expense Reimbursement, the "Expense Reimbursements"), which is not to exceed \$575,000 or \$1,575,000, as the case may be, whether incurred prior to or after August 10, 2018. The Termination Fees and Expense Reimbursements shall be payable as provided for pursuant to the terms of the applicable Stalking Horse Agreements, and nothing herein shall be deemed to limit or otherwise modify the terms thereof, including other circumstances pursuant to which the applicable Termination Fee and applicable Expense Reimbursement may be payable.

The Vimovo Seller and the Canadian Seller have further agreed that, solely with respect to the the Vimovo Termination Fee, the Vimovo Expense Reimbursement, the Canadian Expense Reimbursement and the Canadian Termination Fee, their obligation to pay the Vimovo Termination Fee, the Vimovo Expense Reimbursement, the Canadian Expense Reimbursement and the Canadian Termination Fee pursuant to the applicable Stalking

Horse Agreements shall survive termination of the applicable Stalking Horse Agreements, shall be payable under the terms and conditions of the applicable Stalking Horse Agreements and the orders approving the Bid Procedures, and (i) with respect to the Vimovo Seller, shall constitute an allowed superpriority administrative expense claim under section 503(b) of the Bankruptcy Code senior to all other administrative expenses and, if triggered, shall be payable from the proceeds from the sale of the Vimovo Assets, at the closing of such sale, free and clear of all liens (including those arising under the DIP Financing Order) and (ii) with respect to the Canadian Seller, shall be secured by a priority charge under the CCAA.

Except for the Vimovo Stalking Horse Purchaser and Canadian Purchaser, no other party submitting a bid shall be entitled to any expense reimbursement, breakup fee, termination or similar fee or payment.

D. SALE HEARING

The Sellers will seek entry of separate orders from: the Bankruptcy Court, at a hearing (the "U.S. Sale Hearing") to begin at 11:00 a.m. (prevailing Eastern Time) on December 4, 2018 or as soon thereafter as counsel may be heard; and the Canadian Court, at a hearing (the "Canadian Sale Hearing" and together with the U.S. Sale Hearing, the "Sale Hearings") to take place on the earliest date available after December 4, 2018, to approve and authorize the sale transaction(s) to the Successful Bidder(s) (including without limitation the assumption and assignment to the Successful Bidders(s) of any executory contracts to be assigned to them in accordance with the Stalking Horse Agreement(s) or Proposed Asset Purchase Agreement(s), as applicable, at the Sale Hearing or such other hearing scheduled before the applicable Court) on terms and conditions determined in accordance with the Bid Procedures. A joint hearing before both the Courts may take place. The Stalking Horse Purchasers shall have standing to appear and be heard at any Sale Hearing with respect to all matters before the Court.

Notwithstanding anything herein, any Successful Bid on the Toprol Assets or the Vimovo Assets shall be subject to approval by the Bankruptcy Court and any Successful Bid on the Canadian Assets and/or any asset of Aralez Canada that would be transferred to the Canadian Purchaser pursuant to the Canadian Share Purchase Agreement shall be subject to approval by the Canadian Court.

E. CONSENT TO JURISDICTION

Each Court shall retain jurisdiction to hear and determine all matters arising from or relating to the implementation of the respective Court's Bid Procedures order and/or the bid documents as it pertains to assets and liabilities of the Toprol Seller and Vimovo Seller for the Bankruptcy Court, and as it pertains to assets and liabilities of the Canadian Seller for the Canadian Court, as the case may be. All Qualified Bidders at the Auction shall be deemed to have consented to the jurisdiction.

F. MISCELLANEOUS

Except as expressly provided under these Bid Procedures, the Auction and the Bid Procedures are solely for the benefit of the Sellers and the Stalking Horse Purchasers, and nothing contained in the orders approving the Bid Procedures or the Stalking Horse Agreements or the Bid Procedures shall create any rights in any other person or bidder (including without limitation rights as third-party beneficiaries or otherwise) other than the rights expressly granted to a Successful Bidder under the orders approving the Bid Procedures.

The U.S. Debtors shall provide to the Committee weekly status reports, prompt responses to reasonable information requests (including regarding due diligence access made available to Potential Bidders), and reports of any consultation with Deerfield regarding the Bidding Process (either by copying counsel to the Committee on such communication or by promptly providing the Committee a copy or report of such communication).

Without prejudice to the rights of the Stalking Horse Purchasers under the terms of the Stalking Horse Agreements and the Bid Procedures Order, after consultation with the Consultation Parties, the Sellers may modify the rules, procedures and deadlines set forth herein, or adopt new rules, procedures and deadlines that, in their reasonable discretion (after consultation with the Consultation Parties, will better promote the goals of these procedures (namely, to maximize value for the estates); provided, however, that (a) the Sellers may not modify the Bid Protections afforded to each Stalking Horse Purchaser in accordance with the applicable Stalking Horse Agreement, unless agreed in writing by the applicable Stalking Horse Purchaser and Sellers or otherwise ordered by the Courts, and (b) the Committee shall be permitted to report to the Bankruptcy Court on an emergency basis if it determines the Debtors have modified, or adopted new, rules, procedures and deadlines that are inconsistent with the goals of these procedures and maximizing the value of the estates. For the avoidance of doubt, the Sellers may not modify the rules, procedures, or deadlines set forth herein, or adopt new rules, procedures, or deadlines that would impair the Stalking Horse Purchasers' right to payment of the Termination Fees or the Expense Reimbursements, as applicable, without the express written consent of the applicable Stalking Horse Bidder. All such modifications and additional rules will be communicated to each of the Notice Parties, the DIP Lenders, Potential Bidders, and Qualified Bidders (including the Stalking Horse Purchasers).

63173157 v1

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

Court File No. CV-18-603054-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS CANADA
INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

BIDDING PROCEDURES ORDER

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Lawyers for the Applicants

TAB 3

2016 ONSC 1044
Ontario Superior Court of Justice

Danier Leather Inc., Re

2016 CarswellOnt 2414, 2016 ONSC 1044, 262 A.C.W.S. (3d) 573, 33 C.B.R. (6th) 221

**In the Matter of Intention to Make
a Proposal of Danier Leather Inc.**

Penny J.

Heard: February 8, 2016
Judgment: February 10, 2016
Docket: 31-CL-2084381

Counsel: Jay Swartz, Natalie Renner, for Danier
Sean Zweig, for Proposal Trustee
Harvey Chaiton, for Directors and Officers
Jeffrey Levine, for GA Retail Canada
David Bish, for Cadillac Fairview
Linda Galessiere, for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe
Cambridge
Clifton Prophet, for CIBC

Related Abridgment Classifications

Bankruptcy and insolvency
XIV Administration of estate
XIV.6 Sale of assets
XIV.6.h Miscellaneous

Headnote

Bankruptcy and insolvency --- Administration of estate --- Sale of assets --- Miscellaneous
D Inc. filed notice of intention to make proposal under Bankruptcy and Insolvency Act --- Motion brought to, inter alia, approve stalking horse agreement and SISP --- SISP approved --- Certain other relief granted, including that key employee retention plan and charge were approved, and that material about key employee retention plan and stalking horse offer summary would not form part of public record pending completion of proposal proceedings --- SISP was warranted at this time --- SISP would result in most viable alternative for D Inc. --- If SISP was not implemented in immediate future, D Inc.'s revenues would continue to decline, it would incur significant costs and value of business would erode, decreasing recoveries for D Inc.'s stakeholders --- Market for D Inc.'s assets as going concern would be significantly reduced if SISP was not implemented at this

time because business was seasonal in nature — D Inc. and proposal trustee concurred that SISP and stalking horse agreement would benefit whole of economic community — There had been no expressed creditor concerns with SISP as such — Given indications of value obtained through solicitation process, stalking horse agreement represented highest and best value to be obtained for D Inc.'s assets at this time, subject to higher offer being identified through SISP — SISP would result in transaction that was at least capable of satisfying s. 65.13 of Act criteria.

Table of Authorities

Cases considered by *Penny J.*:

Brainhunter Inc., Re (2009), 2009 CarswellOnt 8207, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]) — followed

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd. (2012), 2012 ONSC 1750, 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — considered

Colossus Minerals Inc., Re (2014), 2014 ONSC 514, 2014 CarswellOnt 1517, 14 C.B.R. (6th) 261 (Ont. S.C.J.) — considered

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — followed

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

Mustang GP Ltd., Re (2015), 2015 ONSC 6562, 2015 CarswellOnt 16398, 31 C.B.R. (6th) 130 (Ont. S.C.J.) — followed

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

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4839, 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

Sino-Forest Corp., Re (2012), 2012 ONSC 2063, 2012 CarswellOnt 4117 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2006), 2006 CarswellOnt 394, 17 C.B.R. (5th) 76 (Ont. S.C.J. [Commercial List]) — followed

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C.

5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1 (S.C.C.) — referred to *W.C. Wood Corp., Re* (2009), 2009 CarswellOnt 7113, 61 C.B.R. (5th) 69 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

Generally — referred to

s. 64.1 [en. 2005, c. 47, s. 42] — considered

s. 65.13 [en. 2005, c. 47, s. 441] — considered

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

Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 137(2) — considered

Penny J.:

The Motion

1 On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

2 Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to:

- (a) approve a stalking horse agreement and SISP;
- (b) approve the payment of a break fee, expense reimbursement and signage costs obligations in connection with the stalking horse agreement;
- (c) authorize Danier to perform its obligations under engagement letters with its financial advisors and a charge to secure success fees;
- (d) approve an Administration Charge;
- (e) approve a D&O Charge;
- (f) approve a KERP and KERP Charge; and
- (g) grant a sealing order in respect of the KERP and a stalking horse offer summary.

Background

3 Danier is an integrated designer, manufacturer and retailer of leather and suede apparel and accessories. Danier primarily operates its retail business from 84 stores located throughout Canada. It does not own any real property. Danier employs approximately 1,293 employees. There is no union or pension plan.

4 Danier has suffered declining revenues and profitability over the last two years resulting primarily from problems implementing its strategic plan. The accelerated pace of change in both personnel and systems resulting from the strategic plan contributed to fashion and inventory miscues which have been further exacerbated by unusual extremes in the weather and increased competition from U.S. and international retailers in the Canadian retail space and the depreciation of the Canadian dollar relative to the American dollar.

5 In late 2014, Danier implemented a series of operational and cost reduction initiatives in an attempt to return Danier to profitability. These initiatives included reductions to headcount, marketing costs, procurement costs and capital expenditures, renegotiating supply terms, rationalizing Danier's operations, improving branding, growing online sales and improving price management and inventory mark downs. In addition, Danier engaged a financial advisor and formed a special committee comprised of independent members of its board of directors to explore strategic alternatives to improve Danier's financial circumstances, including soliciting an acquisition transaction for Danier.

6 As part of its mandate, the financial advisor conducted a seven month marketing process to solicit offers from interested parties to acquire Danier. The financial advisor contacted approximately 189 parties and provided 33 parties with a confidential information memorandum describing Danier and its business. Over the course of this process, the financial advisor had meaningful conversations with several interested parties but did not receive any formal offers to provide capital and/or to acquire the shares of Danier. One of the principal reasons that this process was unsuccessful is that it focused on soliciting an acquisition transaction, which ultimately proved unappealing to interested parties as Danier's risk profile was too great. An acquisition transaction did not afford prospective purchasers the ability to restructure Danier's affairs without incurring significant costs.

7 Despite Danier's efforts to restructure its financial affairs and turn around its operations, Danier has experienced significant net losses in each of its most recently completed fiscal years and in each of the two most recently completed fiscal quarters in the 2016 fiscal year. Danier currently has approximately \$9.6 million in cash on hand but is projected to be cash flow negative every month until at least September 2016. Danier anticipated that it would need to borrow under its loan facility with CIBC by July 2016. CIBC has served a notice of default and indicate no funds will be advanced under its loan facility. In addition, for the 12 months ending December 31, 2015,

30 of Danier's 84 store locations were unprofitable. If Danier elects to close those store locations, it will be required to terminate the corresponding leases and will face substantial landlord claims which it will not be able to satisfy in the normal course.

8 Danier would not have had the financial resources to implement a restructuring of its affairs if it had delayed a filing under the BIA until it had entirely used up its cash resources. Accordingly, on February 4, 2016, Danier commenced these proceedings for the purpose of entering into a stalking horse agreement and implementing the second phase of the SISP.

The Stalking Horse Agreement

9 The SISP is comprised of two phases. In the first phase, Danier engaged the services of its financial advisor to find a stalking horse bidder. The financial advisor corresponded with 22 parties, 19 of whom had participated in the 2015 solicitation process and were therefore familiar with Danier. In response, Danier received three offers and, with the assistance of the financial advisor and the Proposal Trustee, selected GA Retail Canada or an affiliate (the "Agent") as the successful bid. The Agent is an affiliate of Great American Group, which has extensive experience in conducting retail store liquidations.

10 On February 4, 2016, Danier and the Agent entered into the stalking horse agreement, subject to Court approval. Pursuant to the stalking horse agreement, the Agent will serve as the stalking horse bid in the SISP and the exclusive liquidator for the purpose of disposing of Danier's inventory. The Agent will dispose of the merchandise by conducting a "store closing" or similar sale at the stores.

11 The stalking horse agreement provides that Danier will receive a net minimum amount equal to 94.6% of the aggregate value of the merchandise, provided that the value of the merchandise is no less than \$22 million and no more than \$25 million. After payment of this amount and the expenses of the sale, the Agent is entitled to retain a 5% commission. Any additional proceeds of the sale after payment of the commission are divided equally between the Agent and Danier.

12 The stalking horse agreement also provides that the Agent is entitled to (a) a break fee in the amount of \$250,000; (b) an expense reimbursement for its reasonable and documented out-of-pocket expenses in an amount not to exceed \$100,000; and (c) the reasonable costs, fees and expenses actually incurred and paid by the Agent in acquiring signage or other advertising and promotional material in connection with the sale in an amount not to exceed \$175,000, each payable if another bid is selected and the transaction contemplated by the other bid is completed. Collectively, the break fee, the maximum amount payable under the expense reimbursement and the signage costs obligations represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. Another liquidator submitting a successful bid in the course of the SISP will be required to purchase the signage from the Agent at its cost.

13 The stalking horse agreement is structured to allow Danier to proceed with the second phase of the SISP and that process is designed to test the market to ascertain whether a higher or better offer can be obtained from other parties. While the stalking horse agreement contemplates liquidating Danier's inventory, it also establishes a floor price that is intended to encourage bidders to participate in the SISP who may be interested in going concern acquisitions as well.

The SISP

14 Danier, in consultation with the Proposal Trustee and financial advisor, have established the procedures which are to be followed in conducting the second phase of the SISP.

15 Under the SISP, interested parties may make a binding proposal to acquire the business or all or any part of Danier's assets, to make an investment in Danier or to liquidate Danier's inventory and furniture, fixtures and equipment.

16 Danier, in consultation with the Proposal Trustee and its financial advisors, will evaluate the bids and may (a) accept, subject to Court approval, one or more bids, (b) conditionally accept, subject to Court approval, one or more backup bids (conditional upon the failure of the transactions contemplated by the successful bid to close, or (c) pursue an auction in accordance with the procedures set out in the SISP.

17 The key dates of the second phase of the SISP are as follows:

- (1) The second phase of the SISP will commence upon approval by the Court
- (2) Bid deadline: February 22, 2016
- (3) Advising interested parties whether bids constitute "qualified bids": No later than two business days after bid deadline
- (4) Determining successful bid and back-up bid (if there is no auction): No later than five business days after bid deadline
- (5) Advising qualified bidders of auction date and location (if applicable): No later than five business days after bid deadline
- (6) Auction (if applicable): No later than seven business days after bid deadline
- (7) Bringing motion for approval: Within five business days following determination by Danier of the successful bid (at auction or otherwise)
- (8) Back-Up bid expiration date: No later than 15 business days after the bid deadline, unless otherwise agreed

(9) Outside date: No later than 15 business days after the bid deadline

18 The timelines in the SISP have been designed with regard to the seasonal nature of the business and the fact that inventory values will depreciate significantly as the spring season approaches. The timelines also ensure that any purchaser of the business as a going concern has the opportunity to make business decisions well in advance of Danier's busiest season, being fall/winter. These timelines are necessary to generate maximum value for Danier's stakeholders and are sufficient to permit prospective bidders to conduct their due diligence, particularly in light of the fact that is expected that many of the parties who will participate in the SISP also participated in the 2015 solicitation process and were given access to a data room containing non-public information about Danier at that time.

19 Danier does not believe that there is a better viable alternative to the proposed SISP and stalking horse agreement.

20 The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties, *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]) at para. 7.

21 The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA, *Colossus Minerals Inc., Re*, 2014 CarswellOnt 1517 (Ont. S.C.J.) at paras. 22-26.

22 A distinction has been drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.

23 In *Brainhunter Inc., Re*, the Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*. Citing his decision in *Nortel*, Justice Morawetz (as he then was) confirmed that the following four factors should be considered by the Court in the exercise of its discretion to determine if the proposed sale process should be approved:

- (1) Is a sale transaction warranted at this time?
- (2) Will the sale benefit the whole "economic community"?

(3) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(4) Is there a better viable alternative?

Brainhunter Inc., Re, 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]) at paras. 13-17); *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List]) at para. 49.

24 While *Brainhunter* and *Nortel* both dealt with a sale process under the CCAA, the Court has recognized that the CCAA is an analogous restructuring statute to the proposal provisions of the BIA, *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 24; *Indalex Ltd., Re*, [2013] 1 S.C.R. 271 (S.C.C.) at paras. 50-51.

25 Furthermore, in *Mustang*, this Court applied the *Nortel* criteria on a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA, *Mustang GP Ltd., Re*, 2015 CarswellOnt 16398 (Ont. S.C.J.) at paras. 37-38.

26 These proceedings are premised on the implementation of a sale process using the stalking horse agreement as the minimum bid intended to maximize value and act as a baseline for offers received in the SISP. In the present case, Danier is seeking approval of the stalking horse agreement for purposes of conducting the SISP only.

27 The SISP is warranted at this time for a number of reasons.

28 First, Danier has made reasonable efforts in search of alternate financing or an acquisition transaction and has attempted to restructure its operations and financial affairs since 2014, all of which has been unsuccessful. At this juncture, Danier has exhausted all of the remedies available to it outside of a Court-supervised sale process. The SISP will result in the most viable alternative for Danier, whether it be a sale of assets or the business (through an auction or otherwise) or an investment in Danier.

29 Second, Danier projects that it will be cash flow negative for the next six months and it is clear that Danier will be unable to borrow under the CIBC loan facility to finance its operations (CIBC gave notice of default upon Danier's filing of the NOI). If the SISP is not implemented in the immediate future, Danier's revenues will continue to decline, it will incur significant costs and the value of the business will erode, thereby decreasing recoveries for Danier's stakeholders.

30 Third, the market for Danier's assets as a going concern will be significantly reduced if the SISP is not implemented at this time because the business is seasonal in nature. Any purchaser of the business as a going concern will need to make decisions about the raw materials it wishes to acquire and the product lines it wishes to carry by March 2016 in order to be sufficiently prepared for the fall/winter season, which has historically been Danier's busiest.

31 Danier and the Proposal Trustee concur that the SISP and the stalking horse agreement will benefit the whole of the economic community. In particular:

- (a) the stalking horse agreement will establish the floor price for Danier's inventory, thereby maximizing recoveries;
- (b) the SISP will subject the assets to a public marketing process and permit higher and better offers to replace the Stalking horse agreement; and
- (c) should the SISP result in a sale transaction for all or substantially all of Danier's assets, this may result in the continuation of employment, the assumption of lease and other obligations and the sale of raw materials and inventory owned by Danier.

32 There have been no expressed creditor concerns with the SISP as such. The SISP is an open and transparent process. Absent the stalking horse agreement, the SISP could potentially result in substantially less consideration for Danier's business and/or assets.

33 Given the indications of value obtained through the 2015 solicitation process, the stalking horse agreement represents the highest and best value to be obtained for Danier's assets at this time, subject to a higher offer being identified through the SISP.

34 Section 65.13 of the BIA is also indirectly relevant to approval of the SISP. In deciding whether to grant authorization for a sale, the court is to consider, among other things:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the trustee approved the process leading to the proposed sale or disposition;
- (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

35 In the present case, in addition to satisfying the *Nortel* criteria, the SISP will result in a transaction that is at least capable of satisfying the 65.13 criteria. I say this for the following reasons.

36 The SISP is reasonable in the circumstances as it is designed to be flexible and allows parties to submit an offer for some or all of Danier's assets, make an investment in Danier or acquire the business as a going concern. This is all with the goal of improving upon the terms of the stalking horse agreement. The SISP also gives Danier and the Proposal Trustee the right to extend or amend the SISP to better promote a robust sale process.

37 The Proposal Trustee and the financial advisor support the SISP and view it as reasonable and appropriate in the circumstances.

38 The duration of the SISP is reasonable and appropriate in the circumstances having regard to Danier's financial situation, the seasonal nature of its business and the fact that many potentially interested parties are familiar with Danier and its business given their participation in the 2015 solicitation process and/or the stalking horse process.

39 A sale process which allows Danier to be sold as a going concern would likely be more beneficial than a sale under a bankruptcy, which does not allow for the going concern option.

40 Finally, the consideration to be received for the assets under the stalking horse agreement appears at this point, to be *prima facie* fair and reasonable and represents a fair and reasonable benchmark for all other bids in the SISP.

The Break Fee

41 Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected, Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4.

42 Break fees in the range of 3% and expense reimbursements in the range of 2% have recently been approved by this Court, *Nortel Networks Corp., Re*, [2009] O.J. No. 4293 (Ont. S.C.J. [Commercial List]) at paras. 12 and 26; *W.C. Wood Corp., Re*, [2009] O.J. No. 4808 (Ont. S.C.J. [Commercial List]) at para. 3, where a 4% break fee was approved.

43 The break fee, the expense reimbursement and the signage costs obligations in the stalking horse agreement fall within the range of reasonableness. Collectively, these charges represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. In addition, if a liquidation proposal (other than the stalking horse agreement) is the successful bid, Danier is not required to pay the signage costs obligations to the Agent. Instead, the successful bidder will be required to buy the signage and advertising material from the Agent at cost.

44 In the exercise of its business judgment, the Board unanimously approved the break fee, the expense reimbursement and the signage costs obligations. The Proposal Trustee and the financial advisor have both reviewed the break fee, the expense reimbursement and the signage costs obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

- (i) the maximum amount of the break fee, expense reimbursement and signage costs obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the stalking horse agreement, which is within the normal range for transactions of this nature;
- (ii) each stalking horse bidder required a break fee and expense reimbursement as part of their proposal in the stalking horse process;
- (iii) without these protections, a party would have little incentive to act as the stalking horse bidder; and
- (iv) the quantum of the break fee, expense reimbursement and signage costs obligations are unlikely to discourage a third party from submitting an offer in the SISP.

45 I find the break fee to be reasonable and appropriate in the circumstances.

Financial Advisor Success Fee and Charge

46 Danier is seeking a charge in the amount of US\$500,000 to cover its principal financial advisor's (Concensus) maximum success fees payable under its engagement letter. The Consensus Charge would rank behind the existing security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge.

47 Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

- (a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;
- (b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and
- (c) whether the success fee is necessary to incentivize the financial advisor.

Sino-Forest Corp., Re, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) at paras. 46-47; *Colossus Minerals Inc., Re*, *supra*.

48 The SISP contemplates that the financial advisor will continue to be intimately involved in administering the SISP.

49 The financial advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the financial advisor has assisted Danier in its restructuring efforts to date and has gained a thorough and intimate understanding of the business. The continued involvement of the financial advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

50 In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

51 Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which would result in a more competitive sales process. OCI will only be compensated if a transaction is originated by OCI or OCI introduces the ultimate purchaser and/or investor to Danier.

52 Danier and the Proposal Trustee believe that the quantum and nature of the success fee payable under the OCI engagement letter is reasonable in the circumstances. Specifically, because the fees payable to OCI are dependent on the success of transaction or purchaser or investor originated by OCI, the approval of this fee is necessary to incentivize OCI.

53 Accordingly, an order approving the financial advisor and OCI engagement letters is appropriate.

54 A charge ensuring payment of the success fee is also appropriate in the circumstances, as noted below.

Administration Charge

55 In order to protect the fees and expenses of each of the Proposal Trustee, its counsel, counsel to Danier, the directors of Danier and their counsel, Danier seeks a charge on its property and assets in the amount of \$600,000. The Administration Charge would rank behind the existing security, *pari passu* with the Consensus Charge and ahead of the D&O Charge and KERP Charge. It is supported by the Proposal Trustee.

56 Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA.

57 Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process, *Colossus Minerals Inc., Re*, 2014 CarswellOnt 1517 (Ont. S.C.J.) at paras. 11-15.

58 This is an appropriate circumstance for the Court to grant the Administration Charge. The quantum of the proposed Administration Charge is fair and reasonable given the nature of the SISP. Each of the parties whose fees are to be secured by the Administration Charge has played (and will continue to play) a critical role in these proposal proceedings and in the SI. The Administration Charge is necessary to secure the full and complete payment of these fees. Finally, the Administration Charge will be subordinate to the existing security and does not prejudice any known secured creditor of Danier.

D&O Charge

59 The directors and officers have been actively involved in the attempts to address Danier's financial circumstances, including through exploring strategic alternatives, implementing a turnaround plan, devising the SISP and the commencement of these proceedings. The directors and officers are not prepared to remain in office without certainty with respect to coverage for potential personal liability if they continue in their current capacities.

60 Danier maintains directors and officers insurance with various insurers. There are exclusions in the event there is a change in risk and there is potential for there to be insufficient funds to cover the scope of obligations for which the directors and officers may be found personally liable (especially given the significant size of the Danier workforce).

61 Danier has agreed, subject to certain exceptions, to indemnify the directors and officers to the extent that the insurance coverage is insufficient. Danier does not anticipate it will have sufficient funds to satisfy those indemnities if they were ever called upon.

62 Danier seeks approval of a priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the NOI. It is proposed that the D&O Charge be in an amount not to exceed \$4.9 million and rank behind the existing security, the Administration Charge and the Consensus Charge but ahead of the KERP Charge.

63 The amount of the D&O Charge is based on payroll obligations, vacation pay obligations, employee source deduction obligations and sales tax obligations that may arise during these proposal proceedings. It is expected that all of these amounts will be paid in the normal course

as Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

64 The Court has the authority to grant a directors' and officers' charge under section 64.1 of the BIA.

65 In *Colossus Minerals* and *Mustang*, *supra*, this Court approved a directors' and officers' charge in circumstances similar to the present case where there was uncertainty that the existing insurance was sufficient to cover all potential claims, the directors and officers would not continue to provide their services without the protection of the charge and the continued involvement of the directors and officers was critical to a successful sales process under the BIA.

66 I approve the D&O Charge for the following reasons.

67 The D&O Charge will only apply to the extent that the directors and officers do not have coverage under the existing policy or Danier is unable to satisfy its indemnity obligations.

68 The directors and officers of Danier have indicated they will not continue their involvement with Danier without the protection of the D&O Charge yet their continued involvement is critical to the successful implementation of the SISP.

69 The D&O Charge applies only to claims or liabilities that the directors and officers may incur after the date of the NOI and does not cover misconduct or gross negligence.

70 The Proposal Trustee supports the D&O Charge, indicating that the D&O Charge is reasonable in the circumstances.

71 Finally, the amount of the D&O Charge takes into account a number of statutory obligations for which directors and officers are liable if Danier fails to meet these obligations. However, it is expected that all of these amounts will be paid in the normal course. Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

Key Employee Retention Plan and Charge

72 Danier developed a key employee retention plan (the "KERP") that applies to 11 of Danier's employees, an executive of Danier and Danier's consultant, all of whom have been determined to be critical to ensuring a successful sale or investment transaction. The KERP was reviewed and approved by the Board.

73 Under the KERP, the key employees will be eligible to receive a retention payment if these employees remain actively employed with Danier until the earlier of the completion of the SISP, the date upon which the liquidation of Danier's inventory is complete, the date upon which

Danier ceases to carry on business, or the effective date that Danier terminates the services of these employees.

74 Danier is requesting approval of the KERP and a charge for up to \$524,000 (the "KERP Charge") to secure the amounts payable thereunder. The KERP Charge will rank in priority to all claims and encumbrances other than the existing security, the Administration Charge, the Consensus Charge and the D&O Charge.

75 Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts, *Nortel Networks Corp.*, *Re supra*.

76 In *Grant Forest Products Inc., Re*, Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan, including the following:

- (a) whether the court appointed officer supports the retention plan;
- (b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;
- (c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of Danier;
- (d) whether the quantum of the proposed retention payments is reasonable; and
- (e) the business judgment of the board of directors regarding the necessity of the retention payments.

Grant Forest Products Inc., Re, [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]) at paras. 8-22.

77 While *Grant Forest Products Inc., Re* involved a proceeding under the CCAA, key employee retention plans have frequently been approved in proposal proceedings under the BIA, see, for example, *In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013 at para. 10.

78 The KERP and the KERP Charge are approved for the following reasons:

- (i) the Proposal Trustee supports the granting of the KERP and the KERP Charge;
- (ii) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with Danier throughout the SISF and are therefore likely to pursue other employment opportunities;

(iii) Danier has determined that the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction in respect of Danier;

(iv) the Proposal Trustee is of the view that the KERP and the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the individuals entitled to the KERP, which will add stability to the business during these proceedings and will assist in maximizing realizations; and

(v) the KERP was reviewed and approved by the Board.

Sealing Order

79 There are two documents which are sought to be sealed: 1) the details about the KERP; and 2) the stalking horse offer summary.

80 Section 137(2) of the *Courts of Justice Act* provides the court with discretion to order that any document filed in a civil proceeding can be treated as confidential, sealed, and not form part of the public record.

81 In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

(1) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and

(2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

[2002] S.C.J. No. 42 (S.C.C.) at para. 53.

82 In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders, *Stelco Inc., Re*, [2006] O.J. No. 275 (Ont. S.C.J. [Commercial List]) at paras. 2-5; *Nortel Networks Corp., Re, supra*.

83 It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

84 The offer summary contains highly sensitive commercial information about Danier, the business and what some parties, confidentially, were willing to bid for Danier's assets. Disclosure of this information could undermine the integrity of the SISP. The disclosure of the offer summary prior to the completion of a final transaction under the SISP would pose a serious risk to the SISP in the event that the transaction does not close. Disclosure prior to the completion of a SISP would jeopardize value-maximizing dealings with any future prospective purchasers or liquidators of Danier's assets. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

85 The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings...

86 As a result, the *Sierra Club* test for a sealing order has been met. The material about the KERP and the offer summary shall not form part of the public record pending completion of these proposal proceedings.

Order accordingly.

TAB 4

2012 ONSC 1750
Ontario Superior Court of Justice [Commercial List]

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.

2012 CarswellOnt 3158, 2012 ONSC 1750, 213 A.C.W.S. (3d) 12, 90 C.B.R. (5th) 74

**CCM Master Qualified Fund, Ltd. (Applicant) and
blutip Power Technologies Ltd. (Respondent)**

D.M. Brown J.

Heard: March 15, 2012
Judgment: March 15, 2012
Docket: CV-12-9622-00CL

Counsel: L. Rogers, C. Burr for Receiver, Duff & Phelps Canada Restructuring Inc.
A. Cobb, A. Lockhart for Applicant

D.M. Brown J.:

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

1 By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

2 D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

3 The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately \$3.7 million consisting of (i) two convertible senior secured promissory notes (October 21, 2011: \$2.6 million and December 29, 2011: \$800,000), (ii) \$65,000 advanced last month pursuant to a Receiver's Certificate, and (iii)

\$47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

4 At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

5 As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

6 Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties.¹ Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

(i) the fairness, transparency and integrity of the proposed process;

(ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

(iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

7 The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings,² BIA proposals,³ and CCAA proceedings.⁴

8 Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. CCAA proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest CCAA process:

To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.⁵

B. The proposed bidding process

B.1 The bid solicitation/auction process

9 The bidding process proposed by the Receiver would use a Stalking Horse Offer submitted by CCM to the Receiver, and subsequently amended pursuant to negotiations, as a baseline offer and a qualified bid in an auction process. D&P intends to distribute to prospective purchasers an interest solicitation letter, make available a confidential information memorandum to those who sign a confidentiality agreement, allow due diligence, and provide interested parties with a copy of the Stalking Horse Offer.

10 Bids filed by the April 16, 2012 deadline which meet certain qualifications stipulated by the Receiver may participate in an auction scheduled for April 20, 2012. One qualification is that the minimum consideration in a bid must be an overbid of \$100,000 as compared to the Stalking Horse Offer. The proposed auction process is a standard, multi-round one designed to result in a Successful Bid and a Back-Up Bid. The rounds will be conducted using minimum incremental overbids of \$100,000, subject to reduction at the discretion of the Receiver.

B.2 Stalking horse credit bid

11 The CCM Stalking Horse Offer, or Agreement, negotiated with the Receiver contemplates the acquisition of substantially all the company's business and assets on an "as is where is" basis. The purchase price is equal to: (i) Assumed Liabilities, as defined in the Stalking Horse Offer, plus (ii) a credit bid of CCM's secured debt outstanding under the two Notes, the Appointment Costs and the advance under the Receiver's Certificate. The purchase price is estimated to be approximately

\$3.744 million before the value of Assumed Liabilities which will include the continuation of the employment of employees, if the offer is accepted.

12 The Receiver reviewed at length, in its Report and in counsel's factum, the calculation of the value of the credit bid. Interest under both Notes was fixed at 15% per annum and was prepaid in full. The Receiver reported that if both Notes were repaid on May 3, 2012, the anticipated closing date, the effective annual rate of interest (taking into account all costs which could be categorized as "interest") would be significantly higher than 15% per annum - 57.6% on the October Note and 97.4% on the December Note. In order that the interest on the Notes considered for purposes of calculating the value of the credit bid complied with the interest rate provisions of the *Criminal Code*, the Receiver informed CCM that the amount of the secured indebtedness under the Notes eligible for the credit bid would have to be \$103,500 less than the face value of the Notes. As explained in detail in paragraphs 32 through to 39 of its factum, the Receiver is of the view that such a reduction would result in a permissible effective annual interest rate under the December Note. The resulting Stalking Horse Agreement reflected such a reduction.

13 The Stalking Horse Offer does not contain a break-fee, but it does contain a term that in the event the credit bid is not the Successful Bid, then CCM will be entitled to reimbursement of its expenses up to a maximum of \$75,000, or approximately 2% of the value of the estimated purchase price. Such an amount, according to the Receiver, would fall within the range of reasonable break fees and expense reimbursements approved in other cases, which have ranged from 1.8% to 5% of the value of the bid.⁶

C. Analysis

14 Given the financial circumstances of Blutip and the lack of funding available to the Receiver to support the company's operations during a lengthy sales process, I accept the Receiver's recommendation that a quick sales process is required in order to optimize the prospects of securing the best price for the assets. Accordingly, the timeframe proposed by the Receiver for the submission of qualifying bids and the conduct of the auction is reasonable. The marketing, bid solicitation and bidding procedures proposed by the Receiver are likely to result in a fair, transparent and commercially efficacious process in the circumstances.

15 In light of the reduction in the face value of the Notes required by the Receiver for the purposes of calculating the value of the credit bid and the reasonable amount of the Expense Reimbursement, I approved the Stalking Horse Agreement for the purposes requested by the Receiver. I accept the Receiver's assessment that in the circumstances the terms of the Stalking Horse Offer, including the Expense Reimbursement, will not discourage a third party from submitting an offer superior to the Stalking Horse Offer.

16 Also, as made clear in paragraphs 7 and 8 of the Bidding Procedures Order, the Stalking Horse Agreement is deemed to be a Qualified Bid and is accepted solely for the purposes of CCM's right to participate in the auction. My order did not approve the sale of Blutip's assets on the terms set out in the Stalking Horse Agreement. As the Receiver indicated, the approval of the sale of Blutip's assets, whether to CCM or some other successful bidder, will be the subject of a future motion to this Court. Such an approach is consistent with the practice of this Court.⁷

17 For those reasons I approved the bidding procedures recommended by the Receiver.

IV. Priority of receiver's charges

18 Paragraphs 17 and 20 of the Appointment Order granted some priority for the Receiver's Charge and Receiver's Borrowings Charge. However, as noted by the Receiver in section 3.1 of its First Report, because that hearing was brought on an urgent, *ex parte* basis, priority over existing perfected security interests and statutory encumbrances was not sought at that time. The Receiver now seeks such priority.

19 As previously noted, the Receiver reported that Blutip does not maintain any pension plans. In section 3.1 of its Report the Receiver identified the persons served with notice of this motion: (i) parties with registered security interests pursuant to the *PPSA*; (ii) those who have commenced legal proceedings against the Company; (iii) those who have asserted claims in respect of intellectual property against the Company; (iv) the Company's landlord, and (v) standard government agencies. Proof of such service was filed with the motion record. No person appeared on the return of the motion to oppose the priority sought by the Receiver for its charges.

20 Although the Receiver gave notice to affected parties six days in advance of this motion, not seven days as specified in paragraph 31 of the Appointment Order, I was satisfied that secured creditors who would be materially affected by the order had been given reasonable notice and an opportunity to make representations, as required by section 243(6) of the *BIA*, that abridging the notice period by one day, as permitted by paragraph 31 of the Appointment Order, was appropriate and fair in the circumstances, and I granted the priority charges sought by the Receiver.

21 I should note that the Appointment Order contains a standard "come-back clause" (para. 31). Recently, in *First Leaside Wealth Management Inc., Re*, a proceeding under the *CCAA*, I wrote:

[49] In his recent decision in *Timminco Limited (Re)* ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:

In my view, in the absence of the court granting the requested super priority and protection, the objectives of the *CCAA* would be frustrated. It is not reasonable to expect

that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.

...

[51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.⁸

22 In my view those comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* or the proposal provisions of the *BIA*.

23 In the present case the issues of the priority of the Receiver's Charge and Receiver's Borrowings Charge were deferred from the return of the initial application until notice could be given to affected parties. I have noted that Blutip did not maintain pension plans. I have found that reasonable notice now has been given and no affected person appeared to oppose the granting of the priority charges. Consequently, it is my intention that the Bidding Procedures Order constitutes a final disposition of the issue of the priority of those charges (subject, of course, to any rights to appeal the Bidding Procedures Order). I do not regard the presence of a "come-back clause" in the Appointment Order as leaving the door open a crack for some subsequent challenge to the priorities granted by this order.

V. Approval of the Receiver's activities

24 The activities described by the Receiver in its First Report were reasonable and fell within its mandate, so I approved them.

25 May I conclude by thanking Receiver's counsel for a most helpful factum.

Motion granted.

Footnotes

1 (1991), 7 C.B.R. (3d) 1 (Ont. C.A.).

2 *Graceway Canada Co., Re*, 2011 ONSC 6403 (Ont. S.C.J. [Commercial List]), para. 2.

3 *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 15.

4 *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), para. 13; *White Birch Paper Holding Co., Re*, 2010 QCCS 4382 (C.S. Que.), para. 3; *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), para. 2, and *Nortel Networks Corp., Re* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]); *Indalex Ltd., Re*, 2009 CarswellOnt 4262 (Ont. S.C.J. [Commercial List]).

5 Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding — Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16.

6 *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 12; *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (C.S. Que.), paras. 4 to 7; *Nortel Networks Corp., Re* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]), para. 12.

7 *Indalex Ltd., Re*, 2009 CarswellOnt 4262 (Ont. S.C.J. [Commercial List]), para. 7; *Graceway Canada Co., Re*, 2011 ONSC 6403 (Ont. S.C.J. [Commercial List]), para. 5; *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 58.

8 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) (CanLII).

TAB 5

2009 CarswellOnt 8207
Ontario Superior Court of Justice [Commercial List]

Brainhunter Inc., Re

2009 CarswellOnt 8207, 183 A.C.W.S. (3d) 905, 62 C.B.R. (5th) 41

**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
BRAINHUNTER INC., BRAINHUNTER CANADA INC., BRAINHUNTER (OTTAWA)
INC., PROTEC EMPLOYMENT SERVICES LTD., TREKLOGIC INC. (APPLICANTS)

Morawetz J.

Heard: December 11, 2009
Judgment: December 11, 2009
Written reasons: December 18, 2009
Docket: 09-8482-00CL

Counsel: Jay Swartz, Jim Bunting for Applicants
G. Moffat for Monitor, Deloitte & Touche Inc.
Joseph Bellissimo for Roynat Capital Inc.
Peter J. Osborne for R.N. Singh, Purchaser
Edmond Lamek for Toronto-Dominion Bank
D. Dowdall for Noteholders
D. Ullmann for Procom Consultants Group Inc.

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements —
Approval by court — Miscellaneous
Applicants were protected under Companies' Creditors Arrangement Act — Applicants brought
motion for extension of stay period, approval of bid process and approval of "Stalking Horse APA"
— Motion granted — Motion was supported by special committee, advisors, key creditor groups

and monitor — Opposition came from business competitor and party interested in possibly bidding on assets of applicants — Applicants established that sales transaction was warranted and that sale would benefit economic community — No creditor came forward to object sale of business — It was unnecessary for court to substitute its business judgment for that of applicants.

Table of Authorities

Cases considered by *Morawetz J.*:

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

Statutes considered:

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

Generally — referred to

s. 36 — considered

***Morawetz J.*:**

1 At the conclusion of the hearing on December 11, 2009, I granted the motion with reasons to follow. These are the reasons.

2 The Applicants brought this motion for an extension of the Stay Period, approval of the Bid Process and approval of the Stalking Horse APA between TalentPoint Inc., 2223945 Ontario Ltd., 2223947 Ontario Ltd., and 2223956 Ontario Ltd., as purchasers (collectively, the "Purchasers") and each of the Applicants, as vendors.

3 The affidavit of Mr. Jewitt and the Report of the Monitor dated December 1, 2009 provide a detailed summary of the events that lead to the bringing of this motion.

4 The Monitor recommends that the motion be granted.

5 The motion is also supported by TD Bank, Roynat, and the Noteholders. These parties have the significant economic interest in the Applicants.

6 Counsel on behalf of Mr. Singh and the proposed Purchasers also supports the motion.

7 Opposition has been voiced by counsel on behalf of Procom Consultants Group Inc., a business competitor to the Applicants and a party that has expressed interest in possibly bidding for the assets of the Applicants.

8 The Bid Process, which provides for an auction process, and the proposed Stalking Horse APA have been considered by Breakwall, the independent Special Committee of the Board and the Monitor.

9 Counsel to the Applicants submitted that, absent the certainty that the Applicants' business will continue as a going concern which is created by the Stalking Horse APA and the Bid Process, substantial damage would result to the Applicants' business due to the potential loss of clients, contractors and employees.

10 The Monitor agrees with this assessment. The Monitor has also indicated that it is of the view that the Bid Process is a fair and open process and the best method to either identify the Stalking Horse APA as the highest and best bid for the Applicants' assets or to produce an offer for the Applicants' assets that is superior to the Stalking Horse APA.

11 It is acknowledged that the proposed purchaser under the Stalking Horse APA is an insider and a related party. The Monitor is aware of the complications that arise by having an insider being a bidder. The Monitor has indicated that it is of the view that any competing bids can be evaluated and compared with the Stalking Horse APA, even though the bids may not be based on a standard template.

12 Counsel on behalf of Procom takes issue with the \$700,000 break fee which has been provided for in the Stalking Horse APA. He submits that it is neither fair nor necessary to have a break fee. Counsel submits that the break fee will have a chilling effect on the sales process as it will require his client to in effect outbid Mr. Singh's group by in excess of \$700,000 before its bid could be considered. The break fee is approximately 2.5% of the total consideration.

13 The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

- (a) Is a sale transaction warranted at this time?
- (b) Will the sale benefit the whole "economic community"?
- (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
- (d) Is there a better viable alternative?

14 The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

15 Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the

amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

16 Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

17 I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

18 In this case, the Special Committee, the advisors, the key creditor groups and the Monitor all expressed support for the Applicants' process.

19 In my view, the Applicants have established that a sales transaction is warranted at this time and that the sale will be of benefit to the "economic community". I am also satisfied that no better alternative has been put forward. In addition, no creditor has come forward to object to a sale of the business.

20 With respect to the possibility that the break fee may deter other bidders, this is a business point that has been considered by the Applicants, its advisors and key creditor groups. At 2.5% of the amount of the bid, the break fee is consistent with break fees that have been approved by this court in other proceedings. The record makes it clear that the break fee issue has been considered and, in the exercise of their business judgment, the Special Committee unanimously recommended to the Board and the Board unanimously approved the break fee. In the circumstances of this case, it is not appropriate or necessary for the court to substitute its business judgment for that of the Applicants.

21 For the foregoing reasons, I am satisfied that the Bid Process and the Stalking Horse APA be approved.

22 For greater certainty, a bid will not be disqualified as a Qualified Bid (or a bidder as a Qualified Bidder) for the reason that the bid does not contemplate the bidder offering employment to all or substantially all of the employees of the Applicants or assuming liabilities to employees on terms comparable to those set out in s. 5.6 of the Stalking Horse Bid. However, this may be considered as a factor in comparing the relative value of competing bids.

23 The Applicants also seek an extension of the Stay Period to coincide with the timelines in the Bid Process. The timelines call for the transaction to close in either February or March, 2010 depending on whether there is a plan of arrangement proposed.

24 Having reviewed the record and heard submissions, I am satisfied that the Applicants have acted, and are acting, in good faith and with due diligence and that circumstances exist that make the granting of an extension appropriate. Accordingly, the Stay Period is extended to February 8, 2010.

25 An order shall issue to give effect to the foregoing.

Motion granted.

TAB 6

Most Negative Treatment: Check subsequent history and related treatments.

2008 SCC 69

Supreme Court of Canada

BCE Inc., Re

2008 CarswellQue 12595, 2008 CarswellQue 12596, 2008 SCC 69, [2008]
3 S.C.R. 560, [2008] S.C.J. No. 37, 172 A.C.W.S. (3d) 915, 301 D.L.R. (4th)
80, 383 N.R. 119, 52 B.L.R. (4th) 1, 71 C.P.R. (4th) 303, J.E. 2009-43

BCE Inc. and Bell Canada (Appellants / Respondents on cross-appeals) and A Group of 1976 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Manitoba Civil Service Superannuation Board, TD Asset Management Inc. and Manulife Financial Corporation A Group of 1996 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Insurance (Canada) Limited, CIBC Global Asset Management Inc., Manitoba Civil Service Superannuation Board and TD Asset Management Inc. A Group of 1997 Debentureholders composed of: Addenda Capital Management Inc., Manulife Financial Corporation, Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Wawanesa Life Insurance Company, TD Asset Management Inc., Franklin Templeton Investments Corp. and Barclays Global Investors Canada Limited (Respondents / Appellants on cross-appeals) and Computershare Trust Company of Canada and CIBC Mellon Trust Company (Respondents) and Director Appointed Pursuant to the CBCA, Catalyst Asset Management Inc. and Matthew Stewart (Interveners)

6796508 Canada Inc. (Appellant / Respondent on cross-appeals) and A Group of 1976 Debentureholders composed of: Aegon Capital Management Inc., Addenda

Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Manitoba Civil Service Superannuation Board, TD Asset Management Inc. and Manulife Financial Corporation A Group of 1996 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Insurance (Canada) Limited, CIBC Global Asset Management Inc., Manitoba Civil Service Superannuation Board and TD Asset Management Inc. A Group of 1997 Debentureholders composed of: Addenda Capital Management Inc., Manulife Financial Corporation, Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Wawanesa Life Insurance Company, TD Asset Management Inc., Franklin Templeton Investments Corp. and Barclays Global Investors Canada Limited (Respondents / Appellants on cross-appeals) and Computershare Trust Company of Canada and CIBC Mellon Trust Company (Respondents) and Director Appointed Pursuant to the CBCA, Catalyst Asset Management Inc. and Matthew Stewart (Intervenors)

McLachlin C.J.C., Bastarache^{*}, Binnie, LeBel, Deschamps, Abella, Charron JJ.

Heard: June 17-20, 2008
Judgment: December 19, 2008
Docket: 32647

Proceedings: additional reasons to *BCE Inc., Re* (2008), 2008 CarswellQue 5401, 2008 CarswellQue 5402 (S.C.C.); reversing *BCE Inc., Re* (2008), 43 B.L.R. (4th) 157, 2008 CarswellQue 4179, 2008 QCCA 930, 2008 QCCA 931, 2008 QCCA 932, 2008 QCCA 933, 2008 QCCA 934, 2008 QCCA 935 (C.A. Que.); varying *CIBC Mellon Trust Co. v. Bell Canada* (2008), 43 B.L.R. (4th) 39, 2008 QCCS 898, 2008 CarswellQue 1805, [2008] R.J.Q. 1029 (C.S. Que.); and varying *Computershare Trust Co. of Canada v. Bell Canada* (2008), 2008 CarswellQue 2226, 43 B.L.R. (4th) 69, 2008 QCCS 899 (C.S. Que.); and reversing *BCE Inc., Re* (2008), 2008 CarswellQue 2227, 43 B.L.R. (4th) 1, 2008 QCCS 905, [2008] R.J.Q. 1097 (C.S. Que.); affirmed *BCE Inc., Re* (2008), 2008 CarswellQue 2883 (C.A. Que.); and affirming *Addenda Capital inc v. Bell Canada* (2008), 2008 CarswellQue 2228, 43 B.L.R. (4th) 135, 2008 QCCS 906 (C.S. Que.); and affirming *Aegon Capital Management Inc. v. BCE inc.* (2008), 2008 CarswellQue 2229, 43 B.L.R. (4th) 79, 2008 QCCS 907, [2008] R.J.Q. 1119 (C.S. Que.)

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Christian S. Tacit, for Intervener, Catalyst Asset Management Inc.

Raynold Langlois, Q.C., Gerald Apostolatos, for Intervener, Matthew Stewart

Related Abridgment Classifications

Business associations

III Specific matters of corporate organization

III.1 Directors and officers

III.1.g Fiduciary duties

III.1.g.ix Miscellaneous

Business associations

IV Powers, rights and liabilities

IV.8 Corporate borrowing

IV.8.b Bonds and debentures

IV.8.b.vii Miscellaneous

Business associations

VI Changes to corporate status

VI.3 Arrangements and compromises

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Headnote

Business associations --- Specific corporate organization matters — Directors and officers — Fiduciary duties — General principles

Large telecommunications corporation, BCE, received offer from group led by Ontario Teachers Pension Plan Board and financed in part by assumption by Bell Canada, subsidiary of BCE, of \$30 billion debt, to purchase all of BCE's shares — On June 30, 2007, group and BCE entered into definitive agreement and on September 21, 2007, BCE's shareholders approved arrangement in proportion of nearly 98 percent — Leveraged buyout was opposed by debentureholders of Bell Canada on ground that increased debt contemplated by purchase agreement would reduce value of their bonds — Superior Court found arrangement fair, approved it and dismissed debentureholders' claims for oppression — Quebec Court of Appeal allowed debentureholders' appeal, found that arrangement had not been shown to be fair and held that it should not have been approved — BCE and Bell Canada appealed to Supreme Court of Canada and debentureholders cross-appealed — Appeals allowed; cross-appeals dismissed — Fact that shareholders stood to benefit from transaction and that debentureholders were prejudiced did not in itself give rise to conclusion that

directors had breached their fiduciary duty to corporation — Directors had fiduciary duty to act in best interests of corporation and content of this duty was affected by various interests at stake in context of auction process that BCE was undergoing — Directors, faced with conflicting interests, might have no choice but to approve transactions that, while in corporation's best interests, would benefit some groups at expense of others.

Business associations --- Powers, rights and liabilities — Corporate borrowing — Bonds and debentures — Miscellaneous issues

Large telecommunications corporation, BCE, received offer from group led by Ontario Teachers Pension Plan Board and financed in part by assumption by Bell Canada, subsidiary of BCE, of \$30 billion debt, to purchase all of BCE's shares — On June 30, 2007, group and BCE entered into definitive agreement and on September 21, 2007, BCE's shareholders approved arrangement in proportion of nearly 98 percent — Leveraged buyout was opposed by debentureholders of Bell Canada on ground that increased debt contemplated by purchase agreement would reduce value of their bonds — Superior Court found arrangement fair, approved it and dismissed debentureholders' claims for oppression — Quebec Court of Appeal allowed debentureholders' appeal, found that arrangement had not been shown to be fair and held that it should not have been approved — BCE and Bell Canada appealed to Supreme Court of Canada and debentureholders cross-appealed — Appeals allowed; cross-appeals dismissed — It may be impossible to satisfy all stakeholders in given situation — Here, all bids involved substantial increase in Bell Canada's debt — There was no evidence that BCE could have done anything to avoid that risk — This reality would have been appreciated by reasonable debentureholders — Therefore, court concluded that debentureholders failed to establish reasonable expectation that could give rise to claim for oppression.

Business associations --- Changes to corporate status — Arrangements and compromises — Under general corporate legislation

Large telecommunications corporation, BCE, received offer from group led by Ontario Teachers Pension Plan Board and financed in part by assumption by Bell Canada, subsidiary of BCE, of \$30 billion debt, to purchase all of BCE's shares — On June 30, 2007, group and BCE entered into definitive agreement and on September 21, 2007, BCE's shareholders approved arrangement in proportion of nearly 98 percent — Leveraged buyout was opposed by debentureholders of Bell Canada on ground that increased debt contemplated by purchase agreement would reduce value of their bonds — Superior Court found arrangement fair, approved it and dismissed debentureholders' claims for oppression — Quebec Court of Appeal allowed debentureholders' appeal, found that arrangement had not been shown to be fair and held that it should not have been approved — BCE and Bell Canada appealed to Supreme Court of Canada and debentureholders cross-appealed — Appeals allowed; cross-appeals dismissed — In reviewing directors' decision on proposed arrangement to determine if it was fair and reasonable, courts must be satisfied that arrangement had a valid business purpose, which was not disputed — It also must be satisfied that objections of those whose legal rights were being arranged were being resolved in fair and balanced way — Trial judge was correct in concluding that debentureholders should not be permitted to veto almost 98 percent of shareholders simply because trading value of their securities would be affected

— Trial judge did not err in concluding that arrangement addressed debentureholders' interests in fair and balanced way — Judge emphasized that arrangement preserved contractual rights of debentureholders as negotiated — In addition, terms of trust indentures did not contain change of control provisions — Trial judge was right in concluding that arrangement had been shown to be fair and reasonable.

Associations d'affaires --- Questions spécifiquement liées à l'organisation corporative — Administrateurs et dirigeants — Devoirs fiduciaires — Principes généraux

Grande société de télécommunications, BCE, a reçu une offre d'acquisition visant la totalité des actions de la société d'un groupe mené par le Conseil du régime de retraite des enseignantes et des enseignants de l'Ontario et financée en partie par la prise en charge d'une dette de 30 milliards de dollars par Bell Canada, une filiale de BCE — Groupe et BCE ont conclu une entente définitive le 30 juin 2007 et le 21 septembre suivant, les actionnaires de BCE l'ont approuvée dans une proportion de près de 98 pour cent — Détenteurs de débentures de Bell Canada se sont opposés à l'acquisition par emprunt, soutenant que l'augmentation de la dette prévue par la convention d'acquisition réduirait la valeur de leurs obligations — Cour supérieure a conclu au caractère équitable de l'arrangement, l'a approuvé et a rejeté les demandes de redressement pour abus des détenteurs de débentures — Cour d'appel du Québec a accueilli l'appel interjeté par les détenteurs de débentures et a jugé que le caractère équitable de l'arrangement n'avait pas été démontré et que l'arrangement n'aurait pas dû être approuvé — BCE et Bell Canada ont formé un pourvoi devant la Cour suprême du Canada et les détenteurs de débentures ont formé un pourvoi incident — Pourvois accueillis et pourvois incidents rejetés — Fait que les actionnaires puissent réaliser un gain alors que les détenteurs de débentures subiraient un préjudice ne permettait pas en soi de conclure à un manquement à l'obligation fiduciaire des administrateurs envers la société — Administrateurs avaient l'obligation fiduciaire d'agir au mieux des intérêts de la société et le contenu de cette obligation dépendait des divers intérêts en jeu dans le contexte du processus d'enchères dont BCE faisait l'objet — Face à des intérêts opposés, les administrateurs pouvaient n'avoir d'autre choix que d'approuver des transactions qui, bien qu'elles servent au mieux les intérêts de la société, privilégieraient certains groupes au détriment d'autres groupes.

Associations d'affaires --- Pouvoirs, droits et responsabilités — Emprunts de la société — Obligations et débentures — Questions diverses

Grande société de télécommunications, BCE, a reçu une offre d'acquisition visant la totalité des actions de la société d'un groupe mené par le Conseil du régime de retraite des enseignantes et des enseignants de l'Ontario et financée en partie par la prise en charge d'une dette de 30 milliards de dollars par Bell Canada, une filiale de BCE — Groupe et BCE ont conclu une entente définitive le 30 juin 2007 et le 21 septembre suivant, les actionnaires de BCE l'ont approuvée dans une proportion de près de 98 pour cent — Détenteurs de débentures de Bell Canada se sont opposés à l'acquisition par emprunt, soutenant que l'augmentation de la dette prévue par la convention d'acquisition réduirait la valeur de leurs obligations — Cour supérieure a conclu au caractère équitable de l'arrangement, l'a approuvé et a rejeté les demandes de redressement pour abus des détenteurs de débentures — Cour d'appel du Québec a accueilli l'appel interjeté par les détenteurs

de débentures et a jugé que le caractère équitable de l'arrangement n'avait pas été démontré et que l'arrangement n'aurait pas dû être approuvé — BCE et Bell Canada ont formé un pourvoi devant la Cour suprême du Canada et les détenteurs de débentures ont formé un pourvoi incident — Pourvois accueillis et pourvois incidents rejetés — Il peut s'avérer impossible de satisfaire toutes les parties intéressées dans une situation donnée — En l'espèce, toutes les offres que BCE a reçues accroîtraient substantiellement l'endettement de Bell Canada — Rien dans la preuve n'indiquait que BCE aurait pu faire quoi que ce soit pour écarter ce risque — Des détenteurs de débentures raisonnables auraient eu conscience de cette réalité — Par conséquent, la cour a conclu que les détenteurs de débentures n'avaient pas démontré qu'ils avaient une attente raisonnable pouvant donner ouverture à une demande de redressement pour abus.

Associations d'affaires --- Changements corporatifs — Arrangements et transactions — En vertu des lois sur les sociétés d'application générale

Grande société de télécommunications, BCE, a reçu une offre d'acquisition visant la totalité des actions de la société d'un groupe mené par le Conseil du régime de retraite des enseignantes et des enseignants de l'Ontario et financée en partie par la prise en charge d'une dette de 30 milliards de dollars par Bell Canada, une filiale de BCE — Groupe et BCE ont conclu une entente définitive le 30 juin 2007 et le 21 septembre suivant, les actionnaires de BCE l'ont approuvée dans une proportion de près de 98 pour cent — Détenteurs de débentures de Bell Canada se sont opposés à l'acquisition par emprunt, soutenant que l'augmentation de la dette prévue par la convention d'acquisition réduirait la valeur de leurs obligations — Cour supérieure a conclu au caractère équitable de l'arrangement, l'a approuvé et a rejeté les demandes de redressement pour abus des détenteurs de débentures — Cour d'appel du Québec a accueilli l'appel interjeté par les détenteurs de débentures et a jugé que le caractère équitable de l'arrangement n'avait pas été démontré et que l'arrangement n'aurait pas dû être approuvé — BCE et Bell Canada ont formé un pourvoi devant la Cour suprême du Canada et les détenteurs de débentures ont formé un pourvoi incident — Pourvois accueillis et pourvois incidents rejetés — Pour conclure que la décision des administrateurs au sujet de l'arrangement proposé était équitable et raisonnable, le tribunal devait être convaincu que l'arrangement poursuivait un objectif commercial légitime, ce qui n'était pas contesté — Il doit aussi être convaincu qu'il répondait de façon équitable et équilibrée aux objections de ceux dont les droits étaient visés — Juge de première instance avait raison de conclure que les détenteurs de débentures ne pouvaient être autorisés à opposer un veto à près de 98 pour cent des actionnaires simplement parce que la transaction pouvait avoir des répercussions négatives sur la valeur de leurs titres — Juge de première instance n'a commis aucune erreur en concluant que l'arrangement répondait de façon équitable et équilibrée aux intérêts des détenteurs de débentures — Juge a souligné que l'arrangement préservait les droits contractuels des détenteurs de débentures tels que ces derniers les avaient négociés — De plus, les actes de fiducie ne renfermaient aucune stipulation concernant un changement de contrôle — Juge de première instance a eu raison de conclure que le caractère équitable et raisonnable de l'arrangement avait été démontré.

A large telecommunications corporation, BCE, received an offer from a group led by the Ontario Teachers Pension Plan Board and financed in part by the assumption by Bell Canada, a subsidiary

of BCE, of a \$30 billion debt, to purchase all of BCE's shares. On June 30, 2007, the group and BCE entered into a definitive agreement and on September 21, 2007, BCE's shareholders approved the arrangement in a proportion of nearly 98 percent. The leveraged buyout was opposed by debentureholders of Bell Canada on the ground that the increased debt contemplated by the purchase agreement would reduce the value of their bonds.

The Superior Court found the arrangement fair and approved it. It also dismissed the debentureholders' claims for oppression on the grounds that the debt guarantee to be assumed by Bell Canada had a valid business purpose; that the transaction did not breach the reasonable expectations of the debentureholders; that the transaction was not oppressive by reason of rendering the debentureholders vulnerable; and that BCE and its directors had not unfairly disregarded the interests of the debentureholders.

The Quebec Court of Appeal allowed the debentureholders' appeal and found that the arrangement had not been shown to be fair and held that it should not have been approved. According to the court, the directors were under a duty, not simply to accept the best offer, but to consider whether the arrangement could be restructured in a way that provided a satisfactory price to the shareholders while avoiding an adverse effect on the debentureholders. BCE and Bell Canada appealed to the Supreme Court of Canada and the debentureholders cross-appealed.

Held: The appeals were allowed and the cross-appeals were dismissed.

The trial judge did not err in concluding that the fact that the shareholders stood to benefit from the transaction and that the debentureholders were prejudiced did not in itself give rise to a conclusion that the directors had breached their fiduciary duty to the corporation. He recognized that the directors had a fiduciary duty to act in the best interests of the corporation and that the content of this duty was affected by the various interests at stake in the context of the auction process that BCE was undergoing. He emphasized that the directors, faced with conflicting interests, might have no choice but to approve transactions that, while in the best interests of the corporation, would benefit some groups at the expense of others.

It may be impossible to satisfy all stakeholders in a given situation. Here, all of the bids were leveraged, involving a substantial increase in Bell Canada's debt. There was no evidence that BCE could have done anything to avoid that risk. This reality would have been appreciated by reasonable debentureholders. Therefore, the court concluded that the debentureholders failed to establish a reasonable expectation that could give rise to a claim for oppression.

In reviewing the directors' decision on the proposed arrangement to determine if it was fair and reasonable, courts must be satisfied that the arrangement had a valid business purpose, which was not disputed, and that the objections of those whose legal rights were being arranged were being resolved in a fair and balanced way. The trial judge was correct in concluding that the debentureholders should not be permitted to veto almost 98 percent of the shareholders simply because the trading value of their securities would be affected. The trial judge did not err in concluding that the arrangement addressed the debentureholders' interests in a fair and balanced way. The judge emphasized that the arrangement preserved the contractual rights of the debentureholders as negotiated. In addition, the terms of the trust indentures did not contain change

of control provisions. Recognizing that there is no such thing as a perfect arrangement, the trial judge was right in concluding that the arrangement had been shown to be fair and reasonable.

Une grande société de télécommunications, BCE, a reçu une offre d'acquisition visant la totalité des actions de la société d'un groupe mené par le Conseil du régime de retraite des enseignantes et des enseignants de l'Ontario et financée en partie par la prise en charge d'une dette de 30 milliards de dollars par Bell Canada, une filiale de BCE. Le groupe et BCE ont conclu une entente définitive le 30 juin 2007 et le 21 septembre suivant, les actionnaires de BCE l'ont approuvée dans une proportion de près de 98 pour cent. Les détenteurs de débentures de Bell Canada se sont opposés à l'acquisition par emprunt, soutenant que l'augmentation de la dette prévue par la convention d'acquisition réduirait la valeur de leurs obligations.

La Cour supérieure a conclu au caractère équitable de l'arrangement et l'a approuvé. De plus, elle a rejeté les demandes de redressement pour abus des détenteurs de débentures au motif que la garantie d'emprunt fournie par Bell Canada poursuivait un objectif commercial légitime, la transaction ne frustrait pas les attentes raisonnables des détenteurs de débentures, la prétention que la transaction constituait un abus parce qu'elle rendait les détenteurs de débentures vulnérables n'était pas fondée et celle selon laquelle BCE et ses administrateurs s'étaient montrés injustes en ne tenant pas compte des intérêts des détenteurs de débentures ne pouvait être retenue.

La Cour d'appel du Québec a accueilli l'appel interjeté par les détenteurs de débentures et a jugé que le caractère équitable de l'arrangement n'avait pas été démontré et que l'arrangement n'aurait pas dû être approuvé. Selon elle, les administrateurs n'avaient pas simplement l'obligation d'accepter la meilleure offre, mais aussi celle de déterminer si l'arrangement pouvait être restructuré de façon à assurer un prix satisfaisant aux actionnaires tout en évitant de causer un préjudice aux détenteurs de débentures. BCE et Bell Canada ont formé un pourvoi devant la Cour suprême du Canada et les détenteurs de débentures ont formé un pourvoi incident.

Arrêt: Les pourvois ont été accueillis et les pourvois incidents ont été rejetés.

En concluant que le fait que les actionnaires puissent réaliser un gain alors que les détenteurs de débentures subiraient un préjudice ne permettait pas en soi de conclure à un manquement à l'obligation fiduciaire des administrateurs envers la société, le juge de première instance n'a pas commis d'erreur. Il a reconnu que les administrateurs avaient l'obligation fiduciaire d'agir au mieux des intérêts de la société et que le contenu de cette obligation dépendait des divers intérêts en jeu dans le contexte du processus d'enchères dont BCE faisait l'objet. Il a souligné que, face à des intérêts opposés, les administrateurs pouvaient n'avoir d'autre choix que d'approuver des transactions qui, bien qu'elles servent au mieux les intérêts de la société, privilégieraient certains groupes au détriment d'autres groupes.

Il peut s'avérer impossible de satisfaire toutes les parties intéressées dans une situation donnée. En l'espèce, toutes les offres que BCE a reçues comportaient un emprunt qui accroîtrait substantiellement l'endettement de Bell Canada. Rien dans la preuve n'indiquait que BCE aurait pu faire quoi que ce soit pour écarter ce risque. Des détenteurs de débentures raisonnables auraient eu conscience de cette réalité. Par conséquent, la cour a conclu que les détenteurs de débentures

n'avaient pas démontré qu'ils avaient une attente raisonnable pouvant donner ouverture à une demande de redressement pour abus.

Pour conclure que la décision des administrateurs au sujet de l'arrangement proposé était équitable et raisonnable, le tribunal devait être convaincu que l'arrangement poursuivait un objectif commercial légitime, ce qui n'était pas contesté, et répondait de façon équitable et équilibrée aux objections de ceux dont les droits étaient visés. Le juge de première instance avait raison de conclure que les détenteurs de débentures ne pouvaient être autorisés à opposer un veto à près de 98 pour cent des actionnaires simplement parce que la transaction pouvait avoir des répercussions négatives sur la valeur de leurs titres. Le juge de première instance n'a commis aucune erreur en concluant que l'arrangement répondait de façon équitable et équilibrée aux intérêts des détenteurs de débentures. Le juge a souligné que l'arrangement préservait les droits contractuels des détenteurs de débentures tels que ces derniers les avaient négociés. De plus, les actes de fiducie ne renfermaient aucune stipulation concernant un changement de contrôle. En reconnaissant qu'il n'existe pas d'arrangement parfait, le juge de première instance a eu raison de conclure que le caractère équitable et raisonnable de l'arrangement avait été démontré.

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Kerr v. Danier Leather Inc. (2007), 2007 SCC 44, 2007 CarswellOnt 6445, 2007 CarswellOnt 6446, 87 O.R. (3d) 398 (note), 36 B.L.R. (4th) 95, 231 O.A.C. 348, 286 D.L.R. (4th) 601, [2007] 2 S.C.R. 331, 48 C.P.C. (6th) 205, 368 N.R. 204 (S.C.C.) — referred to

Lyall v. 147250 Canada Ltd. (1993), 84 B.C.L.R. (2d) 234, 33 B.C.A.C. 64, 54 W.A.C. 64, 106 D.L.R. (4th) 304, 12 B.L.R. (2d) 161, 1993 CarswellBC 281 (B.C. C.A.) — referred to

Main v. Delcan Group Inc. (1999), 1999 CarswellOnt 1605, 47 B.L.R. (2d) 200 (Ont. S.C.J. [Commercial List]) — referred to

Pacifica Papers Inc. v. Johnstone (2001), 2001 BCSC 1069, 2001 CarswellBC 1505, 15 B.L.R. (3d) 249, 92 B.C.L.R. (3d) 158 (B.C. S.C.) — referred to

Pente Investment Management Ltd. v. Schneider Corp. (1998), 113 O.A.C. 253, (sub nom. *Maple Leaf Foods Inc. v. Schneider Corp.*) 42 O.R. (3d) 177, 1998 CarswellOnt 4035, 44 B.L.R. (2d) 115 (Ont. C.A.) — considered

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

PetroKazakhstan Inc. v. Lukoil Overseas Kumkol B.V. (2005), 12 B.L.R. (4th) 128, 2005 ABQB 789, 2005 CarswellAlta 1515 (Alta. Q.B.) — referred to

Revlon Inc. v. MacAndrews & Forbes Holdings Inc. (1985), 506 A.2d 173, 54 U.S.L.W. 2483, 66 A.L.R.4th 157 (U.S. Del. Super.) — considered

Saskatchewan Wheat Pool v. Canada (1983), (sub nom. *Saskatchewan v. R.*) [1983] 1 S.C.R. 205, (sub nom. *Saskatchewan v. R.*) 45 N.R. 425, (sub nom. *Saskatchewan v. R.*) [1983] 3 W.W.R. 97, (sub nom. *Saskatchewan v. R.*) 23 C.C.L.T. 121, (sub nom. *Saskatchewan v. R.*) 143 D.L.R. (3d) 9, 1983 CarswellNat 521, 1983 CarswellNat 92 (S.C.C.) — considered

SCI Systems Inc. v. Gornitzki Thompson & Little Co. (1997), 1997 CarswellOnt 1769, 36 B.L.R. (2d) 192, 1 C.B.R. (4th) 164, 29 O.T.C. 148, 147 D.L.R. (4th) 300 (Ont. Gen. Div.) — referred to

SCI Systems Inc. v. Gornitzki Thompson & Little Co. (1998), 110 O.A.C. 160, 1998 CarswellOnt 2356 (Ont. Div. Ct.) — referred to

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

Sparling v. Québec (Caisse de dépôt & placement) (1988), 41 B.L.R. 1, 1988 CarswellQue 29, 1988 CarswellQue 147, 55 D.L.R. (4th) 63, [1988] 2 S.C.R. 1015, (sub nom. *Sparling v. Quebec*) 89 N.R. 120, (sub nom. *Sparling v. Quebec*) 20 Q.A.C. 174 (S.C.C.) — considered

St. Lawrence & Hudson Railway, Re (1998), 76 O.T.C. 115, 1998 CarswellOnt 3867 (Ont. Gen. Div. [Commercial List]) — referred to

Stech v. Davies (1987), 1987 CarswellAlta 175, 53 Alta. L.R. (2d) 373, [1987] 5 W.W.R. 563, 80 A.R. 298 (Alta. Q.B.) — referred to

Stelco Inc., Re (2006), 2006 CarswellOnt 863, 18 C.B.R. (5th) 173 (Ont. S.C.J. [Commercial List]) — referred to

Themadel Foundation v. Third Canadian Investment Trust Ltd. (1995), 18 B.L.R. (2d) 209, 23 O.R. (3d) 7, 1995 CarswellOnt 325 (Ont. Gen. Div. [Commercial List]) — referred to

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Trizec Corp., Re (1994), 21 Alta. L.R. (3d) 435, [1994] 10 W.W.R. 127, 158 A.R. 33, 1994 CarswellAlta 171, 20 B.L.R. (2d) 202 (Alta. Q.B.) — considered

Tsui v. International Capital Corp. (1993), [1993] 4 W.W.R. 613, 108 Sask. R. 62, 1993 CarswellSask 313 (Sask. Q.B.) — referred to

Tsui v. International Capital Corp. (1993), 113 Sask. R. 3, 52 W.A.C. 3, [1993] 4 W.W.R. lxvii (note), 1993 CarswellSask 561 (Sask. C.A.) — referred to

Unocal Corp. v. Mesa Petroleum Co. (1985), 493 A.2d 946 (U.S. Del. S.C.) — considered

UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc. (2002), 2002 CarswellOnt 2096, 19 C.C.E.L. (3d) 203, 27 B.L.R. (3d) 53, 214 D.L.R. (4th) 496, 32 C.C.P.B. 120 (Ont. S.C.J. [Commercial List]) — considered

Westfair Foods Ltd. v. Watt (1991), 79 Alta. L.R. (2d) 363, 115 A.R. 34, [1991] 4 W.W.R. 695, 79 D.L.R. (4th) 48, 5 B.L.R. (2d) 160, 1991 CarswellAlta 63 (Alta. C.A.) — referred to

Wright v. Donald S. Montgomery Holdings Ltd. (1998), 1998 CarswellOnt 370, 39 B.L.R. (2d) 266 (Ont. Gen. Div.) — referred to

Zwicker v. Stanbury (1953), [1953] 2 S.C.R. 438, [1954] 1 D.L.R. 257, 1953 CarswellNS 25 (S.C.C.) — referred to
820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113, 1991 CarswellOnt 141 (Ont. Div. Ct.) — referred to

Statutes considered:

Canada Business Corporations Act, S.C. 1974-75-76, c. 33

Generally — referred to

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

Generally — referred to

s. 102(1) — referred to

s. 122 — referred to

s. 122(1)(a) — considered

s. 122(1)(b) — considered

s. 192 — considered

s. 192(1) "arrangement" — considered

s. 192(1) "arrangement" (f) — considered

s. 192(3) — considered

s. 192(4)(c) — considered

s. 239 — considered

s. 241 — considered

s. 241(2) — considered

Companies Act, R.S.C. 1906, c. 79

s. 112A [en. 1923, c. 39, s. 4] — referred to

Companies Act, 1948 (11 & 12 Geo. 6), c. 38

s. 222 — considered

Per curiam:

I. Introduction

1 These appeals arise out of an offer to purchase all shares of BCE Inc. ("BCE"), a large telecommunications corporation, by a group headed by the Ontario Teachers Pension Plan Board

("Teachers"), financed in part by the assumption by Bell Canada, a wholly owned subsidiary of BCE, of a \$30 billion debt. The leveraged buyout was opposed by debentureholders of Bell Canada on the ground that the increased debt contemplated by the purchase agreement would reduce the value of their bonds. Upon request for court approval of an arrangement under s. 192 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), the debentureholders argued that it should not be found to be fair. They also opposed the arrangement under s. 241 of the *CBCA* on the ground that it was oppressive to them.

2 The Quebec Superior Court, *per* Silcoff J., approved the arrangement as fair under the *CBCA* and dismissed the claims for oppression. The Quebec Court of Appeal found that the arrangement had not been shown to be fair and held that it should not have been approved. Thus, it found it unnecessary to consider the oppression claim.

3 On June 20, 2008, this Court allowed the appeals from the Court of Appeal's disapproval of the arrangement and dismissed two cross-appeals from the dismissal of the claims for oppression, with reasons to follow. These are those reasons.

II. Facts

4 At issue is a plan of arrangement valued at approximately \$52 billion, for the purchase of the shares of BCE by way of a leveraged buyout. The arrangement was opposed by a group, comprised mainly of financial institutions, that hold debentures issued by Bell Canada. The crux of their complaints is that the arrangement would diminish the trading value of their debentures by an average of 20 percent, while conferring a premium of approximately 40 percent on the market price of BCE shares.

5 Bell Canada was incorporated in 1880 by a special Act of the Parliament of Canada. The corporation was subsequently continued under the *CBCA*. BCE, a management holding company, was incorporated in 1970 and continued under the *CBCA* in 1979. Bell Canada became a wholly owned subsidiary of BCE in 1983 pursuant to a plan of arrangement under which Bell Canada's shareholders surrendered their shares in exchange for shares of BCE. BCE and Bell Canada are separate legal entities with separate charters, articles and bylaws. Since January 2003, however, they have shared a common set of directors and some senior officers.

6 At the time relevant to these proceedings, Bell Canada had \$7.2 billion in outstanding long-term debt comprised of debentures issued pursuant to three trust indentures: the 1976, the 1996 and the 1997 trust indentures. The trust indentures contain neither change of control nor credit rating covenants, and specifically allow Bell Canada to incur or guarantee additional debt subject to certain limitations.

7 Bell Canada's debentures were perceived by investors to be safe investments and, up to the time of the proposed leveraged buyout, had maintained an investment grade rating. The

debentureholders are some of Canada's largest and most reputable financial institutions, pension funds and insurance companies. They are major participants in the debt markets and possess an intimate and historic knowledge of the financial markets.

8 A number of technological, regulatory and competitive changes have significantly altered the industry in which BCE operates. Traditionally highly regulated and focused on circuit-switch line telephone service, the telecommunication industry is now guided primarily by market forces and characterized by an ever-expanding group of market participants, substantial new competition and increasing expectations regarding customer service. In response to these changes, BCE developed a new business plan by which it would focus on its core business, telecommunications, and divest its interest in unrelated businesses. This new business plan, however, was not as successful as anticipated. As a result, the shareholder returns generated by BCE remained significantly less than the ones generated by its competitors.

9 Meanwhile, by the end of 2006, BCE had large cash flows and strong financial indicators, characteristics perceived by market analysts to make it a suitable target for a buyout. In November 2006, BCE was made aware that Kohlberg Kravis Roberts & Co. ("KKR"), a United States private equity firm, might be interested in a transaction involving BCE. Mr. Michael Sabia, President and Chief Executive Officer of BCE, contacted KKR to inform them that BCE was not interested in pursuing such a transaction at that time.

10 In February 2007, new rumours surfaced that KKR and the Canada Pension Plan Investment Board were arranging financing to initiate a bid for BCE. Shortly thereafter, additional rumours began to circulate that an investment banking firm was assisting Teachers with a potential transaction involving BCE. Mr. Sabia, after meeting with BCE's board of directors ("Board"), contacted the representatives of both KKR and Teachers to reiterate that BCE was not interested in pursuing a "going-private" transaction at the time because it was set on creating shareholder value through the execution of its 2007 business plan.

11 On March 29, 2007, after an article appeared on the front page of the *Globe and Mail* that inaccurately described BCE as being in discussions with a consortium comprised of KKR and Teachers, BCE issued a press release confirming that there were no ongoing discussions being held with private equity investors with respect to a "going-private" transaction for BCE.

12 On April 9, 2007, Teachers filed a report (Schedule 13D) with the United States Securities and Exchange Commission reflecting a change from a passive to an active holding of BCE shares. This filing heightened press speculation concerning a potential privatization of BCE.

13 Faced with renewed speculation and BCE having been put "in play" by the filing by Teachers of the Schedule 13D report, the Board met with its legal and financial advisors to assess strategic alternatives. It decided that it would be in the best interests of BCE and its shareholders to have competing bidding groups and to guard against the risk of a single bidding group assembling such

a significant portion of available debt and equity that the group could preclude potential competing bidding groups from participating effectively in an auction process.

14 In a press release dated April 17, 2007, BCE announced that it was reviewing its strategic alternatives with a view to further enhancing shareholder value. On the same day, a Strategic Oversight Committee ("SOC") was created. None of its members had ever been part of management at BCE. Its mandate was, notably, to set up and supervise the auction process.

15 Following the April 17 press release, several debentureholders sent letters to the Board voicing their concerns about a potential leveraged buyout transaction. They sought assurance that their interests would be considered by the Board. BCE replied in writing that it intended to honour the contractual terms of the trust indentures.

16 On June 13, 2007, BCE provided the potential participants in the auction process with bidding rules and the general form of a definitive transaction agreement. The bidders were advised that, in evaluating the competitiveness of proposed bids, BCE would consider the impact that their proposed financing arrangements would have on BCE and on Bell Canada's debentureholders and, in particular, whether their bids respected the debentureholders' contractual rights under the trust indentures.

17 Offers were submitted by three groups. All three offers contemplated the addition of a substantial amount of new debt for which Bell Canada would be liable. All would have likely resulted in a downgrade of the debentures below investment grade. The initial offer submitted by the appellant 6796508 Canada Inc. ("the Purchaser"), a corporation formed by Teachers and affiliates of Providence Equity Partners Inc. and Madison Dearborn Partners LLC, contemplated an amalgamation of Bell Canada that would have triggered the voting rights of the debentureholders under the trust indentures. The Board informed the Purchaser that such an amalgamation made its offer less competitive. The Purchaser submitted a revised offer with an alternative structure for the transaction that did not involve an amalgamation of Bell Canada. Also, the Purchaser's revised offer increased the initial price per share from \$42.25 to \$42.75.

18 The Board, after a review of the three offers and based on the recommendation of the SOC, found that the Purchaser's revised offer was in the best interests of BCE and BCE's shareholders. In evaluating the fairness of the consideration to be paid to the shareholders under the Purchaser's offer, the Board and the SOC received opinions from several reputable financial advisors. In the meantime, the Purchaser agreed to cooperate with the Board in obtaining a solvency certificate stating that BCE would still be solvent (and hence in a position to meet its obligations after completion of the transaction). The Board did not seek a fairness opinion in respect of the debentureholders, taking the view that their rights were not being arranged.

19 On June 30, 2007, the Purchaser and BCE entered into a definitive agreement. On September 21, 2007, BCE's shareholders approved the arrangement by a majority of 97.93 percent.

20 Essentially, the arrangement provides for the compulsory acquisition of all of BCE's outstanding shares. The price to be paid by the Purchaser is \$42.75 per common share, which represents a premium of approximately 40 percent to the closing price of the shares as of March 28, 2007. The total capital required for the transaction is approximately \$52 billion, \$38.5 billion of which will be supported by BCE. Bell Canada will guarantee approximately \$30 billion of BCE's debt. The Purchaser will invest nearly \$8 billion of new equity capital in BCE.

21 As a result of the announcement of the arrangement, the credit ratings of the debentures by the time of trial had been downgraded from investment grade to below investment grade. From the perspective of the debentureholders, this downgrade was problematic for two reasons. First, it caused the debentures to decrease in value by an average of approximately 20 percent. Second, the downgrade could oblige debentureholders with credit-rating restrictions on their holdings to sell their debentures at a loss.

22 The debentureholders at trial opposed the arrangement on a number of grounds. First, the debentureholders sought relief under the oppression provision in s. 241 of the *CBCA*. Second, they opposed court approval of the arrangement, as required by s. 192 of the *CBCA*, alleging that the arrangement was not "fair and reasonable" because of the adverse effect on their economic interests. Finally, the debentureholders brought motions for declaratory relief under the terms of the trust indentures, which are not before us ((2008), 43 B.L.R. (4th) 39, 2008 QCCS 898 (C.S. Que.); (2008), 43 B.L.R. (4th) 69, 2008 QCCS 899 (C.S. Que.)).

III. Judicial History

23 The trial judge reviewed the s. 241 oppression claim as lying against both BCE and Bell Canada, since s. 241 refers to actions by the "corporation or any of its affiliates". He dismissed the claims for oppression on the grounds that the debt guarantee to be assumed by Bell Canada had a valid business purpose; that the transaction did not breach the reasonable expectations of the debentureholders; that the transaction was not oppressive by reason of rendering the debentureholders vulnerable; and that BCE and its directors had not unfairly disregarded the interests of the debentureholders: (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907 (C.S. Que.); (2008), 43 B.L.R. (4th) 135, 2008 QCCS 906 (C.S. Que.).

24 In arriving at these conclusions, the trial judge proceeded on the basis that the BCE directors had a fiduciary duty under s. 122 of the *CBCA* to act in the best interests of the corporation. He held that while the best interests of the corporation are not to be confused with the interests of the shareholders or other stakeholders, corporate law recognizes fundamental differences between shareholders and debt security holders. He held that these differences affect the content of the directors' fiduciary duty. As a result, the directors' duty to act in the best interests of the corporation might require them to approve transactions that, while in the interests of the corporation, might also benefit some or all shareholders at the expense of other stakeholders. He also noted that in

accordance with the business judgment rule, Canadian courts tend to accord deference to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by shareholders.

25 The trial judge held that the debentureholders' reasonable expectations must be assessed on an objective basis and, absent compelling reasons, must derive from the trust indentures and the relevant prospectuses issued in connection with the debt offerings. Statements by Bell Canada indicating a commitment to retaining investment grade ratings did not assist the debentureholders, since these statements were accompanied by warnings, repeated in the prospectuses pursuant to which the debentures were issued, that negated any expectation that this policy would be maintained indefinitely. The reasonableness of the alleged expectation was further negated by the fact that the debentureholders could have guarded against the business risks arising from a change of control by negotiating protective contract terms. The fact that the shareholders stood to benefit from the transaction and that the debentureholders were prejudiced did not in itself give rise to a conclusion that the directors had breached their fiduciary duty to the corporation. All three competing bids required Bell Canada to assume additional debt, and there was no evidence that the bidders were prepared to treat the debentureholders any differently. The materialization of certain risks as a result of decisions taken by the directors in accordance with their fiduciary duty to the corporation did not constitute oppression against the debentureholders or unfair disregard of their interests.

26 Having dismissed the claim for oppression, the trial judge went on to consider BCE's application for approval of the transaction under s. 192 of the *CBCA* ((2008), 43 B.L.R. (4th) 1, 2008 QCCS 905 (C.S. Que.)). He dismissed the debentureholders' claim for voting rights on the arrangement on the ground that their legal interests were not compromised by the arrangement and that it would be unfair to allow them in effect to veto the shareholder vote. However, in determining whether the arrangement was fair and reasonable — the main issue on the application for approval — he considered the fairness of the transaction with respect to both the shareholders and the debentureholders, and concluded that the arrangement was fair and reasonable. He considered the necessity of the arrangement for Bell Canada's continued operations; that the Board, comprised almost entirely of independent directors, had determined the arrangement was fair and reasonable and in the best interests of BCE and the shareholders; that the arrangement had been approved by over 97 percent of the shareholders; that the arrangement was the culmination of a robust strategic review and auction process; the assistance the Board received throughout from leading legal and financial advisors; the absence of a superior proposal; and the fact that the proposal did not alter or arrange the debentureholders' legal rights. While the proposal stood to alter the debentureholders' economic interests, in the sense that the trading value of their securities would be reduced by the added debt load, their contractual rights remained intact. The trial judge noted that the debentureholders could have protected themselves against this eventuality through contract terms, but had not. Overall, he concluded that taking all relevant matters into account, the arrangement was fair and reasonable and should be approved.

27 The Court of Appeal allowed the appeals on the ground that BCE had failed to meet its onus on the test for approval of an arrangement under s. 192, by failing to show that the transaction was fair and reasonable to the debentureholders. Basing its analysis on this Court's decision in *People's Department Stores Ltd. (1992) Inc., Re*, [2004] 3 S.C.R. 461, 2004 SCC 68 (S.C.C.), the Court of Appeal found that the directors were required to consider the non-contractual interests of the debentureholders. It held that representations made by Bell Canada over the years could have created reasonable expectations above and beyond the contractual rights of the debentureholders. In these circumstances, the directors were under a duty, not simply to accept the best offer, but to consider whether the arrangement could be restructured in a way that provided a satisfactory price to the shareholders while avoiding an adverse effect on the debentureholders. In the absence of such efforts, BCE had not discharged its onus under s. 192 of showing that the arrangement was fair and reasonable. The Court of Appeal therefore overturned the trial judge's order approving the plan of arrangement: (2008), 43 B.L.R. (4th) 157, 2008 QCCA 930, 2008 QCCA 931, 2008 QCCA 932, 2008 QCCA 933, 2008 QCCA 934, 2008 QCCA 935 (C.A. Que.).

28 The Court of Appeal found it unnecessary to consider the s. 241 oppression claim, holding that its rejection of the s. 192 approval application effectively disposed of the oppression claim. In its view, where approval is sought under s. 192 and opposed, there is generally no need for an affected security holder to assert an oppression remedy under s. 241.

29 BCE and Bell Canada appeal to this Court arguing that the Court of Appeal erred in overturning the trial judge's approval of the plan of arrangement. While formally cross-appealing on s. 241, the debentureholders argue that the Court of Appeal was correct to consider their complaints under s. 192, such that their appeals under s. 241 became moot.

IV. Issues

30 The issues, briefly stated, are whether the Court of Appeal erred in dismissing the debentureholders' s. 241 oppression claim and in overturning the Superior Court's s. 192 approval of the plan of arrangement. These questions raise the issue of what is required to establish oppression of debentureholders in a situation where a corporation is facing a change of control, and how a judge on an application for approval of an arrangement under s. 192 of the *CBCA* should treat claims such as those of the debentureholders in these actions. These reasons will consider both issues.

31 In order to situate these issues in the context of Canadian corporate law, it may be useful to offer a preliminary description of the remedies provided by the *CBCA* to shareholders and stakeholders in a corporation facing a change of control.

32 Accordingly, these reasons will consider:

- (1) the rights, obligations and remedies under the *CBCA* in overview;
- (2) the debentureholders' entitlement to relief under the s. 241 oppression remedy;
- (3) the debentureholders' entitlement to relief under the requirement for court approval of an arrangement under s. 192.

33 We note that it is unnecessary for the purposes of these appeals to distinguish between the conduct of the directors of BCE, the holding company, and the conduct of the directors of Bell Canada. The same directors served on the boards of both corporations. While the oppression remedy was directed at both BCE and Bell Canada, the courts below considered the entire context in which the directors of BCE made their decisions, which included the obligations of Bell Canada in relation to its debentureholders. It was not found by the lower courts that the directors of BCE and Bell Canada should have made different decisions with respect to the two corporations. Accordingly, the distinct corporate character of the two entities does not figure in our analysis.

V. Analysis

A. Overview of Rights, Obligations and Remedies under the CBCA

34 An essential component of a corporation is its capital stock, which is divided into fractional parts, the shares: *Bradbury v. English Sewing Cotton Co.*, [1923] A.C. 744 (U.K. H.L.), at p. 767; *Zwicker v. Stanbury*, [1953] 2 S.C.R. 438 (S.C.C.). While the corporation is ongoing, shares confer no right to its underlying assets.

35 A share "is not an isolated piece of property... [but] a 'bundle of inter-related rights and liabilities': *Sparling v. Québec (Caisse de dépôt & placement)*, [1988] 2 S.C.R. 1015 (S.C.C.), at p. 1025, *per* La Forest J. These rights include the right to a proportionate part of the assets of the corporation upon winding-up and the right to oversee the management of the corporation by its board of directors by way of votes at shareholder meetings.

36 The directors are responsible for the governance of the corporation. In the performance of this role, the directors are subject to two duties: a fiduciary duty to the corporation under s. 122(1) (a) (the fiduciary duty); and a duty to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances under s. 122(1)(b) (the duty of care). The second duty is not at issue in these proceedings as this is not a claim against the directors of the corporation for failing to meet their duty of care. However, this case does involve the fiduciary duty of the directors to the corporation, and particularly the "fair treatment" component of this duty, which, as will be seen, is fundamental to the reasonable expectations of stakeholders claiming an oppression remedy.

37 The fiduciary duty of the directors to the corporation originated in the common law. It is a duty to act in the best interests of the corporation. Often the interests of shareholders and stakeholders

are co-extensive with the interests of the corporation. But if they conflict, the directors' duty is clear — it is to the corporation: *Peoples Department Stores*.

38 The fiduciary duty of the directors to the corporation is a broad, contextual concept. It is not confined to short-term profit or share value. Where the corporation is an ongoing concern, it looks to the long-term interests of the corporation. The content of this duty varies with the situation at hand. At a minimum, it requires the directors to ensure that the corporation meets its statutory obligations. But, depending on the context, there may also be other requirements. In any event, the fiduciary duty owed by directors is mandatory; directors must look to what is in the best interests of the corporation.

39 In *Peoples Department Stores*, this Court found that although directors *must* consider the best interests of the corporation, it may also be appropriate, although *not mandatory*, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders. As stated by Major and Deschamps JJ., at para. 42:

We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.

As will be discussed, cases dealing with claims of oppression have further clarified the content of the fiduciary duty of directors with respect to the range of interests that should be considered in determining what is in the best interests of the corporation, acting fairly and responsibly.

40 In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives: see *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.) [hereinafter *Maple Leaf Foods*]; *Kerr v. Danier Leather Inc.*, [2007] 2 S.C.R. 331, 2007 SCC 44 (S.C.C.). It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

41 Normally only the beneficiary of a fiduciary duty can enforce the duty. In the corporate context, however, this may offer little comfort. The directors who control the corporation are unlikely to bring an action against themselves for breach of their own fiduciary duty. The shareholders cannot act in the stead of the corporation; their only power is the right to oversee

the conduct of the directors by way of votes at shareholder assemblies. Other stakeholders may not even have that.

42 To meet these difficulties, the common law developed a number of special remedies to protect the interests of shareholders and stakeholders of the corporation. These remedies have been affirmed, modified and supplemented by the *CBCA*.

43 The first remedy provided by the *CBCA* is the s. 239 derivative action, which allows stakeholders to enforce the directors' duty to the corporation when the directors are themselves unwilling to do so. With leave of the court, a complainant may bring (or intervene in) a derivative action in the name and on behalf of the corporation or one of its subsidiaries to enforce a right of the corporation, including the rights correlative with the directors' duties to the corporation. (The requirement of leave serves to prevent frivolous and vexatious actions, and other actions which, while possibly brought in good faith, are not in the interest of the corporation to litigate.)

44 A second remedy lies against the directors in a civil action for breach of duty of care. As noted, s. 122(1)(b) of the *CBCA* requires directors and officers of a corporation to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances". This duty, unlike the s. 122(1)(a) fiduciary duty, is not owed solely to the corporation, and thus may be the basis for liability to other stakeholders in accordance with principles governing the law of tort and extracontractual liability: *Peoples Department Stores*. Section 122(1)(b) does not provide an independent foundation for claims. However, applying the principles of *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205 (S.C.C.), courts may take this statutory provision into account as to the standard of behaviour that should reasonably be expected.

45 A third remedy, grounded in the common law and endorsed by the *CBCA*, is a s. 241 action for oppression. Unlike the derivative action, which is aimed at enforcing a right of the corporation itself, the oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors. This remedy is available to a wide range of stakeholders — security holders, creditors, directors and officers.

46 Additional "remedial" provisions are found in provisions of the *CBCA* providing for court approval in certain cases. An arrangement under s. 192 of the *CBCA* is one of these. While s. 192 cannot be described as a remedy *per se*, it has remedial-like aspects. It is directed at the situation of corporations seeking to effect fundamental changes to the corporation that affects stakeholder rights. The Act provides that such arrangements require the approval of the court. Unlike the civil action and oppression, which focus on the conduct of the directors, a s. 192 review requires a court approving a plan of arrangement to be satisfied that: (i) the statutory procedures have been met; (ii) the application has been put forth in good faith; and (iii) the arrangement is fair and reasonable. If the corporation fails to discharge its burden of establishing these elements, approval will be withheld and the proposed change will not take place. In assessing whether the arrangement should

be approved, the court will hear arguments from opposing security holders whose rights are being arranged. This provides an opportunity for security holders to argue against the proposed change.

47 Two of these remedies are in issue in these actions: the action for oppression and approval of an arrangement under s. 192. The trial judge treated these remedies as involving distinct considerations and concluded that the debentureholders had failed to establish entitlement to either remedy. The Court of Appeal, by contrast, viewed the two remedies as substantially overlapping, holding that both turned on whether the directors had properly considered the debentureholders' expectations. Having found on this basis that the requirements of s. 192 were not met, the Court of Appeal concluded that the action for oppression was moot. As will become apparent, we do not endorse this approach. In our view, the s. 241 oppression action and the s. 192 requirement for court approval of a change to the corporate structure are different types of proceedings, engaging different inquiries. Accordingly, we find it necessary to consider both the claims for oppression and the s. 192 application for approval.

48 The debentureholders have formally cross-appealed on the oppression remedy. However, due to the Court of Appeal's failure to consider this issue, the debentureholders did not advance separate arguments before this Court. As certain aspects of their position are properly addressed within the context of an analysis of oppression under s. 241, we have considered them here.

49 Against this background, we turn to a more detailed consideration of the claims.

B. The Section 241 Oppression Remedy

50 The debentureholders in these appeals claim that the directors acted in an oppressive manner in approving the sale of BCE, contrary to s. 241 of the *CBCA*. [51] Security holders of a corporation or its affiliates fall within the class of persons who may be permitted to bring a claim for oppression under s. 241 of the *CBCA*. The trial judge permitted the debentureholders to do so, although in the end he found the claim had not been established. The question is whether the trial judge erred in dismissing the claim.

52 We will first set out what must be shown to establish the right to a remedy under s. 241, and then review the conduct complained of in the light of those requirements.

(1) The Law

53 Section 241(2) provides that a court may make an order to rectify the matters complained of where

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

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer....

54 Section 241 jurisprudence reveals two possible approaches to the interpretation of the oppression provisions of the *CBCA*: M. Koehnen, *Oppression and Related Remedies* (2004), at pp. 79-80 and 84. One approach emphasizes a strict reading of the three types of conduct enumerated in s. 241 (oppression, unfair prejudice and unfair disregard): see *Scottish Co-operative Wholesale Society Ltd. v. Meyer* (1958), [1959] A.C. 324 (U.K. H.L.); *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (B.C. S.C.); *Stech v. Davies*, [1987] 5 W.W.R. 563 (Alta. Q.B.). Cases following this approach focus on the precise content of the categories "oppression", "unfair prejudice" and "unfair disregard". While these cases may provide valuable insight into what constitutes oppression in particular circumstances, a categorical approach to oppression is problematic because the terms used cannot be put into watertight compartments or conclusively defined. As Koehnen puts it (at p. 84), "[t]he three statutory components of oppression are really adjectives that try to describe inappropriate conduct.... The difficulty with adjectives is they provide no assistance in formulating principles that should underline court intervention."

55 Other cases have focused on the broader principles underlying and uniting the various aspects of oppression: see *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta. Q.B.), var'd (1989), 45 B.L.R. 110 (Alta. C.A.); *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.); *Westfair Foods Ltd. v. Watt* (1991), 79 D.L.R. (4th) 48 (Alta. C.A.).

56 In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the *CBCA*.

57 We preface our discussion of the twin prongs of the oppression inquiry by two preliminary observations that run throughout all the jurisprudence.

58 First, oppression is an equitable remedy. It seeks to ensure fairness — what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair: *Wright v. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (Ont. Gen. Div.), at p. 273; *Keho Holdings Ltd. v. Noble* (1987), 38 D.L.R. (4th) 368 (Alta. C.A.), at p. 374; see, more generally, Koehnen, at pp. 78-79. It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities: *Scottish Co-operative Wholesale Society*, at p. 343.

59 Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another.

60 Against this background, we turn to the first prong of the inquiry, the principles underlying the remedy of oppression. In *Ebrahimi v. Westbourne Galleries Ltd.* (1972), [1973] A.C. 360 (U.K. H.L.), at p. 379, Lord Wilberforce, interpreting s. 222 of the U.K. *Companies Act, 1948*, described the remedy of oppression in the following seminal terms:

The words ["just and equitable"] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.

61 Lord Wilberforce spoke of the equitable remedy in terms of the "rights, expectations and obligations" of individuals. "Rights" and "obligations" connote interests enforceable at law without recourse to special remedies, for example, through a contractual suit or a derivative action under s. 239 of the *CBCA*. It is left for the oppression remedy to deal with the "expectations" of affected stakeholders. The reasonable expectations of these stakeholders is the cornerstone of the oppression remedy.

62 As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

63 Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context: see *820099 Ontario; Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200 (Ont. S.C.J. [Commercial List]). These expectations are what the remedy of oppression seeks to uphold.

64 Determining whether a particular expectation is reasonable is complicated by the fact that the interests and expectations of different stakeholders may conflict. The oppression remedy recognizes that a corporation is an entity that encompasses and affects various individuals and groups, some of whose interests may conflict with others. Directors or other corporate actors may make corporate decisions or seek to resolve conflicts in a way that abusively or unfairly maximizes a particular group's interest at the expense of other stakeholders. The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by

treating individual stakeholders unfairly. Fair treatment — the central theme running through the oppression jurisprudence — is most fundamentally what stakeholders are entitled to "reasonably expect".

65 Section 241(2) speaks of the "act or omission" of the corporation or any of its affiliates, the conduct of "business or affairs" of the corporation and the "powers of the directors of the corporation or any of its affiliates". Often, the conduct complained of is the conduct of the corporation or of its directors, who are responsible for the governance of the corporation. However, the conduct of other actors, such as shareholders, may also support a claim for oppression: see Koehnen, at pp. 109-10; *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. Gen. Div. [Commercial List]). In the appeals before us, the claims for oppression are based on allegations that the directors of BCE and Bell Canada failed to comply with the reasonable expectations of the debentureholders, and it is unnecessary to go beyond this.

66 The fact that the conduct of the directors is often at the centre of oppression actions might seem to suggest that directors are under a direct duty to individual stakeholders who may be affected by a corporate decision. Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincides with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.

67 Having discussed the concept of reasonable expectations that underlies the oppression remedy, we arrive at the second prong of the s. 241 oppression remedy. Even if reasonable, not every unmet expectation gives rise to claim under s. 241. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations: see Koehnen, at pp. 81-88. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders.

68 In summary, the foregoing discussion suggests conducting two related inquiries in a claim for oppression: (1) Does the evidence support the reasonable expectation asserted by the claimant?

and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

69 Against the background of this overview, we turn to a more detailed discussion of these inquiries.

(a) Proof of a Claimant's Reasonable Expectations

70 At the outset, the claimant must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held. As stated above, it may be readily inferred that a stakeholder has a reasonable expectation of fair treatment. However, oppression, as discussed, generally turns on particular expectations arising in particular situations. The question becomes whether the claimant stakeholder reasonably held the particular expectation. Evidence of an expectation may take many forms depending on the facts of the case.

71 It is impossible to catalogue exhaustively situations where a reasonable expectation may arise due to their fact-specific nature. A few generalizations, however, may be ventured. Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful": Dickerson Committee (R. W. V. Dickerson, J. L. Howard and L. Getz), *Proposals for a New Business Corporations Law for Canada* (1971), vol. 1, at p. 163. The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play: *Re Keho Holdings Ltd. and Noble*. It follows that not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression as against the corporation.

72 Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

(i) Commercial Practice

73 Commercial practice plays a significant role in forming the reasonable expectations of the parties. A departure from normal business practices that has the effect of undermining or frustrating the complainant's exercise of his or her legal rights will generally (although not inevitably) give rise to a remedy: *Adecco Canada Inc. v. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275 (Ont. S.C.J. [Commercial List]); *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (Ont. Gen. Div.), var'd (1998), 110 O.A.C. 160 (Ont. Div. Ct.); *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 200 D.L.R. (4th) 289 (Ont. C.A.), leave to appeal refused, [2002] 3 S.C.R. vi (S.C.C.).

(ii) The Nature of the Corporation

74 The size, nature and structure of the corporation are relevant factors in assessing reasonable expectations: *First Edmonton Place*; G. Shapira, "Minority Shareholders' Protection — Recent Developments" (1982), 10 *N.Z. Univ. L. Rev.* 134, at pp. 138 and 145-46. Courts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company.

(iii) Relationships

75 Reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors. Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm's length shareholders in a widely held corporation. As noted in *Ferguson v. Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718 (Ont. C.A.), "when dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such" (p. 727).

(iv) Past Practice

76 Past practice may create reasonable expectations, especially among shareholders of a closely held corporation on matters relating to participation of shareholders in the corporation's profits and governance: *Gibbons v. Medical Carriers Ltd.* (2001), 17 B.L.R. (3d) 280, 2001 MBQB 229 (Man. Q.B.); 820099 *Ontario*. For instance, in *Gibbons*, the court found that the shareholders had a legitimate expectation that all monies paid out of the corporation would be paid to shareholders in proportion to the percentage of shares they held. The authorization by the new directors to pay fees to themselves, for which the shareholders would not receive any comparable payments, was in breach of those expectations.

77 It is important to note that practices and expectations can change over time. Where valid commercial reasons exist for the change and the change does not undermine the complainant's rights, there can be no reasonable expectation that directors will resist a departure from past practice: *Alberta Treasury Branches v. SevenWay Capital Corp.* (1999), 50 B.L.R. (2d) 294 (Alta. Q.B.), *aff'd* (2000), 8 B.L.R. (3d) 1, 2000 ABCA 194 (Alta. C.A.).

(v) Preventive Steps

78 In determining whether a stakeholder expectation is reasonable, the court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered. Thus it may be relevant to inquire whether a secured creditor claiming oppressive conduct could have negotiated protections against the prejudice suffered: *First Edmonton Place*; *SCI Systems*.

(vi) Representations and Agreements

79 Shareholder agreements may be viewed as reflecting the reasonable expectations of the parties: *Main; Lyall v. 147250 Canada Ltd.* (1993), 106 D.L.R. (4th) 304 (B.C. C.A.).

80 Reasonable expectations may also be affected by representations made to stakeholders or to the public in promotional material, prospectuses, offering circulars and other communications: *Tsui v. International Capital Corp.*, [1993] 4 W.W.R. 613 (Sask. Q.B.), aff'd (1993), 113 Sask. R. 3 (Sask. C.A.); *Deutsche Bank Canada v. Oxford Properties Group Inc.* (1998), 40 B.L.R. (2d) 302 (Ont. Gen. Div. [Commercial List]); *Themadel Foundation v. Third Canadian Investment Trust Ltd.* (1995), 23 O.R. (3d) 7 (Ont. Gen. Div. [Commercial List]), var'd (1998), 38 O.R. (3d) 749 (Ont. C.A.).

(vii) Fair Resolution of Conflicting Interests

81 As discussed, conflicts may arise between the interests of corporate stakeholders *inter se* and between stakeholders and the corporation. Where the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen.

82 The cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.

83 Directors may find themselves in a situation where it is impossible to please all stakeholders. The "fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction": *Maple Leaf Foods* per Weiler J.A., at p. 192.

84 There is no principle that one set of interests — for example the interests of shareholders — should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way.

85 On these appeals, it was suggested on behalf of the corporations that the "Revlon line" of cases from Delaware support the principle that where the interests of shareholders conflict with the interests of creditors, the interests of shareholders should prevail.

86 The "Revlon line" refers to a series of Delaware corporate takeover cases, the two most important of which are *Revlon Inc. v. MacAndrews & Forbes Holdings Inc.*, 506 A.2d 173 (U.S. Del. Super. 1985), and *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (U.S. Del. S.C. 1985). In both cases, the issue was how directors should react to a hostile takeover bid. *Revlon* suggests that in such circumstances, shareholder interests should prevail over those of other stakeholders, such as creditors. *Unocal* tied this approach to situations where the corporation will not continue as a going concern, holding that although a board facing a hostile takeover "may have regard for various constituencies in discharging its responsibilities, ... such concern for non-stockholder interests is inappropriate when ... the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder" (p. 182).

87 What is clear is that the *Revlon* line of cases has not displaced the fundamental rule that the duty of the directors cannot be confined to particular priority rules, but is rather a function of business judgment of what is in the best interests of the corporation, in the particular situation it faces. In a review of trends in Delaware corporate jurisprudence, former Delaware Supreme Court Chief Justice E. Norman Veasey put it this way:

[It] is important to keep in mind the precise content of this "best interests" concept — that is, to whom this duty is owed and when. Naturally, one often thinks that directors owe this duty to both the corporation and the stockholders. That formulation is harmless in most instances because of the confluence of interests, in that what is good for the corporate entity is usually derivatively good for the stockholders. There are times, of course, when the focus is directly on the interests of the stockholders [i.e., as in *Revlon*]. But, in general, the directors owe fiduciary duties to the *corporation*, not to the stockholders. [Emphasis in original.]

(E. Norman Veasey with Christine T. Di Guglielmo, "What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments" (2005), 153 *U. Pa. L. Rev.* 1399, at p. 1431)

88 Nor does this Court's decision in *Peoples Department Stores* suggest a fixed rule that the interests of creditors must prevail. In *Peoples Department Stores*, the Court had to consider whether, in the case of a corporation under threat of bankruptcy, creditors deserved special consideration (para. 46). The Court held that the fiduciary duty to the corporation did not change in the period preceding the bankruptcy, but that if the directors breach their duty of care to a stakeholder under s. 122(1)(b) of the *CBCA*, such a stakeholder may act upon it (para. 66).

(b) Conduct which is Oppressive, is Unfairly Prejudicial or Unfairly Disregards the Claimant's Relevant Interests

89 Thus far we have discussed how a claimant establishes the first element of an action for oppression — a reasonable expectation that he or she would be treated in a certain way.

However, to complete a claim for oppression, the claimant must show that the failure to meet this expectation involved unfair conduct and prejudicial consequences within s. 241 of the *CBCA*. Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression. The court must be satisfied that the conduct falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of the claimant's interest, within the meaning of s. 241 of the *CBCA*. Viewed in this way, the reasonable expectations analysis that is the theoretical foundation of the oppression remedy, and the particular types of conduct described in s. 241, may be seen as complementary, rather than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable, to return to the language of *Ebrahimi v. Westbourne Galleries Ltd.*.

90 In most cases, proof of a reasonable expectation will be tied up with one or more of the concepts of oppression, unfair prejudice, or unfair disregard of interests set out in s. 241, and the two prongs will in fact merge. Nevertheless, it is worth stating that as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression.

91 The concepts of oppression, unfair prejudice and unfairly disregarding relevant interests are adjectival. They indicate the type of wrong or conduct that the oppression remedy of s. 241 of the *CBCA* is aimed at. However, they do not represent watertight compartments, and often overlap and intermingle.

92 The original wrong recognized in the cases was described simply as oppression, and was generally associated with conduct that has variously been described as "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" going to the probity of how the corporation's affairs are being conducted: see Koehnen, at p. 81. It is this wrong that gave the remedy its name, which now is generally used to cover all s. 241 claims. However, the term also operates to connote a particular type of injury within the modern rubric of oppression generally — a wrong of the most serious sort.

93 The *CBCA* has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "[U]nfair prejudice" is generally seen as involving conduct less offensive than "oppression". Examples include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm: see Koehnen, at pp. 82-83.

94 "[U]nfair disregard" is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241. Examples include favouring a director by failing to properly prosecute claims, improperly

reducing a shareholder's dividend, or failing to deliver property belonging to the claimant: see Koehnen, at pp. 83-84.

(2) Application to these Appeals

95 As discussed above (at para. 68), in assessing a claim for oppression a court must answer two questions: (1) Does the evidence support the reasonable expectation the claimant asserts? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

96 The debentureholders in this case assert two alternative expectations. Their highest position is that they had a reasonable expectation that the directors of BCE would protect their economic interests as debentureholders in Bell Canada by putting forward a plan of arrangement that would maintain the investment grade trading value of their debentures. Before this Court, however, they argued a softer alternative — a reasonable expectation that the directors would consider their economic interests in maintaining the trading value of the debentures.

97 As summarized above (at para. 25), the trial judge proceeded on the debentureholders' alleged expectation that the directors would act in a way that would preserve the investment grade status of their debentures. He concluded that this expectation was not made out on the evidence, since the statements by Bell Canada suggesting a commitment to retaining investment grade ratings were accompanied by warnings that explicitly precluded investors from reasonably forming such expectations, and the warnings were included in the prospectuses pursuant to which the debentures were issued.

98 The absence of a reasonable expectation that the investment grade of the debentures would be maintained was confirmed, in the trial judge's view, by the overall context of the relationship, the nature of the corporation, its situation as the target of a bidding war, as well as by the fact that the claimants could have protected themselves against reduction in market value by negotiating appropriate contractual terms.

99 The trial judge situated his consideration of the relevant factors in the appropriate legal context. He recognized that the directors had a fiduciary duty to act in the best interests of the corporation and that the content of this duty was affected by the various interests at stake in the context of the auction process that BCE was undergoing. He emphasized that the directors, faced with conflicting interests, might have no choice but to approve transactions that, while in the best interests of the corporation, would benefit some groups at the expense of others. He held that the fact that the shareholders stood to benefit from the transaction and that the debentureholders were prejudiced did not in itself give rise to a conclusion that the directors had breached their fiduciary duty to the corporation. All three competing bids required Bell Canada to assume additional debt, and there was no evidence that bidders were prepared to accept less leveraged debt. Under the

business judgment rule, deference should be accorded to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by the shareholders.

100 We see no error in the principles applied by the trial judge nor in his findings of fact, which were amply supported by the evidence. We accordingly agree that the first expectation advanced in this case — that the investment grade status of the debentures would be maintained — was not established.

101 The alternative, softer, expectation advanced is that the directors would consider the interests of the bondholders in maintaining the trading value of the debentures. The Court of Appeal, albeit in the context of its reasons on the s. 192 application, accepted this as a reasonable expectation. It held that the representations made over the years, while not legally binding, created expectations beyond contractual rights. It went on to state that in these circumstances, the directors were under a duty, not simply to accept the best offer, but to consider whether the arrangement could be restructured in a way that provided a satisfactory price to the shareholders while avoiding an adverse effect on debentureholders.

102 The evidence, objectively viewed, supports a reasonable expectation that the directors would consider the position of the debentureholders in making their decisions on the various offers under consideration. As discussed above, reasonable expectations for the purpose of a claim of oppression are not confined to legal interests. Given the potential impact on the debentureholders of the transactions under consideration, one would expect the directors, acting in the best interests of the corporation, to consider their short and long-term interests in the course of making their ultimate decision.

103 Indeed, the evidence shows that the directors did consider the interests of the debentureholders. A number of debentureholders sent letters to the Board, expressing concern about the proposed leveraged buyout and seeking assurances that their interests would be considered. One of the directors, Mr. Pattison, met with Phillips, Hager & North, representatives of the debentureholders. The directors' response to these overtures was that the contractual terms of the debentures would be met, but no additional assurances were given.

104 It is apparent that the directors considered the interests of the debentureholders and, having done so, concluded that while the contractual terms of the debentures would be honoured, no further commitments could be made. This fulfilled the duty of the directors to consider the debentureholders' interests. It did not amount to "unfair disregard" of the interests of the debentureholders. As discussed above, it may be impossible to satisfy all stakeholders in a given situation. In this case, the Board considered the interests of the claimant stakeholders. Having done so, and having considered its options in the difficult circumstances it faced, it made its decision, acting in what it perceived to be the best interests of the corporation.

105 What the claimants contend for on this appeal, in reality, is not merely an expectation that their interests be considered, but an expectation that the Board would take further positive steps to restructure the purchase in a way that would provide a satisfactory purchase price to the shareholders and preserve the high market value of the debentures. At this point, the second, softer expectation asserted approaches the first alleged expectation of maintaining the investment grade rating of the debentures.

106 The difficulty with this proposition is that there is no evidence that it was reasonable to suppose it could have been achieved. BCE, facing certain takeover, acted reasonably to create a competitive bidding process. The process attracted three bids. All of the bids were leveraged, involving a substantial increase in Bell Canada's debt. It was this factor that posed the risk to the trading value of the debentures. There is no evidence that BCE could have done anything to avoid that risk. Indeed, the evidence is to the contrary.

107 We earlier discussed the factors to consider in determining whether an expectation is reasonable on a s. 241 oppression claim. These include commercial practice; the size, nature and structure of the corporation; the relationship between the parties; past practice; the failure to negotiate protections; agreements and representations; and the fair resolution of conflicting interests. In our view, all these factors weigh against finding an expectation beyond honouring the contractual obligations of the debentures in this particular case.

108 Commercial practice — indeed commercial reality — undermines the claim that a way could have been found to preserve the trading position of the debentures in the context of the leveraged buyout. This reality must have been appreciated by reasonable debentureholders. More broadly, two considerations are germane to the influence of general commercial practice on the reasonableness of the debentureholders' expectations. First, leveraged buyouts of this kind are not unusual or unforeseeable, although the transaction at issue in this case is noteworthy for its magnitude. Second, trust indentures can include change of control and credit rating covenants where those protections have been negotiated. Protections of that type would have assured debentureholders a right to vote, potentially through their trustee, on the leveraged buyout, as the trial judge pointed out. This failure to negotiate protections was significant where the debentureholders, it may be noted, generally represent some of Canada's largest and most reputable financial institutions, pension funds and insurance companies.

109 The nature and size of the corporation also undermine the reasonableness of any expectation that the directors would reject the offers that had been presented and seek an arrangement that preserved the investment grade rating of the debentures. As discussed above (at para. 74), courts may accord greater latitude to the reasonableness of expectations formed in the context of a small, closely held corporation, rather than those relating to interests in a large, public corporation. Bell Canada had become a wholly owned subsidiary of BCE in 1983, pursuant to a plan of arrangement

which saw the shareholders of Bell Canada surrender their shares in exchange for shares of BCE. Based upon the history of the relationship, it should not have been outside the contemplation of debentureholders acquiring debentures of Bell Canada under the 1996 and 1997 trust indentures, that arrangements of this type had occurred and could occur in the future.

110 The debentureholders rely on past practice, suggesting that investment grade ratings had always been maintained. However, as noted, reasonable practices may reflect changing economic and market realities. The events that precipitated the leveraged buyout transaction were such realities. Nor did the trial judge find in this case that representations had been made to debentureholders upon which they could have reasonably relied.

111 Finally, the claim must be considered from the perspective of the duty on the directors to resolve conflicts between the interests of corporate stakeholders in a fair manner that reflected the best interests of the corporation.

112 The best interests of the corporation arguably favoured acceptance of the offer at the time. BCE had been put in play, and the momentum of the market made a buyout inevitable. The evidence, accepted by the trial judge, was that Bell Canada needed to undertake significant changes to continue to be successful, and that privatization would provide greater freedom to achieve its long-term goals by removing the pressure on short-term public financial reporting, and bringing in equity from sophisticated investors motivated to improve the corporation's performance. Provided that, as here, the directors' decision is found to have been within the range of reasonable choices that they could have made in weighing conflicting interests, the court will not go on to determine whether their decision was the perfect one.

113 Considering all the relevant factors, we conclude that the debentureholders have failed to establish a reasonable expectation that could give rise to a claim for oppression. As found by the trial judge, the alleged expectation that the investment grade of the debentures would be maintained is not supported by the evidence. A reasonable expectation that the debentureholders' interests would be considered is established, but was fulfilled. The evidence does not support a further expectation that a better arrangement could be negotiated that would meet the exigencies that the corporation was facing, while better preserving the trading value of the debentures.

114 Given that the debentureholders have failed to establish that the expectations they assert were reasonable, or that they were not fulfilled, it is unnecessary to consider in detail whether conduct complained of was oppressive, unfairly prejudicial, or unfairly disregarded the debentureholders' interests within the terms of s. 241 of the *CBCA*. Suffice it to say that "oppression" in the sense of bad faith and abuse was not alleged, much less proved. At best, the claim was for "unfair disregard" of the interests of the debentureholders. As discussed, the evidence does not support this claim.

C. The Section 192 Approval Process

115 The second remedy relied on by the debentureholders is the approval process for complex corporate arrangements set out under s. 192 of the *CBCA*. BCE brought a petition for court approval of the plan under s. 192. At trial, the debentureholders were granted standing to contest such approval. The trial judge concluded that "[i]t seemed 'only logical and 'fair' to conduct this analysis having regard to the interests of BCE and those of its shareholders and other stakeholders, if any, whose interests are being arranged or affected" ((2008), 43 B.L.R. (4th) 1, 2008 QCCS 905 (C.S. Que.), at para. 151). On the basis of Corporations Canada's *Policy concerning Arrangements under Section 192 of the CBCA*, November 2003 ("Policy Statement 15.1"), the trial judge held that the s. 192 approval did not require the Board to afford the debentureholders the right to vote. He nonetheless considered their interests in assessing the fairness of the arrangement. After a full hearing, he approved the arrangement as "fair and reasonable", despite the debentureholders' objections that the arrangement would adversely affect the trading value of their securities.

116 The Court of Appeal reversed this decision, essentially on the ground that the directors had not given adequate consideration to the debentureholders' reasonable expectations. These expectations, in its view, extended beyond the debentureholders' legal rights and required the directors to consider whether the adverse impact on the debentureholders' economic interests could be alleviated or attenuated. The court held that the corporation had failed to discharge the burden of showing that it was impossible to structure the sale in a manner that avoided the adverse economic effect on debentureholdings, and consequently had failed to establish that the proposed plan of arrangement was fair and reasonable.

117 Before considering what must be shown to obtain approval of an arrangement under s. 192, it may be helpful to briefly return to the differences between an action for oppression under s. 241 of the *CBCA* and a motion for approval of an arrangement under s. 192 of the *CBCA* alluded to earlier.

118 As we have discussed (at para. 47), the reasoning of the Court of Appeal effectively incorporated the s. 241 oppression claim into the s. 192 approval proceeding, converting it into an inquiry based on reasonable expectations.

119 As we view the matter, the s. 241 oppression remedy and the s. 192 approval process are different proceedings, with different requirements. While a conclusion that the proposed arrangement has an oppressive result may support the conclusion that the arrangement is not fair and reasonable under s. 192, it is important to keep in mind the differences between the two remedies. The oppression remedy is a broad and equitable remedy that focuses on the reasonable expectations of stakeholders, while the s. 192 approval process focuses on whether the arrangement, objectively viewed, is fair and reasonable and looks primarily to the interests of the parties whose legal rights are being arranged. Moreover, in an oppression proceeding, the onus is

on the claimant to establish oppression or unfairness, while in a s. 192 proceeding, the onus is on the corporation to establish that the arrangement is "fair and reasonable".

120 These differences suggest that it is possible that a claimant might fail to show oppression under s. 241, but might succeed under s. 192 by establishing that the corporation has not discharged its onus of showing that the arrangement in question is fair and reasonable. For this reason, it is necessary to consider the debentureholders' s. 192 claim on these appeals, notwithstanding our earlier conclusion that the debentureholders have not established oppression.

121 Whether the converse is true is not at issue in these proceedings and need not detain us. It might be argued that in theory, a finding of s. 241 oppression could be coupled with approval of an arrangement as fair and reasonable under s. 192, given the different allocations of burden of proof in the two actions and the different perspectives from which the assessment is made. On the other hand, common sense suggests, as did the Court of Appeal, that a finding of oppression sits ill with the conclusion that the arrangement involved is fair and reasonable. We leave this interesting question to a case where it arises.

(1) The Requirements for Approval under Section 192

122 We will first describe the nature and purpose of the s. 192 approval process. We will then consider the philosophy that underlies s. 192 approval; the interests at play in the process; and the criteria to be applied by the judge on a s. 192 proceeding.

(a) The Nature and Purpose of the Section 192 Procedure

123 The s. 192 approval process has its genesis in 1923 legislation designed to permit corporations to modify their share capital: *Companies Act Amending Act, 1923*, S.C. 1923, c. 39, s. 4. The legislation's concern was to permit changes to shareholders' rights, while offering shareholders protection. In 1974, plans of arrangements were omitted from the *CBCA* because Parliament considered them superfluous and feared that they could be used to squeeze out minority shareholders. Upon realizing that arrangements were a practical and flexible way to effect complicated transactions, an arrangement provision was reintroduced in the *CBCA* in 1978: Consumer and Corporate Affairs Canada, *Detailed background paper for an Act to amend the Canada Business Corporations Act* (1977), p. 5 ("Detailed Background Paper").

124 In light of the flexibility it affords, the provision has been broadened to deal not only with reorganization of share capital, but corporate reorganization more generally. Section 192(1) of the present legislation defines an arrangement under the provision as including amendments to articles, amalgamation of two or more corporations, division of the business carried on by a corporation, privatization or "squeeze-out" transactions, liquidation or dissolution, or any combination of these.

125 This list of transactions is not exhaustive and has been interpreted broadly by courts. Increasingly, s. 192 has been used as a device for effecting changes of control because of advantages it offers the purchaser: C. C. Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (2007), at p. 76. One of these advantages is that it permits the purchaser to buy shares of the target company without the need to comply with provincial takeover bid rules.

126 The s. 192 process is generally applicable to change of control transactions that share two characteristics: the arrangement is sponsored by the directors of the target company; and the goal of the arrangement is to require some or all of the shareholders to surrender their shares to either the purchaser or the target company.

127 Fundamentally, the s. 192 procedure rests on the proposition that where a corporate transaction will alter the rights of security holders, this impact takes the decision out of the scope of management of the corporation's affairs, which is the responsibility of the directors. Section 192 overcomes this impediment through two mechanisms. First, proposed arrangements generally can be submitted to security holders for approval. Although there is no explicit requirement for a security holder vote in s. 192, as will be discussed below, these votes are an important feature of the process for approval of plans of arrangement. Second, the plan of arrangement must receive court approval after a hearing in which parties whose rights are being affected may partake.

(b) The Philosophy Underlying Section 192

128 The purpose of s. 192, as we have seen, is to permit major changes in corporate structure to be made, while ensuring that individuals and groups whose lights may be affected are treated fairly. In conducting the s. 192 inquiry, the judge must keep in mind the spirit of s. 192, which is to achieve a fair balance between conflicting interests. In discussing the objective of the arrangement provision introduced into the *CBCA* in 1978, the Minister of Consumer and Corporate Affairs stated:

... the Bill seeks to achieve a fair balance between flexible management and equitable treatment of minority shareholders in a manner that is consonant with the other fundamental change institutions set out in Part XIV.

(Detailed Background Paper, at p. 6)

129 Although s. 192 was initially conceived as permitting and has principally been used to permit useful restructuring while protecting minority shareholders against adverse effects, the goal of ensuring a fair balance between different constituencies applies with equal force when considering the interests of non-shareholder security holders recognized under s. 192. Section 192 recognizes that major changes may be appropriate, even where they have an adverse impact on the rights

of particular individuals or groups. It seeks to ensure that the interests of these rights holders are considered and treated fairly, and that in the end the arrangement is one that should proceed.

(c) Interests Protected by Section 192

130 The s. 192 procedure originally was aimed at protecting shareholders affected by corporate restructuring. That remains a fundamental concern. However, this aim has been subsequently broadened to protect other security holders in some circumstances.

131 Section 192 clearly contemplates the participation of security holders in certain situations. Section 192(1)(f) specifies that an arrangement may include an exchange of securities for property. Section 192(4)(c) provides that a court can make an interim order "requiring a corporation to call, hold and conduct a meeting of holders of securities ...". The Director appointed under the *CBCA* takes the view that, at a minimum, all security holders whose legal rights stand to be affected by the transaction should be permitted to vote on the arrangement: Policy Statement 15.1, s. 3.08.

132 A difficult question is whether s. 192 applies only to security holders whose *legal rights* stand to be affected by the proposal, or whether it applies to security holders whose legal rights remain intact but whose *economic interests* may be prejudiced.

133 The purpose of s. 192, discussed above, suggests that only security holders whose legal rights stand to be affected by the proposal are envisioned. As we have seen, the s. 192 procedure was conceived and has traditionally been viewed as aimed at permitting a corporation to make changes that affect the *rights* of the parties. It is the fact that rights are being altered that places the matter beyond the power of the directors and creates the need for shareholder and court approval. The distinction between the focus on legal rights under arrangement approval and reasonable expectations under the oppression remedy is a crucial one. The oppression remedy is grounded in unfair treatment of stakeholders, rather than on legal rights in their strict sense.

134 This general rule, however, does not preclude the possibility that in some circumstances, for example threat of insolvency or claims by certain minority shareholders, interests that are not strictly legal should be considered: see Policy Statement 15.1, s. 3.08, referring to "extraordinary circumstances".

135 It is not necessary to decide on these appeals precisely what would amount to "extraordinary circumstances" permitting consideration of non-legal interests on a s. 192 application. In our view, the fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities would generally not, without more, constitute such a circumstance.

(d) Criteria for Court Approval

136 Section 192(3) specifies that the corporation must obtain court approval of the plan. In determining whether a plan of arrangement should be approved, the court must focus on the terms and impact of the arrangement itself, rather than on the process by which it was reached. What is required is that the arrangement itself, viewed substantively and objectively, be suitable for approval.

137 In seeking approval of an arrangement, the corporation bears the onus of satisfying the court that: (1) the statutory procedures have been met; (2) the application has been put forward in good faith; and (3) the arrangement is fair and reasonable: see *Trizec Corp., Re* (1994), 21 Alta. L.R. (3d) 435 (Alta. Q.B.), at p. 444. This may be contrasted with the s. 241 oppression action, where the onus is on the claimant to establish its case. On these appeals, it is conceded that the corporation satisfied the first two requirements. The only question is whether the arrangement is fair and reasonable.

138 In reviewing the directors' decision on the proposed arrangement to determine if it is fair and reasonable under s. 192, courts must be satisfied that (a) the arrangement has a valid business purpose, and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way. It is through this two-pronged framework that courts can determine whether a plan is fair and reasonable.

139 In the past, some courts have answered the question of whether an arrangement is fair and reasonable by applying what is referred to as the business judgment test, that is whether an intelligent and honest business person, as a member of the voting class concerned and acting in his or her own interest would reasonably approve the arrangement: see *Trizec*, at p. 444; *Pacifica Papers Inc. v. Johnstone* (2001), 15 B.L.R. (3d) 249, 2001 BCSC 1069 (B.C. S.C.). However, while this consideration may be important, it does not constitute a useful or complete statement of what must be considered on a s. 192 application.

140 First, the fact that the business judgment test referred to here and the business judgment rule discussed above (at para. 40) are so similarly named leads to confusion. The business judgment *rule* expresses the need for deference to the business judgment of directors as to the best interests of the corporation. The business judgment *test* under s. 192, by contrast, is aimed at determining whether the proposed arrangement is fair and reasonable, having regard to the corporation and relevant stakeholders. The two inquiries are quite different. Yet the use of the same terminology has given rise to confusion. Thus, courts have on occasion cited the business judgment test while saying that it stands for the principle that arrangements do not have to be perfect, i.e. as a deference principle: see *Abitibi-Consolidated Inc., Re*, [2007] Q.J. No. 16158, 2007 QCCS 6830 (Que. Bkcty.). To conflate the business judgment test and the business judgment rule leads to difficulties in understanding what "fair and reasonable" means and how an arrangement may satisfy this threshold.

141 Second, in instances where affected security holders have voted on a plan of arrangement, it seems redundant to ask what an intelligent and honest business person, as a member of the voting class concerned and acting in his or her own interest, would do. As will be discussed below (at para. 150), votes on arrangements are an important indicator of whether a plan is fair and reasonable. However, the business judgment test does not provide any more information than does the outcome of a vote. Section 192 makes it clear that the reviewing judge must delve beyond whether a reasonable business person would approve of a plan to determine whether an arrangement is fair and reasonable. Insofar as the business judgment test suggests that the judge need only consider the perspective of the majority group, it is incomplete.

142 In summary, we conclude that the business judgment test is not useful in the context of a s. 192 application, and indeed may lead to confusion.

143 The framework proposed in these reasons reformulates the s. 192 test for what is fair and reasonable in a way that reflects the logic of s. 192 and the authorities. Determining what is fair and reasonable involves two inquiries: first, whether the arrangement has a valid business purpose; and second, whether it resolves the objections of those whose rights are being arranged in a fair and balanced way. In approving plans of arrangement, courts have frequently pointed to factors that answer these two questions as discussed more fully below: *Canadian Pacific Ltd., Re* (1990), 73 O.R. (2d) 212 (Ont. H.C.); *Cinar Corp. v. Shareholders of Cinar Corp.* (2004), 4 C.B.R. (5th) 163 (C.S. Que.); *PetroKazakhstan Inc. v. Lukoil Overseas Kumkol B.V.* (2005), 12 B.L.R. (4th) 128, 2005 ABQB 789 (Alta. Q.B.).

144 We now turn to a more detailed discussion of the two prongs.

145 The valid business purpose prong of the fair and reasonable analysis recognizes the fact that there must be a positive value to the corporation to offset the fact that rights are being altered. In other words, courts must be satisfied that the burden imposed by the arrangement on security holders is justified by the interests of the corporation. The proposed plan of arrangement must further the interests of the corporation as an ongoing concern. In this sense, it may be narrower than the "best interests of the corporation" test that defines the fiduciary duty of directors under s. 122 of the *CBCA* (see paras. 38-40).

146 The valid purpose inquiry is invariably fact-specific. Thus, the nature and extent of evidence needed to satisfy this requirement will depend on the circumstances. An important factor for courts to consider when determining if the plan of arrangement serves a valid business purpose is the necessity of the arrangement to the continued operations of the corporation. Necessity is driven by the market conditions that a corporation faces, including technological, regulatory and competitive conditions. Indicia of necessity include the existence of alternatives and market reaction to the plan. The degree of necessity of the arrangement has a direct impact on the court's level of scrutiny. Austin J. in *Canadian Pacific* concluded that

while courts are prepared to assume jurisdiction notwithstanding a lack of necessity on the part of the company, the lower the degree of necessity, the higher the degree of scrutiny that should be applied.

[Emphasis added; p. 223.]

If the plan of arrangement is necessary for the corporation's continued existence, courts will more willingly approve it despite its prejudicial effect on some security holders. Conversely, if the arrangement is not mandated by the corporation's financial or commercial situation, courts are more cautious and will undertake a careful analysis to ensure that it was not in the sole interest of a particular stakeholder. Thus, the relative necessity of the arrangement may justify negative impact on the interests of affected security holders.

147 The second prong of the fair and reasonable analysis focuses on whether the objections of those whose rights are being arranged are being resolved in a fair and balanced way.

148 An objection to a plan of arrangement may arise where there is tension between the interests of the corporation and those of a security holder, or there are conflicting interests between different groups of affected rights holders. The judge must be satisfied that the arrangement strikes a fair balance, having regard to the ongoing interests of the corporation and the circumstances of the case. Often this will involve complex balancing, whereby courts determine whether appropriate accommodations and protections have been afforded to the concerned parties. However, as noted by Forsyth J. in *Trizec*, at para. 36:

[T]he court must be careful not to cater to the special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist. The overall fairness of any arrangement must be considered as well as fairness to various individual stakeholders.

149 The question is whether the plan, viewed in this light, is fair and reasonable. In answering this question, courts have considered a variety of factors, depending on the nature of the case at hand. None of these alone is conclusive, and the relevance of particular factors varies from case to case. Nevertheless, they offer guidance.

150 An important factor is whether a majority of security holders has voted to approve the arrangement. Where the majority is absent or slim, doubts may arise as to whether the arrangement is fair and reasonable; however, a large majority suggests the converse. Although the outcome of a vote by security holders is not determinative of whether the plan should receive the approval of the court, courts have placed considerable weight on this factor. Voting results offer a key indication of whether those affected by the plan consider it to be fair and reasonable: *St. Lawrence & Hudson Railway, Re*, [1998] O.J. No. 3934 (Ont. Gen. Div. [Commercial List]).

151 Where there has been no vote, courts may consider whether an intelligent and honest business person, as a member of the class concerned and acting in his or her own interest, might reasonably approve of the plan: *Alabama, New Orleans, Texas & Pacific Junction Railway, Re* (1890), [1891] 1 Ch. 213 (Eng. C.A.); *Trizec*.

152 Other indicia of fairness are the proportionality of the compromise between various security holders, the security holders' position before and after the arrangement and the impact on various security holders' rights: see *Canadian Pacific; Trizec*. The court may also consider the reputé of the directors and advisors who endorse the arrangement and the arrangement's terms. Thus, courts have considered whether the plan has been approved by a special committee of independent directors; the presence of a fairness opinion from a reputable expert; and the access of shareholders to dissent and appraisal remedies: see *Stelco Inc., Re* (2006), 18 C.B.R. (5th) 173 (Ont. S.C.J. [Commercial List]); *Cinar; St. Lawrence & Hudson Railway; Trizec; Pacifica Papers; Canadian Pacific*.

153 This review of factors represents considerations that have figured in s. 192 cases to date. It is not meant to be exhaustive, but simply to provide an overview of some factors considered by courts in determining if a plan has reasonably addressed the objections and conflicts between different constituencies. Many of these factors will also indicate whether the plan serves a valid business purpose. The overall determination of whether an arrangement is fair and reasonable is fact-specific and may require the assessment of different factors in different situations.

154 We arrive then at this conclusion: in determining whether a plan of arrangement is fair and reasonable, the judge must be satisfied that the plan serves a valid business purpose and that it adequately responds to the objections and conflicts between different affected parties. Whether these requirements are met is determined by taking into account a variety of relevant factors, including the necessity of the arrangement to the corporation's continued existence, the approval, if any, of a majority of shareholders and other security holders entitled to vote, and the proportionality of the impact on affected groups.

155 As has frequently been stated, there is no such thing as a perfect arrangement. What is required is a reasonable decision in light of the specific circumstances of each case, not a perfect decision: *Trizec; Maple Leaf Foods*. The court on a s. 192 application should refrain from substituting their views of what they consider the "best" arrangement. At the same time, the court should not surrender their duty to scrutinize the arrangement. Because s. 192 facilitates the alteration of legal rights, the Court must conduct a careful review of the proposed transactions. As Lax J. stated in *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J. [Commercial List]), at para. 153: "Although Board decisions are not subject to microscopic examination with the perfect vision of hindsight, they are subject to examination."

(2) Application to these Appeals

156 As discussed above (at paras. 137-38), the corporation on a s. 192 application must satisfy the court that: (1) the statutory procedures are met; (2) the application is put forward in good faith; and (3) the arrangement is fair and reasonable, in the sense that: (a) the arrangement has a valid business purpose; and (b) the objections of those whose rights are being arranged are resolved in a fair and balanced way.

157 The first and second requirements are clearly satisfied in this case. On the third element, the debentureholders no longer argue that the arrangement lacks a valid business purpose. The debate before this Court focuses on whether the objections of those whose rights are being arranged were resolved in a fair and balanced way.

158 The debentureholders argue that the arrangement does not address their rights in a fair and balanced way. Their main contention is that the process adopted by the directors in negotiating and concluding the arrangement failed to consider their interests adequately, in particular the fact that the arrangement, while upholding their contractual rights, would reduce the trading value of their debentures and in some cases downgrade them to below investment grade rating.

159 The first question that arises is whether the debentureholders' economic interest in preserving the trading value of their bonds was an interest that the directors were required to consider on the s. 192 application. We earlier concluded that authority and principle suggest that s. 192 is generally concerned with legal rights, absent exceptional circumstances. We further suggested that the fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities would generally not constitute such a circumstance.

160 Relying on Policy Statement 15.1, the trial judge in these proceedings concluded that the debentureholders were not entitled to vote on the plan of arrangement because their legal rights were not being arranged; "[t]o do so would unjustly give [them] a veto over a transaction with an aggregate common equity value of approximately \$35 billion that was approved by over 97% of the shareholders" (para. 166). Nevertheless, the trial judge went on to consider the debentureholders' perspective.

161 We find no error in the trial judge's conclusions on this point. Since only their economic interests were affected by the proposed transaction, not their legal rights, and since they did not fall within an exceptional situation where non-legal interests should be considered under s. 192, the debentureholders did not constitute an affected class under s. 192. The trial judge was thus correct in concluding that they should not be permitted to veto almost 98 percent of the shareholders simply because the trading value of their securities would be affected. Although not required, it remained open to the trial judge to consider the debentureholders' economic interests in his assessment of whether the arrangement was fair and reasonable under s. 192, as he did.

162 The next question is whether the trial judge erred in concluding that the arrangement addressed the debentureholders' interests in a fair and balanced way. The trial judge emphasized that the arrangement preserved the contractual rights of the debentureholders as negotiated. He noted that it was open to the debentureholders to negotiate protections against increased debt load or the risks of changes in corporate structure, had they wished to do so. He went on to state:

... the evidence discloses that [the debentureholders'] rights were in fact considered and evaluated. The Board concluded, justly so, that the terms of the 1976, 1996 and 1997 Trust Indentures do not contain change of control provisions, that there was not a change of control of Bell Canada contemplated and that, accordingly, the Contesting Debentureholders could not reasonably expect BCE to reject a transaction that maximized shareholder value, on the basis of any negative impact [on] them.

((2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, at para. 162, quoting (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907, at para. 199)

163 We find no error in these conclusions. The arrangement does not fundamentally alter the debentureholders' rights. The investment and the return contracted for remain intact. Fluctuation in the trading value of debentures with alteration in debt load is a well-known commercial phenomenon. The debentureholders had not contracted against this contingency. The fact that the trading value of the debentures stood to diminish as a result of the arrangement involving new debt was a foreseeable risk, not an exceptional circumstance. It was clear to the judge that the continuance of the corporation required acceptance of an arrangement that would entail increased debt and debt guarantees by Bell Canada: necessity was established. No superior arrangement had been put forward, and BCE had been assisted throughout by expert legal and financial advisors, suggesting that the proposed arrangement had a valid business purpose.

164 Based on these considerations, and recognizing that there is no such thing as a perfect arrangement, the trial judge concluded that the arrangement had been shown to be fair and reasonable. We see no error in this conclusion.

165 The Court of Appeal's contrary conclusion rested, as suggested above, on an approach that incorporated the s. 241 oppression remedy with its emphasis on reasonable expectations into the s. 192 arrangement approval process. Having found that the debentureholders' reasonable expectations (that their interests would be considered by the Board) were not met, the court went on to combine that finding with the s. 192 onus on the corporation. The result was to combine the substance of the oppression action with the onus of the s. 192 approval process. From this hybrid flowed the conclusion that the corporation had failed to discharge its burden of showing that it could not have met the alleged reasonable expectations of the debentureholders. This result could not have obtained under s. 241, which places the burden of establishing oppression on the claimant.

By combining s. 241's substance with the reversed onus of s. 192, the Court of Appeal arrived at a conclusion that could not have been sustained under either provision, read on its own terms.

VI. Conclusion

166 We conclude that the debentureholders have failed to establish either oppression under s. 241 of the *CBCA* or that the trial judge erred in approving the arrangement under s. 192 of the *CBCA*.

167 For these reasons, the appeals are allowed, the decision of the Court of Appeal set aside, and the trial judge's approval of the plan of arrangement is affirmed with costs throughout. The cross-appeals are dismissed with costs throughout.

Appeals allowed; cross-appeals dismissed.

Pourvois accueillis et pourvois incidents rejetés.

Footnotes

* Bastarache J. joined in the judgment of June 20, 2008, but took no part in these reasons for judgment.

TAB 7

CITATION: U.S. Steel Canada Inc. (Re), 2015 ONSC 2523
COURT FILE NO.: CV-14-10695-00CL
DATE: 20150417

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT
WITH RESPECT TO U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *K. Peters and R. Paul Steep*, for the Applicant

R. Sahni, for the Monitor

R. Thornton and J. Galway, for United States Steel Corporation

L. Harmer, for the United Steelworkers International Union, the United Steelworkers Union, Local 8782 and as agent for the United Steelworkers Union, Local 1005

A. Hatnay and B. Walancik, for the non-unionized retirees and active employees

L. Willis, for Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario)

HEARD: April 2, 2015

ENDORSEMENT

[1] The applicant sought an order authorizing a sale and restructuring process (the "SARP") and approving the eighth report of the Monitor and the activities described therein, which relate principally to the SARP. The order was granted with written reasons to follow, which are set out in this Endorsement.

[2] The proposed form of the SARP was initially the subject of objections from Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario), the United Steelworkers, the United Steelworkers Local 8782, the United Steelworkers Local 1005, and the non-unionized retirees and active employees of the applicant (collectively, the "Major Stakeholders"). After negotiations among the parties, the revised form of the SARP was consented to by the Major Stakeholders and the United States Steel Corporation.

[3] The proposed process satisfies the criteria enumerated by Morawetz R.S.J. in *Nortel Networks Corp., Re*, 2009 CanLII39492 (ONSC) at para. 49 for the following four reasons which address the four factors articulated in that decision.

[4] First, commencement of the SARP is warranted at this time to permit the applicant sufficient time to run an effective sales and investment process if a consensual restructuring is not possible among the stakeholders.

[5] Second, a sale or restructuring process will benefit the whole "economic community" having a stake in the applicant. In particular, an active sales or investment process is necessary to maintain the confidence of the applicant's suppliers and customers and thereby ensure the continued operation of the applicant's business in the ordinary course. Absent a consensual restructuring, a sale of, or investment in, the applicant is the only form of restructuring that would have the potential for maintaining the applicant's business as a going concern and thereby maintaining the economic and social benefits of its continued operation, including preservation of employment at the applicant's two facilities.

[6] Third, as mentioned, the Major Stakeholders consented to the Order. The Monitor also advised the Court that it supported the SARP. No other creditors objected to the SARP process as contemplated in the proposed order.

[7] Lastly, there is no better viable alternative. In particular, in the absence of a consensual restructuring, a sale or investment transaction produced by the SARP would likely preserve considerably more value than a sale in a receivership or in a bankruptcy liquidation proceeding.

[8] In addition, while not technically applicable, the relevant factors in s. 36(3) of the *Companies' Creditors Arrangement Act* are also satisfied in respect of the Order. In particular, as mentioned, the Monitor supported the proposed SARP, which was also consented to by the Major Stakeholders. Further, the process contemplated is reasonable, both in terms of the substance and the timelines contemplated for the stages of such process, and is consistent with sales and investment process orders for businesses of comparable complexity in the current market.



Wilton-Siegel J.

Date: April 17, 2015

TAB 8

Most Negative Treatment: Distinguished

Most Recent Distinguished: Arrangement de MPECO Construction inc. | 2019 QCCS 297, 2019 CarswellQue 730, EYB 2019-306949, 67 C.B.R. (6th) 87 | (Que. Bkcty., Feb 4, 2019)

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

**Century Services Inc. (Appellant) and Attorney
General of Canada on behalf of Her Majesty
The Queen in Right of Canada (Respondent)**

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

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Related Abridgment Classifications

Tax

I General principles

I.5 Priority of tax claims in bankruptcy proceedings

Tax

III Goods and Services Tax

III.14 Collection and remittance

III.14.b GST held in trust

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly

repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyait que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du

tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyait que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion

that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in

the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de

la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait

dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la préséance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurerait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

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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.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re (2000), 2000 CarswellOnt 3269, 19 C.B.R. (4th) 158 (Ont. S.C.J.) — referred to

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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.) — referred to

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Solid Resources Ltd., Re (2002), [2003] G.S.T.C. 21, 2002 CarswellAlta 1699, 40 C.B.R. (4th) 219 (Alta. Q.B.) — referred to
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Generally — referred to

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

Generally — referred to

s. 67(2) — referred to

s. 67(3) — referred to

s. 81.1 [en. 1992, c. 27, s. 38(1)] — considered

s. 81.2 [en. 1992, c. 27, s. 38(1)] — considered

s. 86(1) — considered

s. 86(3) — referred to

Bankruptcy Act and to amend the Income Tax Act in consequence thereof, Act to amend the, S.C. 1992, c. 27

Generally — referred to

s. 39 — referred to

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12

s. 73 — referred to

s. 125 — referred to

s. 126 — referred to

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

s. 23(3) — referred to

s. 23(4) — referred to

Cités et villes, Loi sur les, L.R.Q., c. C-19

en général — referred to

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en général — referred to

art. 2930 — referred to

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Generally — referred to

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36

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

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — referred to

s. 11(4) — referred to

s. 11(6) — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — referred to

s. 11.09 [en. 2005, c. 47, s. 128] — considered

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

s. 18.3 [en. 1997, c. 12, s. 125] — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 18.4 [en. 1997, c. 12, s. 125] — referred to

s. 18.4(1) [en. 1997, c. 12, s. 125] — considered

s. 18.4(3) [en. 1997, c. 12, s. 125] — considered

s. 20 — considered

s. 21 — considered

s. 37 — considered

s. 37(1) — referred to

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222(1) [en. 1990, c. 45, s. 12(1)] — referred to

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Fairness for the Self-Employed Act, S.C. 2009, c. 33

Generally — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

s. 227(4) — referred to

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — referred to

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

s. 44(f) — considered

Personal Property Security Act, S.A. 1988, c. P-4.05

Generally — referred to

Sales Tax and Excise Tax Amendments Act, 1999, S.C. 2000, c. 30

Generally — referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1

Generally — referred to

s. 69 — referred to

s. 128 — referred to

s. 131 — referred to

Statutes considered *Fish J.*:

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Generally — referred to

s. 67(2) — considered

s. 67(3) — considered

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

s. 23 — considered

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

Generally — referred to

s. 11 — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3)(a) [en. 1990, c. 45, s. 12(1)] — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered

Statutes considered *Abella J.* (dissenting):

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

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

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

s. 2(1)"enactment" — considered

s. 44(f) — considered

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

Generally — referred to

Deschamps J.:

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("*LeRoy Trucking*") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("*GST*") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions

GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding \$5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of \$305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from

which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to

adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing \$1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of \$5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor

to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

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

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be

repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is

ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the CCAA

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims

largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at § 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the *Alberta Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which

to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

222. (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

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

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

18.4 (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision

confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency.

The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the

BIA. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and

reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of *CCAA* law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, *per* Farley J.).

58 CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the CCAA's purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

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

(*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the CCAA takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They

have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

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

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*.

This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 Express Trust

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these

funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

Fish J. (concurring):

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

227 (4) Trust for moneys deducted — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Extension of trust — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in

the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...

...

... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

67 (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

102 Thus, Parliament has first *created* and then *confirmed the continued operation* of the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...

...

... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

Abella J. (dissenting):

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I

agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11¹ of the *CCAA* stated:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

222 (3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

18.3 (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the*

Commercial Provisions of Bill C-55; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument

on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

[T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:

The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non*

derogant). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "override" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,² s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

...

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

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

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(f) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where

s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at December 13, 2007)**

11. (1) Powers of court — Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) Initial application court orders — A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (i);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) Other than initial application court orders — A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

- (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

...

(6) Burden of proof on application — The court shall not make an order under subsection (3) or (4) unless

- (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
- (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) Her Majesty affected — An order made under section 11 may provide that

- (a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's

premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

- (i) the expiration of the order,
 - (ii) the refusal of a proposed compromise by the creditors or the court,
 - (iii) six months following the court sanction of a compromise or arrangement,
 - (iv) the default by the company on any term of a compromise or arrangement, or
 - (v) the performance of a compromise or arrangement in respect of the company;
- and\

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

- (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
- (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) may apply.

(2) When order ceases to be in effect — An order referred to in subsection (1) ceases to be in effect if

- (a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under
 - (i) subsection 224(1.2) of the *Income Tax Act*,
 - (ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or

an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) Deemed trusts — Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole

purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) Status of Crown claims — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) Operation of similar legislation — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

...

20. [Act to be applied conjointly with other Acts] — The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C.

1985, c. C-36 (as at September 18, 2009)

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

...

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

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) Stays, etc. — other than initial application — A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) Burden of proof on application — The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) Stay — Her Majesty — An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

- (i) the expiry of the order,
- (ii) the refusal of a proposed compromise by the creditors or the court,
- (iii) six months following the court sanction of a compromise or an arrangement,
- (iv) the default by the company on any term of a compromise or an arrangement, or
- (v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

(2) When order ceases to be in effect — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension

plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that

it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

37. (1) Deemed trusts — Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

- (a) property held by the bankrupt in trust for any other person,
- (b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or
- (b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

- (c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and
- (d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(3) Exceptions — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

- (a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or
- (b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or

withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan*

in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

Footnotes

- 1 Section 11 was amended, effective September 18, 2009, and now states:
11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
- 2 The amendments did not come into force until September 18, 2009.

TAB 9

2015 ONSC 303
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 620, 2015 ONSC 303, [2015] O.J.
No. 247, 22 C.B.R. (6th) 323, 248 A.C.W.S. (3d) 753

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

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co.,
Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy
(BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy
Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

Morawetz R.S.J.

Heard: January 15, 2015
Judgment: January 16, 2015
Docket: CV-15-10832-00CL

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

Jay Swartz for Target Corporation

Alan Mark, Melaney Wagner, Jesse Mighton for Proposed Monitor, Alvarez and Marsal Canada
ULC ("Alvarez")

Terry O'Sullivan for Honourable J. Ground, Trustee of the Proposed Employee Trust

Susan Philpott for Proposed Employee Representative Counsel, for Employees of the Applicants

Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application

XIX.2.e Proceedings subject to stay

XIX.2.e.vi Miscellaneous

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application

XIX.2.h Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Miscellaneous

Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. — Canadian operations suffered significant loss in every quarter — T Co. decided to stop funding Canadian operations — Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA) — Application granted — Initial order granted — Stay of proceedings granted — Stay extended to certain limited partnerships, which were related to or carried on operations integral to applicants' business — Stay of proceedings extended to rights of third party tenants against landlords that arose out of insolvency — Stay extended to T Co. and its U.S. subsidiaries in relation to claims derivative of claims against Canadian operations.

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

Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. — Canadian operations suffered significant loss in every quarter — T Co. decided to stop funding Canadian operations — Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA) — Application granted — Initial order granted — Stay of proceedings granted — It was appropriate to grant broad relief to ensure status quo was maintained — Applicants were all insolvent — Although there was no prospect restructured "going concern" solution would result, use of CCAA protection was appropriate in circumstances — Creation of employee trust to cover payments to employees was approved — Key employee retention program (KERP) and charge as security for KERP payments were approved — Appointment of Employee Representative Counsel was approved — DIP Lenders' Charge and DIP Facility were approved — Administration charge and Directors' and Officers' charge approved.

Table of Authorities

Cases considered by *Morawetz R.S.J.*:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — considered

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — followed

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) — referred to

Prizm Income Fund, Re (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed
Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, [2004] O.T.C. 284, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — followed

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Stelco Inc., Re (2004), 338 N.R. 196 (note), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.) — referred to

T. Eaton Co., Re (1997), 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) — considered

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

U.S. Steel Canada Inc., Re (2014), 2014 ONSC 6145, 2014 CarswellOnt 16465 (Ont. S.C.J.) — considered

Statutes considered:

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

Generally — referred to

s. 2 "insolvent person" — considered

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

Generally — referred to

s. 11 — considered

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

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

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.7(1) [en. 1997, c. 12, s. 124] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 36 — considered

Rules considered:

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

Generally — referred to

Words and phrases considered:

insolvent

"Insolvent" is not expressly defined in the [*Companies' Creditors Arrangement Act* (CCAA)]. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act* . . . or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [Stelco], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

Morawetz R.S.J.:

1 Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

2 TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

3 In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today,

TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

4 Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

5 After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

6 Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

7 The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

- a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;
- b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;
- c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and
- d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

8 The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure

with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

9 TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

10 TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

11 The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

12 A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 - 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

13 TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

14 In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

15 TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than \$2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

16 TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

17 Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

18 Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately \$5.408 billion and total liabilities of approximately \$5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

19 Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately \$2.5 billion. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of \$62 million since November 1, 2014.

20 NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of \$4 billion. TCC owed NE1 approximately \$3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

21 As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately \$1.632 billion and total liabilities of approximately \$1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately \$1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. \$89 million to Target Corporation under a Demand Promissory Note.

22 TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

23 Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

24 Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

25 On this initial hearing, the issues are as follows:

- a) Does this court have jurisdiction to grant the CCAA relief requested?
 - a) Should the stay be extended to the Partnerships?
 - b) Should the stay be extended to "Co-tenants" and rights of third party tenants?
 - c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?
 - d) Should the Court approve protections for employees?
 - e) Is it appropriate to allow payment of certain pre-filing amounts?
 - f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;
 - g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?
 - h) Should the court exercise its discretion to approve the Court-ordered charges?

26 "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]), [Stelco], leave to appeal refused, [2004] O.J. No. 1903 (Ont. C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336 (S.C.C.), where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm*

Income Fund, Re, [2011] O.J. No. 1491 (Ont. S.C.J.), 2011 and *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) [*Canwest*].

27 Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

28 I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

29 I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

30 In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

31 The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

32 Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

33 The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

34 In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

35 The required audited financial statements are contained in the record.

36 The required cash flow statements are contained in the record.

37 Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

38 Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

39 The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

40 I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

41 Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

42 It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Prizm Income Fund, Re*, 2011 ONSC 2061 (Ont. S.C.J.); *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) ("*Canwest Publishing*") and

Canwest Global Communications Corp., Re, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) ("*Canwest Global*").

43 In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

44 The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

45 The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *T. Eaton Co., Re*, 1997 CarswellOnt 1914 (Ont. Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

46 In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

47 The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

48 I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

49 The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

50 I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

51 With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

52 Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

53 In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of \$70 million.

54 The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

55 In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

56 The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of \$6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

57 The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Nortel Networks Corp., Re*, 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) [*Nortel Networks (KERP)*], and *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List]). In *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (Ont. S.C.J.), I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

58 In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

59 Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

60 The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

61 I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) (*Nortel Networks Representative Counsel*)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

- (i) the vulnerability and resources of the groups sought to be represented;
- (ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

62 The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

63 Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

64 The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of \$10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

65 In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

66 In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

67 TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. \$175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%.

Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

68 The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

69 The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

70 The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

71 Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. \$175 million and the DIP Facility is approved.

72 Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCAA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

73 With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of \$6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

74 In *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]), Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

- a. The size and complexity of the business being restructured;
- b. The proposed role of the beneficiaries of the charge;
- c. Whether there is an unwarranted duplication of roles;
- d. Whether the quantum of the proposed Charge appears to be fair and reasonable;
- e. The position of the secured creditors likely to be affected by the Charge; and
- f. The position of the Monitor.

75 Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

76 The Applicants seek a Directors' and Officers' charge in the amount of up to \$64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

77 Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

78 I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

79 In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

80 The stay of proceedings is in effect until February 13, 2015.

81 A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

82 The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

83 Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the

Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

84 Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 211 D.L.R. (4th) 193, [2002] 2 S.C.R. 522 (S.C.C.), I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

85 The Initial Order has been signed in the form presented.

Application granted.

**IN THE MATTER OF THE *COMPANIES CREDITORS' ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CLOVER LEAF HOLDINGS
COMPANY, CONNORS BROS. CLOVER LEAF SEAFOODS COMPANY, K.C.R. FISHERIES LTD., 6162410 CANADA
LIMITED, CONNORS BROS. HOLDINGS COMPANY and CONNORS BROS. SEAFOODS COMPANY**

Court File No. CV-19-631523-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced in Toronto

APPLICANTS' BOOK OF AUTHORITIES

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