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COURT FILE NUMBER	**2101-00814**
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended

AND IN THE MATTER OF CALGARY OIL & GAS SYNDICATE GROUP LTD., CALGARY OIL AND GAS INTERCONTINENTAL GROUP LTD. (IN ITS OWN CAPACITY AND IN ITS CAPACITY AS GENERAL PARTNER OF T5 SC OIL AND GAS LIMITED PARTNERSHIP), CALGARY OIL AND SYNDICATE PARTNERS LTD. and PETROWORLD ENERGY LTD.

COM
May 25, 2021
Justice Jeffrey

BENCH BRIEF OF THE APPLICANTS,

CALGARY OIL & GAS SYNDICATE GROUP LTD., CALGARY OIL AND GAS INTERCONTINENTAL GROUP LTD. (IN ITS OWN CAPACITY AND IN ITS CAPACITY AS GENERAL PARTNER OF T5 SC OIL AND GAS LIMITED PARTNERSHIP), CALGARY OIL AND SYNDICATE PARTNERS LTD. and PETROWORLD ENERGY LTD,

IN SUPPORT OF AN APPLICATION RETURNABLE MAY 25, 2021 AT 3:00 P.M. BEFORE THE HONOURABLE MR. JUSTICE P.R. JEFFREY

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. This Brief of Law is submitted on behalf of the Applicants, Calgary Oil & Gas Syndicate Group Ltd. ("**Syndicate Group**"), Calgary Oil and Gas Intercontinental Group Ltd. ("**COGL**") (in its own capacity and in its capacity as general partner of T5 SC Oil and Gas Limited Partnership (the "**Limited Partnership**")), Calgary Oil and Syndicate Partners Ltd. ("**Syndicate Partners**") and Petroworld Energy Ltd. ("**Petroworld**" and, collectively, the "**Applicants**", and together with the Limited Partnership, the "**Companies**"), in support of an Application for a stay extension and a late-filed claims procedure order (the **"Late Filed Claims Order**) and creditors' meeting order (the "**Creditors' Meeting Order"**), both appended to the Application as Schedules "B" and "C" respectively.

2. All capitalized terms not otherwise defined in this Brief have the meanings ascribed thereto in the Application in the within proceedings filed by the Applicants on May 17, 2021.

II. FACTS

3. The facts supporting the relief sought in the within Application are more particularly set out in the Affidavit sworn on May 17, 2021 by Ryan Martin, the Applicants' corporate representative (the "**Martin Affidavit**").[1]

III. ISSUES

4. The Applicants respectfully request that this Honourable Court determine the following issues:

   (a) Should the requested Late Filed Claims Order be granted?

   (b) Should the requested Creditors' Meeting Order be granted?

   (c) Should the requested Stay Extension Order be granted?

[1] Affidavit of Ryan Martin, sworn on May 17, 2021 at para 1 [**Martin Affidavit**].

IV. LAW & ARGUMENT

A. The Late Filed Claims Order Permits a Fair Resolution of the Post-Filing Restructuring Claimants' Claims

5. Courts have a discretionary jurisdiction to allow late-filed claims or applications.[2] A Claims Procedure Order that contains a claims bar date does not preclude a Court from allowing a claim after this date, as the Court remains the "ultimate arbiter of disputed claims" and "should always be viewed as having the jurisdiction to permit appropriate revision of claims".[3]

6. The disclaimer of the Disclaimed Agreements will likely be necessary for both the timely and efficient resolution of the process under the *Companies Creditors' Arrangement Act,* RSC 1985, c C-36 (the "***CCAA***"), and for the Transaction with Spartan to provide requisite funding for the Plan, which will provide funds for distribution to Creditors.[4] Courts routinely allow claimants whose claims arise after a claims bar date to file subsequent claims. For example, in the matter of *Semcanada Crude Company,* Romaine J. granted a Claims Process Order which allowed for the filing of any Claim arising after the original Filing Date as the result of the debtor company's disclaimer of a contract after the Filing Date.[5]

7. Much like in *SemCanada Crude Company,* a number of claims in this matter will be post-filing claims. The Post-Filing Restructuring Claimants' claims will only arise as a result of disclaimers that were required under the transaction with Spartan and finalized after the Claims Procedure Order was granted on April 13, 2021. The Late Filed Claims Order is therefore required to allow the Post-Filing Restructuring Claimants to assert claims that they could not have brought prior to the Claims Procedure Order.

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[2] *Re Canadian Red Cross Society,* 72 OTC 99, 2008 CarswellOnt 6105 at para 27 [**TAB 1**].
[3] *Re ScoZinc Ltd,* 2009 NSSC 163 at paras 38, 49 [**TAB 2**]; the test to submit late-filed claims remains a relatively low bar even where the claims in question are from a late-filing creditor rather than the debtor party: see *Blue Range Resource Corp., Re,* 2000 ABCA 285 at para 41 [*Blue Range*] [**TAB 3**];
[4] Martin Affidavit at para 20.
[5] *Re SemCanada Crude Company,* Claims Process Order granted by the Honourable Madam Justice B.E.C. Romaine, Action No. 0801.08510 at para 5, Schedule A at paras 1(ii), 1 (jj) [**TAB 4].**

8. Courts have held that it "is clear that the timing of the later claim with respect to the stage of proceedings is a key consideration."[6]. Even when advanced by creditors, late filed claims made prior to court sanction of a plan of arrangement are treated leniently. For example, in *Re Scozinc* ,the Supreme Court of Nova Scotia ruled that a Monitor, acting on its own, has the necessary authority to allow the revision of a claim after the claim's bar date but before the date set for the Monitor to complete it's assessment of claims.[7]

9. Granting the Late Filed Claims Order would result in no prejudice to the other creditors, as the mere fact that other creditors will receive less money if late claims are accepted is not "prejudice' within the context of a late filed claims procedure.[8] The Late Filed Claims Order provides for considerable oversight over the Late Claims Process by the Monitor, who will review each Late Proof of Claim and, in conjunction with the Applicants, either accept, revise or disallow the Late Filed Claim subject to the procedures set out in the Late Filed Claims Order.[9]

B. The Extended Stay of Proceedings is Necessary and Appropriate in the Circumstances

10. Section 11.02(2) of the ***CCAA*** empowers a Court to extend the stay of proceedings granted to a debtor company. In considering whether to grant a stay extension, the Court should consider whether it is appropriate in the circumstances and whether the applicant has been acting in good faith and with due diligence.[10] These considerations underpin any exercise of the Court's discretionary authority under the *CCAA*.[11]

11. Appropriateness is assessed by examining whether the order sought advances the remedial policy objectives underlying the *CCAA* designed to mitigate the potentially catastrophic impacts of insolvency. These objectives include: (a) the timely, efficient and impartial resolution of a debtor's insolvency; (b) preserving and maximizing value of the debtor's assets for the benefit of its stakeholders; (c) ensuring the fair and equitable treatment of

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[6] *Re SemCanada Crude Co.*, 2012 ABQB 489 at para 66 [*SemCanada*] [**TAB 5**].
[7] *ScoZinc* at para 48 [**TAB 2**].
[8] *Blue Range* at para 40 [**TAB 3**].
[9] Late Filed Claims Order at para 10.
[10] *Companies Creditors' Arrangement Act*, RSC 1985, c C-36, s 11.02(3) [**TAB 6**].
[11] *9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10 at para 49 [***Callidus***] [**TAB 7**].

claims against the debtor; and (d) the preservation of jobs and communities affected by the company's financial distress.[12]

12. The possibility that one or more creditors may be prejudiced as a result of a stay should not affect the Court's exercise of its authority to grant one. The prejudice to one or more stakeholders must be balanced against, and offset by, the benefit to all stakeholders impacted by the company facilitating a reorganization. Thus, the Court's primary concerns under the *CCAA* are not for one stakeholder, but for the debtor and all of its stakeholders.[13]

13. Since the granting of the Claims Procedure Order, and the Stay Extension and Payment of Pre-Filing Amount Order by the Honourable Justice J.J. Gill of this Court on April 13, 2021 (the "**April 13 Orders**"), the Companies, with the oversight and assistance of the Monitor, have further negotiated and come to agreement on a restructuring Transaction and Plan in cooperation with Spartan Delta Corp. ("**Spartan**") based on the Spartan LOI referenced during the April 13, 2021 proceedings before Justice Gill.[14] As a result of such negotiations, some of the Companies and Spartan executed an Investment Agreement effective April 21, 2021 (the "**Definitive Agreement**").[15]

14. Under the terms of the Definitive Agreement, Spartan will provide $37,500,000.00 in cash consideration in exchange for the issuance of limited partnership units from treasury of the Limited Partnership, an amount which more than meets the claims of Crown Capital Partner Funding, LP ("**Crown Capital**"), the Applicants' primary secured creditor.[16]

15. The Applicants have prepared a plan of compromise or arrangement based on the Definitive Agreement, attached as Schedule "D" to the Application filed in conjunction with this Brief (the "**Plan**"). In general, the Plan will:

    (a) allow the operations of the Companies to continue as normal following the implementation of the Plan, including by preserving existing Indian Oil and Gas

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[12] *Callidus* at paras 40, 42 and 50 [**TAB 7**].
[13] *Re Lehndorff General Partner Ltd*, 17 CBR (3d) 24, 1993 CarswellOnt 183 at paras 5-6 [**TAB 8**].
[14] Martin Affidavit at para 9(c).
[15] *Ibid*.
[16] Martin Affidavit at paras 15, 22(b).

Canada ("**IOGC**") leases with the Companies, thereby allowing the Companies to continue to operate their assets in a manner which minimizes business disruption;[17]

(b) facilitate full recovery of the debt owed to Crown Capital; [18]

(c) facilitate full or substantial recovery for all valid lienholders, as determined pursuant Claims Procedure Order or the Late File Claims Order, as applicable;[19]

(d) facilitate likely partial recovery of the debt owed by the Companies to unsecured creditors, as determined pursuant Claims Procedure Order or the Late File Claims Order, as applicable;[20]

(e) preserve tax losses, providing increased value for all stakeholders;[21] and

(f) provide increased certainty to creditors.[22]

16. In addition, since the April 13 Orders, the Applicants have made significant progress implementing the Claims Procedure Order. In particular, the Applicants, with the assistance of the Monitor, have:

(a) sent to all Creditors of which they and the Monitor were aware a copy of the Claims Notice, a blank proof of claim and related instruction letter and copy of the Claims Procedure Order;[23]

(b) published a Notice to Creditors of the Claims Procedure in the *Calgary Herald*, the *Edmonton Journal* and the *Daily Oil Bulletin*; [24]

(c) received Proofs of Claim from twenty-two (22) claimants; [25] and

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[17] Martin Affidavit at para 22(a).
[18] Martin Affidavit at para 22(b).
[19] Martin Affidavit at para 22(c).
[20] Martin Affidavit at para 22(d).
[21] Affidavit of Ryan Martin, sworn on April 6, 2021 at para 32.
[22] Martin Affidavit at para 17.
23 Martin Affidavit at para 9(b)(i).
24 Martin Affidavit at para 9(b)(ii).
25 Martin Affidavit at para 9(b)(iii)

(d) reviewed and considered the Proofs of Claim received in accordance with the Claims Procedure Order.[26]

17. In addition, since the April 13 Orders, the Companies have worked with Spartan and the Monitor to identify agreements to which the Companies are a party that must be disclaimed to effect the Transaction with Spartan, and considered the issuance of Notices of Disclaimer in relation to such agreements.[27] In order to address any disputes respecting the Disclaimed Agreements, and assess and determine any Claims arising from the Disclaimed Agreements, the Applicants and the Monitor have also prepared the proposed Late Claims Procedure as set out in the Late Filed Claims Order.[28]

18. The Applicants seek a stay of proceedings up to and including July 31, 2021, which would extend to the Limited Partnership, and their directors and officers. The requested stay extension will allow the Applicants time to resolve any revisions or disallowances under the Claims Procedure, implement the Late Claims Procedure contemplated by the Late Filed Claims Order, implement the process contemplated by the Creditors' Meeting Order, and obtain the Court's sanction of the Plan, if the Plan is approved at the Creditors' Meeting.[29]

19. Since the granting of the Initial Order, the Companies have at all times operated and managed the business and operations of the Limited Partnership's Ferrier Assets in the ordinary course of business.[30] The Companies have been acting in good faith and with due diligence throughout these CCAA proceedings and submit that the requested stay extension is appropriate in the circumstances.[31]

26 Martin Affidavit at para 9(b)(iv).
27 Martin Affidavit at para 9(f).
28 Martin Affidavit at para 20.
29 Martin Affidavit at para 36.
30 Martin Affidavit at para 9, 9(a).
31 Martin Affidavit at para 37.

C. A Creditors' Meeting Order is Necessary to Permit the Timely and Efficient Advancement of the CCAA Process

20. Sections 4 and 5 of the *CCAA* grant courts the discretionary authority to order a meeting of unsecured or secured creditors of a debtor company to vote on a plan of arrangement or compromise.[32]

21. The standard for issuing a meeting order is low.[33] Courts will only refuse to summon a creditor's meeting where the compromise or plan of arrangement is "contrary to the creditor's interests", "doomed to failure due to a lack of creditor support", or there is "no reasonable chance" the debtor will be able to continue in business.[34] A Court may refuse to summon a creditor's meeting where the plan is "unworkable", "unrealistic in the circumstances" or as one which "lacks economic reality".[35]

22. As Justice Beveridge stated in *Re ScoZinc Ltd.,*

> In my opinion it should not be up to the Court to second guess the probability of success of a proposed plan of arrangement. Businessmen are free to make their own views known before and ultimately at the creditors' meeting. It seems to me that the Court should only decline to give preliminary approval and refuse to order a meeting if it was of the view that there was no hope that the plan would be approved by the creditors or, if it was approved by the creditors, it would not, for some other reason, be approved by the Court.[36]

23. A Court is therefore not required to determine the fairness and reasonableness of a plan at this stage. Courts have recognized that plans of arrangement may involve variables, contingencies and uncertainties, and that the debtor company is not saddled with a "heavy burden to establish the likelihood of success from the outset".[37]

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[32] *CCCA*, ss 4-5, *Callidus* at para 57 [**TAB 8**].
[33] *Arrangement relatif a Bloom Lake*, 2018 QCCS 1657 at para 19 [*Bloom Lake*] [**TAB 9**].
[34] *Kerr Interior Systems, Re,* 2011 ABQB 214 at para 29 [**TAB 10**].
[35] *Re Fracmaster*, 1999 ABQB 379 at para 24 [**TAB 11**].
[36] *Re ScoZinc Ltd*, 2009 NSSC 163 at para 7 [*ScoZinc*] [**TAB 2**]; see also *Red Cross* at para 37 [**TAB 1**].
[37] *Nova Metal Products Inc v Comskey (Trustee of)* (1990), 41 OAC 282 (Ont CA), 1990 CarswellOnt 139 at para 90 [*Nova*] [**TAB 12**].

24. The feasibility of a plan is, however, one factor that a court may consider in determining whether to order a meeting of creditors.[38] Courts will grant a meeting order where, among other factors, it is clear that a plan "significantly simplifies matters" and "creates no apparent material prejudice".[39] Courts will also grant a meeting order that provides for reasonable and sufficient notice and contains provisions that are reasonable and appropriate in the circumstances.[40]

25. The Plan proposed by the Applicants and Spartan is a workable and realistic plan with a reasonable probability of success.[41] Notably, the Plan has the support of Creditors collectively representing 28% of the currently known Affected Creditors (as defined in the Plan), and approximately $3,740,353.00 in value, or 40% of the total currently known estimated Affected Claim (as defined in the Plan) value of $9,443,241.00, have executed binding support agreements with Spartan pursuant to which they have agreed to support the Plan.[42] A further 21 Creditors collectively representing a further 13% of the currently known Affected Creditors, and approximately $1,574,571.00 in value, or a further 16% of the total currently known estimated Affected Claims, have indicated that they will support the Plan without executing a binding support agreement.[43] If the Plan is approved, it will provide not only for full recovery of debt owed by the Companies to Crown Capital and lienholders, but also substantial recovery by unsecured creditors.[44]

26. The Plan, developed in consultation with the Monitor, facilitates a recapitalization of the Companies and enables the business of the Companies to continue as a going concern, in the expectation that a greater benefit will be derived from the continued operation of its business than would result from either a forced liquidation of the Companies' assets or competing offers focused on a sale of assets.[45]

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[38] *Ibid*.
[39] *Bloom Lake* at para 20 [**TAB 9**].
[40] *Ibid.*
[41] Martin Affidavit at para 28.
[42] Martin Affidavit, at para 25.
[43] Martin Affidavit at para 26.
[44] Martin Affidavit at para 22.
[45] Martin Affidavit at para 21.

27. In addition, the process contemplated by the Creditors' Meeting Order provides for reasonable and sufficient notice of the Plan and the Creditors' Meeting and contains provisions, including those governing voting and the conduct of the Creditors' Meeting, that are reasonable and appropriate in the circumstances, and that have been commonly accepted in many previous CCAA proceedings.[46]

D. A Sealing Order is Necessary to Protect Confidential Information Disclosed in the Martin Affidavit

28. The Applicants seek a further sealing Order applicable to Confidential Exhibit "1" of the Affidavit of Ryan Martin sworn on May 17, 2021.

29. The Supreme Court of Canada has held that sealing orders may be granted where:

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

    (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the public interest in open and accessible court proceedings.[47]

30. The Confidential Exhibits in question set out certain commercially sensitive information relating to the ongoing restructuring Transaction with Spartan.[48] The dissemination of the information set out in the Confidential Exhibit could adversely affect the ongoing transaction and any subsequent restructuring efforts, resulting in significant prejudice against the stakeholder's ability to recover value therefrom.[49] A sealing order over this information is therefore both necessary to protect the stakeholders' commercial interests and of minimal detriment to the principal of open and accessible court proceedings.

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[46] Martin Affidavit at paras 29-31.
[47] *Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41 at para 53 [**TAB 13]**.
[48] Martin Affidavit at para 38.
[49] Martin Affidavit at para 39.

V. CONCLUSION

31. Accordingly, for the reasons set out above, the Applicants submit that it is necessary and appropriate in the circumstances to grant the requested relief as set forth in the proposed Stay Extension Order, Creditors' Meeting Order, Late Filed Claims Order and the Sealing Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17TH DAY OF MAY 2021

BORDEN LADNER GERVAIS LLP

Per: Matti Lemmens
Solicitors for the Applicants, Calgary Oil & Gas Syndicate Group Ltd., Calgary Oil and Gas Intercontinental Group Ltd. ((in its own capacity and in its capacity as general partner of T5 SC Oil and Gas Limited Partnership), Calgary Oil and Syndicate Partners Ltd., and Petroworld Energy Ltd.

VI. LIST OF AUTHORITIES AND OTHER ATTACHMENTS

TAB NO.	DOCUMENT DESCRIPTION
1	*Re Canadian Red Cross Society*, 72 OTC 99, 1998 CanLII 14907 (ON SC) 2008 CarswellOnt 6105
2	*Re ScoZinc Ltd*, 2009 NSSC 163
3	*Blue Range Resource Corp., Re*, 2000 ABCA 285
4	*Re SemCanada Crude Company*, Claims Process Order granted by the Honourable Madam Justice B.E.C. Romaine, Action No. 0801.08510
5	*Re SemCanada Crude Co.*, 2012 ABQB 489
6	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36
7	*9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10
8	*Re Lehndorff General Partner Ltd*, 17 CBR (3d) 24, 1993 CarswellOnt 183
9	*Arrangement relatif a Bloom Lake*, 2018 QCCS 1657
10	*Kerr Interior Systems*, 2011 ABQB 214
11	*Re Fracmaster*, 1999 ABQB 379
12	*Nova Metal Products Inc v Comskey (Trustee of)* (1990), 41 OAC 282 (Ont CA), 1990 CarswellOnt 139
13	*Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41

TAB 1

2008 CarswellOnt 6105
Ontario Superior Court of Justice

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re

2008 CarswellOnt 6105, [2008] O.J. No. 4114, 171 A.C.W.S. (3d) 21, 44 E.T.R. (3d) 31, 48 C.B.R. (5th) 41

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

IN THE MATTER OF A PLAN OF ARRANGEMENT OF THE CANADIAN RED CROSS SOCIETY/LA SOCIETE CANADIENNE DE LA CROIX ROUGE

THE CANADIAN RED CROSS SOCIETY/LA SOCIETE CANADIENNE DE LA CROIX ROUGE

Cullity J.

Heard: September 3, 2008
Judgment: September 29, 2008
Docket: 98-CL-002970

Counsel: Risa Kirshblum for Trustee under the Plan of Arrangement
Harvey T. Strosberg QC, Heather Rumble Peterson, Dawna Ring Q.C., Peter I. Waldmann, Thomas Sheppard, Kenneth Arenson, John Plater for Claimants under the Plan of Arrangement

Subject: Insolvency; Estates and Trusts; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.e Jurisdiction
XIX.1.e.i Court

Headnote

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

Jurisdiction — Pursuant to amended plan of compromise and agreement approved under Companies' Creditors Arrangement Act, trust was established for purpose of holding, administering and distributing fund in satisfaction of claims of persons infected with HIV virus who received blood products supplied by Canadian Red Cross Society prior to 1998 — No distributions from HIV trust were made — Trustee brought motion for advice and directions with respect to jurisdiction of court to relieve against late-filed or otherwise irregular applications for determination of damages by referee appointed in plan — Motion granted — Court has discretionary jurisdiction consistent with case law which is to be exercised sparingly in light of particular circumstances — Considerations that justified exercise of jurisdiction included structure of plan with its provisions of separate fund for HIV claimants and fact that no distributions from that fund were made — No prejudice would be suffered by society and other claimants, limitations issues created uncertainty, and circumstances of claimants distinguished them from commercial creditors — Adequate notice to claimants was essential for plan to be effective and application forms provided to claimants did not clearly indicate that they were required to identify each claimant in family group that included infected person — Selection of appropriate methods of disseminating notice of deadline for applications may have been affected and unduly limited by misapprehension about number of potential claimants — Approach that most appropriately engaged jurisdiction of court and powers of trustee was for trustee to receive and dispose of late and irregular applications in accordance with guidelines provided in appendix to reasons.

Table of Authorities

Cases considered by *Cullity J.*:

Algoma Steel Corp. v. Royal Bank (1992), 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303, 11 C.B.R. (3d) 11, 1992 CarswellOnt 163 (Ont. C.A.) — referred to

Blue Range Resource Corp., Re (2000), 2000 ABCA 285, 2000 CarswellAlta 1145, [2001] 2 W.W.R. 477, (sub nom. *Enron Canada Corp. v. National-Oilwell Canada Ltd.)* 193 D.L.R. (4th) 314, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352 (Alta. C.A.) — followed

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (2005), 19 E.T.R. (3d) 189, 2005 CarswellOnt 4773 (Ont. S.C.J.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (2006), 2006 CarswellOnt 4004, 23 C.B.R. (5th) 143, 25 E.T.R. (3d) 128, [2007] 1 C.T.C. 27 (Ont. S.C.J.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (2008), 2008 CarswellOnt 3075, 40 E.T.R. (3d) 256 (Ont. S.C.J.) — referred to

Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of) (2001), 21 C.B.R. (4th) 222, (sub nom. *Juniper Lumber Co., Re)* 233 N.B.R. (2d) 111, (sub nom. *Juniper Lumber Co., Re)* 601 A.P.R. 111, 2001 CarswellNB 21 (N.B. Q.B.) — referred to

Ivorylane Corp. v. Country Style Realty Ltd. (2004), 2004 CarswellOnt 2567 (Ont. S.C.J. [Commercial List]) — considered

McCarthy v. Canadian Red Cross Society (2001), 8 C.P.C. (5th) 350, 2001 CarswellOnt 2255, [2001] O.T.C. 470 (Ont. S.C.J.) — referred to

Noma Co., Re (2004), 2004 CarswellOnt 5033 (Ont. S.C.J. [Commercial List]) — considered

Ontario v. Canadian Airlines Corp. (2000), 2000 CarswellAlta 1336, (sub nom. *Canadian Airlines Corp., Re)* 276 A.R. 273 (Alta. Q.B.) — referred to

Pangeo Pharma inc., Re (2004), 2004 CarswellQue 292 (C.S. Que.) — referred to

Roman Catholic Episcopal Corp. of St. George's, Re (2007), 2007 CarswellNfld 198, 2007 NLTD 20, 801 A.P.R. 309, 264 Nfld. & P.E.I.R. 309, 32 C.B.R. (5th) 302 (N.L. T.D.) — referred to

West Bay SonShip Yachts Ltd., Re (2007), 37 C.B.R. (5th) 253, 2007 BCSC 1553, 2007 CarswellBC 2518 (B.C. S.C. [In Chambers]) — referred to

West Bay SonShip Yachts Ltd., Re (2007), 60 C.C.E.L. (3d) 21, 35 C.B.R. (5th) 104, 2007 CarswellBC 1868, 2007 BCCA 419 (B.C. C.A. [In Chambers]) — referred to

Statutes considered:

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

Generally — referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6

ss. 17-19 — referred to

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

Generally — referred to

Trustee Act, R.S.O. 1990, c. T.23

s. 60(2) — referred to

Rules considered:

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

R. 9.01 — referred to

R. 10 — referred to

MOTION by trustee for advice and directions with respect to jurisdiction of court to relieve against late-filed or otherwise irregular applications for determination of damages by referee.

***Cullity J.*:**

1 The issues in this motion for advice and directions were previously raised in a motion heard on May 22 and 23 of this year. In my reasons, and in an endorsement, released on May 28, 2008, consideration of the issues was deferred pending the delivery of further material by the parties.

2 The advice now requested relates to the jurisdiction of the court to relieve against late-filed, or otherwise irregular, applications for a determination of damages by the Referee appointed in the Amended Plan of Compromise and Arrangement (the "Plan") of the Canadian Red Cross Society (the "Society"). The Plan was approved by an order (the "Approval Order") of this court dated September 14, 2000 under the *Companies' Creditors Arrangement Act* (Canada) ("CCAA").

Background

3 Pursuant to the Plan, a Trust was established for the purpose of holding, administering and distributing a fund ("HIV Fund") in satisfaction of the claims of persons ("HIV Claimants") who were infected with the HIV virus from receiving blood, blood derivatives or blood products collected or supplied by the Society prior to September 28, 1998. Funds were also established to be administered by the Trustee for persons who contracted Creutzfeld-Jacob Disease and Hepatitis C. I will refer to the trusts attaching to the HIV Fund and the Hepatitis C Fund as the "HIV Trust" the "HCV Trust" respectively.

4 A Trust Agreement that sets out the powers and responsibilities of the Trustee was made as of September 24, 2001 with the Honourable Peter Cory as sole Trustee. On June 26, 2006, following Mr Cory's resignation, the Honourable John W. Morden was appointed by an order of Blair J. to replace him. Payments from the HIV Fund are to be made in accordance with damages assessments by a Referee — the Honourable Robert S. Montgomery, Q.C. — appointed pursuant to the provisions of the Plan.

5 The HIV Trust has been bedevilled by problems and litigation since its inception, with the result that no distributions from the Trust have been made in the eight years since the Plan was approved. Several motions have been decided by the court. The most substantial of these raised limitations issues that could have a significant effect on the size of the class of HIV Claimants. This has been a matter of concern not only to those whose claims might be barred, but also to other Claimants whose entitlement would be reduced if the total damages awarded exceed the amount of the HIV Fund — an amount that was originally approximately $14 million but will have since been eroded by administration expenses and the costs of the litigation. It will undoubtedly be depleted further if the disputes continue.

6 Independently of the limitations issues, it appears that the number of potential HIV Claimants was underestimated by at least some of the creditors involved in negotiating, and voting for, the relevant provisions of the Plan — including the amount of the HIV Fund. These creditors had filed Proofs of Claim within time limits imposed by the court. Those who did not do so were barred from voting on the Plan but their claims against the Society were not thereby extinguished. Pursuant to paragraph 5.13 (b) of the Plan, this occurred on the Plan Implementation Date (October 5, 2001), when the rights of such Claimants against the Society were, in effect, converted into, or replaced by, rights to receive damages from the HIV Fund.

7 The same concern about the number of HIV Claimants who may be entitled to share in the HIV Fund was reflected in the submissions of counsel in this motion. Each of them supported the existence of the jurisdiction to relieve against what were described as irregularities in applications, but they were not unanimous on the extent, if any, to which it extended beyond such cases. In Mr Strosberg's submission all of the other late-filed applications should be disallowed. It is tragic that a plan designed to provide compensation for innocent victims should be tied up in disputes over whether all, or only some of them, are to receive it — disputes that many and, perhaps, most of the eligible HIV Claimants must find mystifying, and disheartening. Much of the impetus for the litigation has stemmed from an initial misapprehension that the number of the potential Claimants was significantly less than has since appeared to be the case.

The issues

8 The Plan provides for the Referee to receive and dispose of applications by HIV Claimants for an assessment of their damages. Article 5.10 provides in part:

> HIV Claimants may apply to the Referee within 4 months following the Plan Implementation Date for a determination of damages with respect to their respective HIV Claim.

9 Although that language is, in form, permissive, it is provided later in the same article as follows:

> Any surplus remaining after disposition of all references filed within the four month period following Plan Implementation Date shall be paid to the HCV Fund.

10 Read literally — and without regard to the possibility that the court could grant relief to Claimants whose applications were filed outside the deadline — the Plan provides that any surplus would be computed without reference to late applications. The disposition of surplus appears to be analogous to a gift over under a traditional testamentary trust, or trust *inter vivos*.

11 The four months' deadline referred to in article 5.10 expired on February 5, 2002. I am advised that timely applications were received in respect of the Claims — or derivative of the Claims — of 89 infected persons. I am now asked by the Trustee to advise whether the court has jurisdiction to extend the deadline or, otherwise to direct that additional late, or irregular, applications should be accepted. In paragraph 18 of his helpful affidavit, the Trustee's counsel, Mr Michael Royce, stated:

> As previously indicated, we do not yet have information from all "Late Claimants" explaining why their applications were made after the deadline. For the purposes of this motion, however, which is simply to determine without reference to any particular case, the question of whether the court has the power to extend or otherwise relieve against the effect of the deadline, the Trustee assumes that among the Claimants there exist at least some whose reasons for submitting their applications after the deadline are compelling and represent circumstances that were entirely beyond their control.

12 Having been advised that the existence of the jurisdiction would be disputed by other Claimants — I endorsed this two-stage approach.

13 In his affidavit, Mr Royce refers to a variety of explanations provided by HIV Claimants whose applications were irregular or out of time. The Trustee's records reveal that late applications have been received relating to the Claims of 38 persons who were either infected persons, or persons with derivative Claims as members of the families of infected persons. On the basis of communications from various haemophilia societies and other organisations, the Trustee believes that further late applications may be made in the future. In addition, there are a number of applications — described by the Trustee's counsel as "irregular" in which timely applications for damages assessments were made on behalf of some, but not all, HIV Claimants of the same family. It appears that at least some of the omissions were the result of inadvertence, or a misunderstanding of the language of the application forms provided.

14 Some of the Claimants whose applications were received after the deadline state that they did not receive notice of the HIV Fund before the deadline expired. This may have been due to inadequacies of the notice dissemination caused by what appears, with hindsight, to have been an initial erroneous assumption that there were no more than 35-40 infected Claimants and that these could be identified, and contacted, through various federal and provincial agencies. In addition, it is alleged that that one such agency did not send out notices it had agreed to provide. Other late-filed applications were made by, or on behalf of, individuals who state that they were unable to comply with the deadline as their HIV infection was discovered after the deadline had expired.

15 The notice that informed HIV Claimants of the deadline stated that persons who decided to make "a claim on the *HIV Fund"*, must do so by February 5, 2002. One Claimant who had previously provided a Proof of Claim to the Monitor appointed under the CCAA has stated that he believed that nothing further was required from him.

16 In considering whether the court has jurisdiction to legitimise late and irregular applications, there are number of special features of the HIV Trust that distinguish it from trusts of a more traditional kind, and even the more closely analogous provisions of settlements of class proceedings under which — because of the inevitable imperfection of notice-dissemination programs — late-filed claims have been allowed from time to time.

17 Most fundamentally, the Trust was created pursuant to the CCAA and was part of a compromise of the claims of the HIV Claimants and the Society that was approved by the order of September 14, 2000. Paragraph 12 of the Approval Order contemplates a continuing role for the court while the Plan is being implemented.

> THIS COURT ORDERS that any interested party may apply to this court for directions or to seek relief in respect of any matter arising out of or incidental to the Plan or this Order, including, without limitation, the interpretation of this Order and the Plan, the implementation of the Plan, and for any further Order that may be required for implementation of the Plan, on notice to any party likely to be affected by the Order sought.

18 Although the Trust Agreement provides that its provisions are subject to those of the Plan to the extent of any inconsistency, the Plan does not purport to deal with the terms of the HIV Trust except to the extent that it provides for the distribution of the HIV Fund. Paragraph 1.01 states:

> "Trust Agreement" means that agreement among the Society, the Plan Participants and the Trustee, to be entered into on the Plan Implementation Date subject to the terms of this Plan, pursuant to which the Trust shall be established and governed.

19 The terms of the Trust Agreement were evidently to be settled between the parties without any other assistance from the provisions of the Plan and without any requirement in it for court approval. The Agreement was, however, approved, and incorporated in the order of this court made in *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (Ont. S.C.J.) in a proceeding relating to the HCV Fund.

20 Having imposed what is, in effect, a four-month limitation period for applications for damages assessments, the Plan does not address whether, or how, notice of this was to be given to HIV Claimants. The question of notice is dealt with under paragraph 8 (f) of the Trust Agreement that empowers the Trustee:

> to authorize, prescribe, publish and distribute, at the cost of the Trust Fund, all forms and notices necessary for the administration of the Distribution Scheme including, without limitation, any advertising to potential beneficiaries as to the existence of the Trust Fund and the call for claims relating thereto.

21 Again, unlike the position under section 17-19 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6, there is no requirement for the Trustee to obtain the approval of the court for notices informing HIV Claimants of their rights.

22 More generally, in addition to the detailed powers given to the Trustee for the purpose of administering the trust property, paragraph 8 of the Trust Agreement confers extensive powers and authority on the Trustee in connection with the administration of the "Distribution Scheme" in Article 5 of the Plan. These include power to decide all questions concerning the administration of the Distribution Scheme, to determine the persons who are to receive payments from HIV Trust, and to authorise such payments. In the exercise of these powers, the Trustee is, again, subject to the controlling jurisdiction of the court.

23 Finally, I note that, In his reasons disposing of another motion, Blair J. opined that, for the purpose of providing access to the HIV Fund, the Plan should be given a liberal interpretation: [2005] O.J. No. 4177 (Ont. S.C.J.), para 15. In a subsequent motion he emphasised that the Plan was intended to be effective: [2006] O.J. No. 2675 (Ont. S.C.J.), para 24. The learned judge has also referred to the fact that the circumstances of the HIV Claimants are very different to those of commercial creditors affected by CCAA proceedings. While, as a general rule, the latter can be presumed to be knowledgeable, and ready and willing to assert their claims, the same cannot be said of the HIV Claimants who did not personally retain lawyers and did not participate in the CCAA proceeding. This was, I believe, reflected in the bar order that disqualified them from voting but did not purport to bar their Claims. Some, and perhaps most of them, prepared applications without professional assistance.

Heads of jurisdiction

24 I do not believe there is any doubt that the court has jurisdiction to intervene to give relief in at least some of the cases described by Mr Royce. To the extent that the responsibility to determine how potential HIV Claimants are to be notified — and to supervise this process — is that of the Trustee, there is, *first*, the general jurisdiction of the court to exercise control over the

administration of the trust and the exercise of a trustee's discretionary powers. If, as was suggested in the material filed on this motion, the application forms lacked clarity in material respects, or if the dissemination of notice was manifestly inadequate, the court would not be powerless to intervene.

25 The jurisdiction in such cases is extended by paragraph 12 of the Approval Order which reserved to the court the authority to make orders required for the purpose of implementing the plan. In reasons delivered on a previous motion, I held that "required" for this purpose meant "reasonably required" and I accepted Ms Ring's submission that the paragraph was intended to continue the overall supervision of the court over proceedings under the CCAA: [2008] O.J. No. 2102 (Ont. S.C.J.), at para 29.

26 Authorities under the CCAA support the existence of a third head of jurisdiction that is grounded in the supervisory role of the court under the statute. I do not think it matters whether the interpretation of paragraph 12 is considered to be informed by the existence of this more general jurisdiction, a reflection of it, or as supplemented by it.

27 The question whether the general jurisdiction under the CCAA can be applied to relieve against late-filed, or otherwise irregular, claims or applications made in the course of negotiating — or after — an arrangement under the CCAA is not novel. The existence of the jurisdiction has been accepted by this court, as well as in the courts of other provinces. It is a discretionary jurisdiction that is, I believe, appropriately described as an equitable jurisdiction as it involves an extension of familiar principles of equity to cases under the statute.

28 In *Blue Range Resource Corp., Re*, [2000] A.J. No. 1232 (Alta. C.A.) — the decision that has been most influential in the later cases — all counsel conceded that the jurisdiction existed notwithstanding that an arrangement under the CCAA had been approved by creditors who had filed Proofs of Claim, and an unqualified provision in a claims bar order that claims filed out of time would be "forever barred".

29 Although most of the discussion in the reasons for judgment was directed at the criteria to be applied in exercising the jurisdiction, I do not understand the discussion to be premised on counsel's agreement that it existed. The tenor of the reasons of the Court of Appeal suggests to me that it considered the concession to be correct. Having found assistance in authorities under the United States bankruptcy rules, the approach taken under the *Bankruptcy and Insolvency Act* (Canada), the application of procedural rules governing delays in the prosecution of actions, and the principles applied in dealing with applications for relief from forfeiture under insurance statutes, Wittmann J.A. concluded:

> These authorities arise in a clearly different context from that which I am dealing with in this case, but they demonstrate that there is a somewhat consistent approach in a variety of areas of the law when dealing with the impact of late notice for delays in particular processes.
>
> Therefore, the appropriate criteria to apply to the late Claimants is as follows:
>
> 1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
>
> 2. What it is the effect of permitting a claim in terms of the existence and impact of any relevant prejudice caused by the delay?
>
> 3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
>
> 4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing? (paras 26 and 41)
>
> In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional.

30 Leave to appeal to the Supreme Court of Canada from the decision of the Court of Appeal was denied.

31 I note that, in permitting a number of late-filed claims, the court in *Blue Range Resources* did not purport to amend the provisions of the bar order by imposing a new deadline. The jurisdiction supported was limited to determining whether, in individual cases, equitable relief should be given to those who for some reason had not filed in time.

32 *Blue Range Resources* was cited and the court's apparent recognition of the jurisdiction was expressly accepted by Cumming J. in *Ivorylane Corp. v. Country Style Realty Ltd.*, [2004] O.J. No. 2662 (Ont. S.C.J. [Commercial List]), at para 47 — where the jurisdiction was described as limited to "exceptional circumstances", and there is no suggestion that the point had been conceded by counsel. The analysis of Wittmann J.A. was applied — again without any such suggestion — by Cameron J. in *Noma Co., Re*, [2004] O.J. No. 4914 (Ont. S.C.J. [Commercial List]), in which a late-filed claim was rejected.

33 The jurisdiction was also discussed, and its exercise considered, in three unreported endorsements of Farley J. of September 20, 1999 in respect of a CCAA arrangement for Royal Oaks Inc. (relief granted); of December 1, 2000 on a motion in the liquidation of T. Eaton Company Limited (relief granted); and of July 22, 2003 in a CCAA application involving Algoma Steel Inc. (relief denied).

34 Other cases in which the reasoning in *Blue Range Resources* was accepted, or was cited with apparent approval, include *Ontario v. Canadian Airlines Corp.*, [2000] A.J. No. 1321 (Alta. Q.B.); *West Bay SonShip Yachts Ltd., Re*, [2007] B.C.J. No. 2287 (B.C. S.C. [In Chambers]), leave to appeal granted from the exercise of the discretion: [2007] B.C.J. No. 1813 (B.C. C.A. [In Chambers]); and *Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of)*, [2001] N.B.J. No. 20 (N.B. Q.B.); see, also, *Roman Catholic Episcopal Corp. of St. George's, Re*, [2007] N.J. No. 32 (N.L. T.D.) (bankruptcy); and *Pangeo Pharma inc., Re*, [2004] J.Q. No. 706 (C.S. Que.). The earlier authorities are discussed in a helpful annotation by Mr Vern DaRe in 26 C.B.R. (4th) 142.

35 Contrary to the submission of Mr Strosberg, I do not consider that the reasoning of the Court of Appeal in *Algoma Steel Corp. v. Royal Bank*, [1992] O.J. No. 889 (Ont. C.A.) precludes an application of the analysis in *Blue Range Resources*, and the cases in which it has been accepted, to the facts of this case. In *Algoma Steel*, the court gave leave to a creditor to bring proceedings against the appellant notwithstanding unambiguous language in a plan of arrangement that extinguished the claims of the creditor as a known designated unsecured creditor of the appellant. In the course of its reasons, the court stated, at paras 6-7:

> The plan of arrangement is a matter of contract, it is argued, and the court's jurisdiction is limited to sanctioning or refusing to sanction the arrangement arrived at contractually. There is much merit in this argument but, in our view, it is not a complete answer.
>
> [The creditor] does not deny that if the language of the plan of arrangement quoted above, extinguishing the claims of designated unsecured creditors is unambiguous, as we believe it is, to grant the relief which it seeks would require an amendment by the court of the plan arrangement. We accept the submission that, generally speaking, the plan of arrangement is consensual and the result of agreement and that if it is fair and reasonable (an issue for the court to decide) it is not to be interfered with by the court unless (a) the Act authorises the court to affect the plan and (b) there are compelling reasons justifying the court's action. ...
>
> The CCAA must be the authority for the jurisdiction and the critical issue is whether there is any provision in the Act that fairly gives rise to a power in the court to amend. In our view there is such a provision and that provision, s.11 (c), depending on the language of the plan itself, may by necessary inference, in an appropriate case, enable the court to make an order, the technical effect of which is that the plan is amended.

36 In *Algoma Steel*, the creditor was seeking leave to proceed against a corporation that had been the subject of a plan of arrangement, and not simply seeking to enforce its rights under the plan. The extinguishment of claims against the corporation was an essential part of the plan that had been sanctioned by the court under the CCAA. The finding that the relief sought by the creditor would involve an amendment to the plan of arrangement which would require statutory authority does not, in my

judgment, necessarily extend to late-filed applications to enforce the rights of claimants to share in a fund created pursuant to the provisions of a CCAA plan — the only scenario that I am concerned with. Any analogy between the two sets of fact is, I believe, tenuous. In the absence of any indication that the Court of Appeal intended to address issues such as those in this motion, I do not believe that I am obliged to conclude that the jurisdiction discussed in *Blue Range Resources* requires explicit statutory justification for its existence in the circumstances of this case.

37 The words of the Plan indicate that the "surplus" to be paid to the HCV Trust is to be computed without reference to claims that were out of time. I believe it is implicit in *Blue Range Resources* that such provisions of the Plan are not to be understood as ousting the equitable jurisdiction of the court to relieve against late, or irregular, applications but, rather, are to be read as subject to it. Immediately after his reference to counsel's concession, Wittmann J.A. stated, at para 10:

> It necessarily follows that a claims bar order and its schedule should not purport to "forever bar" a claim without a saving provision. That saving provision could be simply worded with a proviso such as "without leave of the court", which appears to be not only what was contemplated, but what in fact occurred here.

38 I emphasise, however, that, in the exercise of the jurisdiction, the provisions of a Plan that has been approved by the creditors and the court are to be respected. The jurisdiction is essentially a discretionary jurisdiction to grant relief from a strict application of those provisions. As Wittmann J.A. accepted, it involves an application of equitable principles analogous to those that — in other situations and subject to other limitations — enable the court to relieve against forfeiture.

39 To the extent that some of the irregularities, and omissions, in otherwise timely applications submitted in this case were caused by inadequacies in the application forms provided, I agree with counsel that these could be remedied by an exercise of the authority in paragraph 12 of the Approval Order to make orders implementing the Plan without reference to any wider jurisdiction. I do not, however, accept that paragraph 12 is to be read as limited to such cases, or that a narrow interpretation of the concept of "implementation" should be considered to exclude the court's inherent equitable jurisdiction imposed on the bare-bones legislative scheme under the CCAA. If no notice had been given — or if its dissemination and reach are now, with the benefit of hindsight, seen to have been inadequate — the court must, in my opinion, be able to intervene. If the Plan was, as I believe, intended to make damages available to all persons who would be able to establish that they were HIV Claimants within the four months period, adequate notice to such persons was essential. Independently of the jurisdiction under the CCAA, the requirement of adequate notice could be enforced in the exercise of the court's supervisory jurisdiction over trustees and the consequences of failing to give such notice would not, in my opinion, be outside the control of the court.

40 Cases where a Claimant was not diagnosed with HIV until after the deadline are more difficult. The jurisdiction to relieve against untimely applications is, in my opinion, limited to applications by persons who could have established their eligibility within the four months period. It would not apply to persons whose infection was not discovered before the expiration of the period. The intention to withhold damages from such persons is inherent in the imposition of the deadline and is not affected by deficiencies in, and the imperfection of, notice dissemination that, in a case such as this and in class proceedings, underlie the jurisdiction to relieve against untimely applications. The necessity for some cut-off date in respect of the time of a diagnosis is reinforced by the likelihood that the HIV Fund will prove to be inadequate to satisfy all of the qualified HIV Claimants, with the result that distributions might need to be deferred until the maximum number of Claimants was ascertained. In my judgment, it is one thing to grant relief to persons who might have — but, for some reason, did not — claim within the four months' period and something fundamentally different to extend the class to persons who would not have been able to establish a claim within the period. The exclusion of the latter should, in my opinion, be considered to be part of the compromise effected by the Plan, and to that extent its provisions are to be respected.

Prejudice

41 In *Blue Range Resources*, prejudice to other creditors was recognised as an important factor that would militate against an exercise of the court's discretionary jurisdiction under the CCAA. At paragraph 40 of his reasons for judgment, Wittmann J.A. stated:

> In a CCAA context, as in a BIA context, the fact that Enron and the other Creditors will receive less money if late and late-amended claims are allowed is not prejudice relevant to this criterion. Reorganisation under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share cannot be characterised as prejudice: ... Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal .... It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late Claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

42 In affidavits delivered for the purpose of this motion, Mr Strosberg's client relied on negotiations that preceded the acceptance of the plan by the HIV creditors voting as a separate class for that purpose. He stated that Mr Strosberg was instrumental in persuading other creditors represented by Mr Arenson to vote in support of the Plan and that without this it would have been defeated. He stated further that, at that time, he believed that there were no more than 34 eligible Claimants.

43 Paragraph 18 of the client's original affidavit and paragraph 6 of a supplementary affidavit read as follows:

> 18. Fundamental to my decision to support the plan of arrangement and to persuade Mr Arenson's clients to support the plan was the limited number of HIV Claimants who could come forward to claim and the short period of time these HIV Claimants had to apply under the plan of arrangement. Had I believed that there were more than 34 HIV claimants or that the period of time that potential HIV claimants had to pursue their claims by making application under the plan of arrangement would be extended, I would not have instructed Mr Strosberg to enter into negotiations with Mr Arenson and I too would have voted against the plan of arrangement thereby causing its rejection. It was for good reason that potential HIV claimants were required to apply under the plan of arrangement within four months.
>
> 6. If the plan was rejected, I would have been in a position to bargain for a greater share of the available monies to compensate for the risk of an extension of the four-month period and the risk that additional claimants who would dilute the HIV Fund might claim after the expiration of the four-month period.

44 I do not believe that the consequences of the client's mistake about the number of potential HIV Claimants should be regarded as the kind of prejudice that might weigh against an exercise of the court's jurisdiction. On the basis of the evidence — such as it is — and the findings made in earlier motions, I am prepared to accept that a number, and perhaps all, of the HIV Claimants who filed Proofs of Claim, and thereby were entitled to vote on the Plan, underestimated the number of persons with eligible HIV Claims. I am also prepared to accept that this may have influenced the decisions of the voting Claimants to approve the Plan, and the amount of the HIV Fund to be established according to its terms. Even if there was evidence that their misapprehension was reasonable, it would not affect the eligibility of HIV Claimants to share in the Fund. This being the case, I do not consider that it is a factor that should militate against a discretionary decision to allow late-filed applications for payment out of the Fund if, for example, they would otherwise be allowed on the ground that the notice of the deadline provided to Claimants was found to be materially inadequate. In short, in applying the test of prejudice accepted in *Blue Range Resources*, the loss of an opportunity to vote against the Plan by reason of an erroneous belief that there were only 34 eligible Claimants is not a loss that would occur "by reason of the late filings".

45 Similarly, while, as in *Blue Range Resources* (at para 40, quoted above), knowledge of the possibility that late claims might be permitted may militate against a finding of prejudice, I do not think ignorance of this, of and by itself, is sufficient to establish it in the present circumstances. The client's statement that — even on the assumption that there were only 34 eligible Claimants — he would have voted against the Plan if he had known of the possibility that late-filed applications would be permitted appears to be based on his expectation that the short deadline would have the practical effect of excluding a number of eligible HIV Claimants. This expectation contemplated that the underlying purpose of the Plan would be frustrated. As mentioned earlier in these reasons, the bar order that restricted voting rights to Claimants who filed Proofs of Claim did not purport to extinguish the HIV Claims of others — known or unknown. All HIV Claimants who had not released the Society, and whose Claims were not barred by limitations defences, were intended to be eligible to file applications for damages assessments

under the provisions of the Plan. Thus, in a motion in these proceedings, Blair J. — who had previously supervised the CCAA application and made the Approval Order — stated:

> As I read the Plan, the reason for establishing the HIV Fund was not to provide recourse to a limited number of HIV Claimants. The reason was to make the HIV Fund available to *all* those who had an HIV Claim existing against the Society on July 20, 1998: [2005] O.J. No. 4177 (S.C.J.), at para 15 (*italics* in the original).

46 In my judgment, a creditor who hopes, and bargains on the basis of a belief, that a plan of arrangement and compromise under the CCAA will not achieve its intended effect does not suffer material prejudice for the purpose of the court's equitable jurisdiction when the belief turns out to have been unfounded.

47 In *Blue Range Resources*, the focus of the analysis was directed at prejudice to other creditors. Prejudice to the insolvent debtor corporation was not treated as in issue, and it is not in issue in this case in which the Society was released from all HIV Claims on the Plan Implementation Date. In another unreported case, prejudice to the debtor was emphasised by Blair J. where, in the course of a reconstructuring of T. Eaton Company Limited, a bar order had been made extinguishing the claims of creditors who did not file proofs of claim on or before a particular date. A creditor moved for leave to file a Proof of Claim after an arrangement had been approved by the court and implemented. She relied on her solicitor's failure to advise her of the bar order, and the fact that she filed a proof of claim as soon as she became aware of it and its effect. In an endorsement of May 5, 1999, Blair J. declined to grant an extension of time. The bar order specifically reserved to the court's jurisdiction to waive it, but it was held that to permit the creditor to have access to the debtor corporation's post-arrangement assets would be prejudicial to it, and — citing *Algoma Steel* — that the case was:

> ... not one for the "sparing" and "exceptional" jurisdiction to make such an order.

In contrast, the issue before me is confined to rights of claimants to share in the HIV Fund, and is not for recourse against the Society and its remaining assets.

48 Any prejudice that beneficiaries of the HCV Trust would suffer by the elimination, or reduction, of surplus in the Fund as a result of accepting late-filed applications appears now to be entirely theoretical.

Conclusion

49 I am satisfied that the court has the discretionary jurisdiction discussed in *Blue Range Resources* and the cases that have followed the reasoning of the Alberta Court of Appeal. I accept also that it is a jurisdiction to be exercised sparingly in the light of the particular circumstances of each case. It is very much fact specific. The considerations that I consider will justify its exercise in this case can be summarised as follows:

> (a) the structure of the Plan with its provision of a separate Fund for HIV Claimants;
>
> (b) the fact that no distributions from the HIV Fund have yet been made;
>
> (c) the absence of prejudice that would be suffered by the Society and other Claimants;
>
> (d) the uncertainty created by the limitations issues;
>
> (e) the circumstances of the Claimants that distinguish them from commercial creditors;
>
> (f) the fact that adequate notice to them was essential if the Plan was to be effective;
>
> (g) the application forms provided to Claimants did not clearly indicate that they were required to identify each Claimant in a family group that included an infected person. Similarly, I am of the opinion that it was not unreasonable for a Claimant who had filed a Proof of Claim to understand that this would be considered to be a claim against the HIV Fund to which the deadline was said to apply in the notice provided by the Trustee; and

(h). the selection of appropriate methods of disseminating notice of the deadline for applications may have been affected, and unduly limited, by the misapprehension as to the number of potential Claimants. It appears, also, that, as in the case of those in Nova Scotia, the chosen method may not have been completely successful in reaching Claimants whose identities were ascertainable.

50 I have considered whether my decision should be simply that the jurisdiction exists, and that the manner of its exercise is to be determined by the court on the facts relating to each late or irregular application. I am satisfied that in, providing advice and directions to the Trustee, it is unnecessary to adopt such a restricted approach. The process of dealing with late and irregular applications will involve a degree of fact finding that is within the powers of the Trustee under paragraph 8 of the Trust Agreement. Those powers can be exercised with less formality and more expedition than the practice and procedure of the court would permit. I believe that the approach that most appropriately engages the jurisdiction of the court and the powers of the Trustee is for the Trustee to receive and dispose of late and irregular applications in accordance with the guidelines I will provide in an Appendix to these reasons.

51 The guidelines do not address every possible situation and may be supplemented, or amended, by further orders of the court from time to time. If the Trustee is uncertain as to the application of the guidelines to particular cases — or if particular applications are, in the opinion of the trustee, not covered by the guidelines — they may be referred to the court in writing to be dealt with summarily. HIV Claimants whose applications are disallowed by the Trustee are to be informed of their right to have the decision reviewed by filing a motion record in the court for the purpose within 30 days, or such longer period as the court may order.

52 Any further procedural issues that may arise — including the question whether notice to HIV Claimants who have not filed applications is required — can be disposed of at a case conference to be arranged as soon as practicable.

53 As has been the case on previous motions, not all of the potential HIV claimants were served with the motion record and the counsel who appeared did not represent all of them. On motions for directions by a trustee in a case like this, it is unnecessary to name all beneficiaries as parties unless the court orders otherwise. This is provided by rule 9.01 of the Rules of Civil Procedure and it is reinforced by paragraphs 1 (f) and 17 of the Trust Agreement that require notice of applications to the court to be given only to Ms Ring and Mr Arenson. Despite these provisions, the Trustee attempted to notify as many of the Claimants as was practicable, and the issues on the motion were comprehensively addressed by his counsel and the other counsel appearing. In these circumstances, I did not find it expedient to deplete the HIV Fund further by ordering service of the motion record on the unrepresented claimants, to add them as parties, or to make a representation order pursuant to Rule 10. By virtue of section 60 (2) of the *Trustee Act* (Ontario), the Trustee will be protected in acting on the directions I have given.

54 I appreciate the assistance that counsel have provided. The Trustee is to be fully indemnified out of the HIV Fund for his costs of the motion. Other parties represented at the hearing — including Mr Plater's client — are to have a substantial indemnity for their costs. Submissions in writing with respect to quantum may be made within 21 days of the release of these reasons.

— Appendix

Guidelines for Late and Irregular Applications

1. Applications made by one member of a family of an infected person are to be treated as applications by, and on behalf of, all members of the family who are HIV Claimants, and the personal representatives of deceased HIV Claimants.

2. Late applications by persons who had filed timely Proofs of Claim are to be allowed;

3. Applications by persons who did not receive notice of the deadline until after it had passed should be allowed if, in the opinion of the trustee, the applications were made within a reasonable time after notice was acquired;

4. Applications by HIV claimants whose failure to meet the deadline was due to matters that, in the opinion of the Trustee, should reasonably be considered to be beyond their control should be allowed;

5. Other late applications made by persons who had notice of the deadline before it expired should be disallowed unless, in the opinion of the Trustee, the timing of the receipt of such notice was inadequate for the purpose of making an application;

6. Late applications are to be allowed only if they are from, or in respect of, persons who, being aware of their infection during the four months period, could have established their eligibility as HIV Claimants before it expired; and

7. Any other late or irregular applications — and those where the Trustee is uncertain as to the appropriate application of the above guidelines — should be referred in writing to the court to be dealt with summarily.

Motion granted.

TAB 2

2009 NSSC 163
Nova Scotia Supreme Court

ScoZinc Ltd., Re

2009 CarswellNS 283, 2009 NSSC 163, 177 A.C.W.S. (3d) 294, 55 C.B.R. (5th) 205

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 ScoZinc Limited

D.R. Beveridge J.

Heard: May 1, 2009
Judgment: May 1, 2009
Written reasons: May 20, 2009
Docket: Hfx 305549

Counsel: John D. Stringer, Q.C., Ben Durnford for Applicant
Robbie MacKeigan, Q.C. for Daniel Rozon
John McFarlane, Q.C. for Kamatsu

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by creditors
Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings
Company obtained order under s. 11 of Companies' Creditors Arrangement Act for stay of proceedings — This order was, as required by Act, limited to period of 30 days — Order was extended on two occasions and was now due to expire one day after day on which meeting of creditors was scheduled — There was tentative return date scheduled for one week after meeting of creditors for court to consider sanctioning plan, should it be approved by creditors — Company brought motion seeking order for, inter alia, further stay of proceedings — Motion granted — In light of conclusion that company met threshold for ordering meeting of creditors under ss. 4 and 5 of Act, appropriateness of further extension of stay of proceedings permitting company to return to court within very short period of time following meeting of creditors was patently obvious.
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues
Company obtained stay of proceedings under Companies' Creditors Arrangement Act, which was later extended on two occasions — Company brought motion seeking order for, inter alia, meeting of creditors pursuant to ss. 4 and 5 of Act and approval of notice of this motion being given only to certain defined creditors — Motion granted — Court should only decline to give preliminary approval of proposed plan and refuse to order meeting if it was of view that there was no hope that plan would be approved by creditors or, if it was approved by creditors, it would not, for some other reason, be approved by court

— Monitor's report indicated proposed plan was reasonable — Given that opinion and in light of terms set out in proposed plan, plan was far from one that was doomed to failure — Plan was one that should be put to creditors for consideration — It was appropriate to exercise discretion set out in ss. 4 and 5 of Act and order meeting of creditors — Given number of creditors that appeared early on in proceedings, it was somewhat impractical to give notice to each of them with volumes of materials that would be required to be produced and served — With respect to prior motions, it had been required that notice be given to all creditors asserting claims against company in excess of $100,000 and all creditors asserting builders liens — In addition, all creditors were apprised of these proceedings by way of mail out to every creditor as required by Act leading to filing of proofs of claim — Status of proceedings, including this motion, was posted on monitor's website — No reason to depart from previous practice.

Table of Authorities

Cases considered by *D.R. Beveridge J.*:

Fairview Industries Ltd., Re (1991), 1991 CarswellNS 35, 11 C.B.R. (3d) 43, (sub nom. *Fairview Industries Ltd., Re (No. 2))* 109 N.S.R. (2d) 12, (sub nom. *Fairview Industries Ltd., Re (No. 2))* 297 A.P.R. 12 (N.S. T.D.) — considered

Federal Gypsum Co., Re (2007), 2007 NSSC 384, 2007 CarswellNS 630, 261 N.S.R. (2d) 314, 835 A.P.R. 314, 40 C.B.R. (5th) 39 (N.S. S.C.) — considered

ScoZinc Ltd., Re (2009), 2009 CarswellNS 177, 2009 NSSC 108, 52 C.B.R. (5th) 200 (N.S. S.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 4 — referred to

s. 5 — referred to

s. 11 — referred to

s. 11(4) — referred to

s. 11(6) — referred to

MOTION by company for order for meeting of creditors pursuant to ss. 4 and 5 of *Companies' Creditors Arrangement Act*, further extension of stay of proceedings granted to company under *Act*, and approval of notice of motion being given only to certain defined creditors.

***D.R. Beveridge J.*:**

1 ScoZinc brings a motion seeking an order to accomplish three things. The first is for a meeting of the creditors pursuant to ss. 4 and 5 of the *Companies' Creditors Arrangement Act*. The second is a further extension of the stay of proceedings initially ordered by this Court on December 22, 2008 and extended from time to time. The third is approval of notice of this motion being given only to certain defined creditors.

2 The company has filed an affidavit of William Felderhof referred to as his seventh affidavit, sworn April 28, 2009 and the Monitor has filed its sixth report dated April 30, 2009.

3 As part of its submissions the company notes that there is nothing in the *CCAA* which requires the Court to give prior preliminary approval of ScoZinc's proposed plan before it is presented to the creditors. It notes that the jurisprudence establishes that this approval is generally desirable prior to calling a meeting of the creditors. Some, but not all of this jurisprudence was reviewed by MacAdam J. in *Federal Gypsum Co., Re*, 2007 NSSC 384 (N.S. S.C.).

4 Justice MacAdam in *Federal Gypsum Co., Re* did refer to the two different standards that have been proposed or referred to in cases from Ontario and British Columbia. Some of these cases have expressed the view that the debtor company should

establish that the plan has "a reasonable chance" that it would be accepted by the creditors. Other cases have referred to the appropriate test as simply a determination as to whether or not the proposed plan is one that would be "doomed to failure".

5 In a different context, Glube C.J.T.D. (as she then was) in *Fairview Industries Ltd., Re* (1991), 11 C.B.R. (3d) 43 (N.S. T.D.) cautioned that it would be impractical and extremely costly to continue to prepare a plan when "there is no hope that it would be approved".

6 I think it fair to say that MacAdam J., although not expressly but by necessary implication, preferred the lower standard facing a debtor company in submitting its plan to the Court for a preliminary approval. At para. 12 he wrote:

> [12] In view of the relatively low threshold on the Company in seeking Court approval to have a plan of arrangement submitted to the creditors for a vote, I am satisfied the plan should proceed and the creditors should determine whether they do, or do not accept the plan as finally filed.

7 In my opinion it should not be up to the Court to second guess the probability of success of a proposed plan of arrangement. Businessmen are free to make their own views known before and ultimately at the creditors' meeting. It seems to me that the Court should only decline to give preliminary approval and refuse to order a meeting if it was of the view that there was no hope that the plan would be approved by the creditors or, if it was approved by the creditors, it would not, for some other reason, be approved by the Court.

8 The Monitor in its sixth report says that the proposed plan is reasonable under the circumstances. This opinion appears to flow from its conclusion that if the plan is rejected and the company forced into receivership or bankruptcy, unsecured creditors will not recover the amount offered in the plan and it is highly unlikely that the secured creditors will recover the amount offered to them. I see no reason to disagree with the opinion offered by the Monitor.

9 Given that opinion and in light of the terms that are set out in the proposed plan I am certainly satisfied that the plan is far from one that is doomed to failure. It is one that should be put to the creditors for their consideration. It is therefore appropriate that I exercise the discretion that is set out in ss. 4 and 5 of the *CCAA* and order a meeting of the creditors on the terms set out in the proposed meeting order.

10 With respect to the extension of the stay of proceedings, as I noted at the outset there had been an initial order of this Court under s.11 of the *CCAA*. This order was granted on December 22, 2008. It was, as required by the statute, limited to a period of 30 days. It has been extended on two previous occasions. It is now due to expire May 22 nd , 2009. The meeting of the creditors is scheduled for May 21, 2009. There is a tentative return date scheduled for May 28, 2009 for the Court to consider sanctioning the plan, should it be approved by the creditors.

11 The test with respect to extending the stay of proceedings has been set out in a number of cases that have considered ss. 11(4) and (6) of the *CCAA*. These were reviewed by me in *ScoZinc Ltd., Re*, 2009 NSSC 108 (N.S. S.C.). In these circumstances there is no need to review the test and the evidence in support of that test.

12 In light of my conclusion that the company had met the threshold for ordering a meeting of the creditors under ss. 4 and 5 of the *CCAA* the appropriateness of a further extension permitting the company to return to the Court within a very short period of time following that meeting of the creditors is patently obvious. The extension is therefore granted.

13 The last issue is the approval of notice of this motion being given only to certain defined creditors. Given the number of creditors that appeared early on in the proceedings it was somewhat impractical to give notice to each of them with the volumes of materials that would be required to be produced and served. With respect to the prior motions it was required that notice be given to all creditors asserting claims against the debtor company in excess of $100,000.00 and all creditors asserting builders liens. In addition all creditors were apprised of these proceedings by way of the mail out to each and every creditor as required by the *CCAA* leading to filing of proofs of claim. The status of the proceedings, including this motion, have been posted on the Monitor's website. I see no reason to depart from the previous practice and this aspect of the motion is also granted.

Motion granted.

End of Document

TAB 3

Most Negative Treatment: Check subsequent history and related treatments.

2000 ABCA 285
Alberta Court of Appeal

Blue Range Resource Corp., Re

2000 CarswellAlta 1145, 2000 ABCA 285, [2000] A.J. No. 1232, [2001] 2 W.W.R. 477, 100 A.C.W.S. (3d) 956, 193 D.L.R. (4th) 314, 234 W.A.C. 138, 271 A.R. 138, 87 Alta. L.R. (3d) 352

In the matter of the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended; and in the matter of Blue Range Resources Corporation; Enron Canada Corp., and the Creditor's Committee (Appellants/Appellants) and National Oil-well Canada Ltd. et al. (Respondents/Respondents)

Russell, Sulatycky, Wittmann JJ.A.

Heard: June 15, 2000
Judgment: October 24, 2000
Docket: Calgary Appeal 99-18564, 99-18565, 99-18566, 99-18567, 99-18568, 99-18569, 99-18570, 99-18571, 99-18802

Proceedings: affirmed *Blue Range Resource Corp., Re* (1999), 1999 CarswellAlta 1053, 251 A.R. 1 (Alta. Q.B.)

Counsel: *A. Robert Anderson* and *Scott J. Burrell*, for Enron Canada Corp. and Creditors' Committee.
S. Collins, for TransAlta Utilities Corporation.
D.W. Dear, for Rigel Oil & Gas Ltd.
D. Mann, for Barrington Petroleum Ltd. and PetroCanada Oil & Gas.
K.E. Staroszik, for Founders Energy Ltd.
J.N. Thom, for National-Oilwell Canada Ltd. and Campbell's Industrial Supply Ltd.

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

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
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues
Monitor appointed by court obtained order establishing procedure to determine claims of creditors of corporation — Claims bar date was set during which creditors could prove claims — Notices of claim filed after claims bar date by certain creditors were disallowed by monitor — Partial distribution was made by court — Late-filing creditors applied to court for permission to file or amend claims after expiry of claims bar date — Applications were allowed on basis that same test should apply to late-filing creditors under Companies' Creditors Arrangement Act (CCAA) as under Bankruptcy and Insolvency Act (BIA) — Creditor EC Corp. and creditors committee appealed — Appeal dismissed — Claims bar orders setting out claims procedure ought not to purport to extinguish debt, but simply set deadline for obtaining remedy — Inadvertence alone can be basis for permitting late filing, provided claimant can show it acted in good faith and not in effort to manipulate its position — Any prejudicial effect of

permitting claim is relevant factor, as is availability of means to alleviate prejudice — All creditors had acted in good faith and existing creditors suffered no prejudice as result of late filings or amendments — Existing creditors were aware of potential for further claims and that these might be permitted by court — No evidence existed to suggest that existing creditors would have voted differently on plan of arrangement had late-filing creditors filed in time — Value of claims of late-filing creditors was less than one per cent of total of claims filed in time — Fact that existing creditors might receive less money if late claims allowed did not constitute prejudice, since policy of CCAA depends on all legitimate creditors being able to participate in available proceeds — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

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

Monitor appointed by court obtained order establishing procedure to determine claims of creditors of corporation — Claims bar date was set during which creditors could prove claims — Notices of claim filed after claims bar date by certain creditors were disallowed by monitor — Partial distribution was made by court — Late-filing creditors applied to court for permission to file or amend claims after expiry of claims bar date — Applications were allowed on basis that same test should apply to late-filing creditors under Companies' Creditors Arrangement Act (CCAA) as under Bankruptcy and Insolvency Act (BIA) — Creditor EC Corp. and creditors committee appealed — Appeal dismissed — Claims bar orders setting out claims procedure ought not to purport to extinguish debt, but simply set deadline for obtaining remedy — Inadvertence alone can be basis for permitting late filing, provided claimant can show it acted in good faith and not in effort to manipulate its position — Any prejudicial effect of permitting claim is relevant factor, as is availability of means to alleviate prejudice — All creditors had acted in good faith and existing creditors suffered no prejudice as result of late filings or amendments — Existing creditors were aware of potential for further claims and that these might be permitted by court — No evidence existed to suggest that existing creditors would have voted differently on plan of arrangement had late-filing creditors filed in time — Value of claims of late-filing creditors was less than one per cent of total of claims filed in time — Fact that existing creditors might receive less money if late claims allowed did not constitute prejudice, since policy of CCAA depends on all legitimate creditors being able to participate in available proceeds — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Wittmann J.A.*:

Allen v. Sir Alfred McAlpine & Sons Ltd., [1968] 2 Q.B. 229, [1968] 1 All E.R. 543 (Eng. C.A.) — applied

Cohen, Re (1956), 19 W.W.R. 14, 3 D.L.R. (2d) 528, 36 C.B.R. 21 (Alta. C.A.) — considered

Hogan v. Kolisnyk, [1983] 3 W.W.R. 481, 25 Alta. L.R. (2d) 17, 43 A.R. 17 (Alta. Q.B.) — considered

Kuziw v. Kucheran Estate, 2000 ABCA 226 (Alta. C.A.) — considered

Lethbridge Motors Co. v. American Motors (Can.) Ltd. (1987), 53 Alta. L.R. (2d) 326, 20 C.P.C. (2d) 11, 79 A.R. 321, 40 D.L.R. (4th) 544 (Alta. C.A.) — considered

Lindsay v. Transtec Canada Ltd. (1994), 28 C.B.R. (3d) 110, 5 C.C.P.B. 219, [1995] 2 W.W.R. 404, 99 B.C.L.R. (2d) 73 (B.C. S.C.) — distinguished

Mount James Mines (Que.) Ltd., Re (1980), 28 O.R. (2d) 271, 33 C.B.R. (N.S.) 227, 110 D.L.R. (3d) 80 (Ont. Bktcy.) — considered

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) — considered

Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership (1993), 507 U.S. 380, 113 S. Ct. 1489 (U.S. Tenn.) — considered

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

Specialty Equipment Cos. Inc., Re (1993), 159 B.R. 236 (U.S. Bankr. N.D. Ill.) — considered

W. Schoeler Trucking Ltd. v. Markel Insurance Co. of Canada (1979), 9 Alta. L.R. (2d) 232, 19 A.R. 196, [1980] I.L.R. 1-1210 (Alta. Dist. Ct.) — considered

312630 British Columbia Ltd. v. Alta Surety Co., 30 C.C.L.I. (2d) 165, 10 B.C.L.R. (3d) 84, [1995] 10 W.W.R. 100, 23 C.L.R. (2d) 273, 61 B.C.A.C. 208, 100 W.A.C. 208 (B.C. C.A.) — applied

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 — referred to
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — considered
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered

s. 6 — considered

s. 12(2)(a)(iii) — referred to
Insurance Act, R.S.A. 1980, c. I-5
s. 205 — referred to

s. 211 — referred to

s. 385 — referred to

Rules considered:
Alberta Rules of Court, Alta. Reg. 390/68
Generally — considered

R. 244(4) [en. Alta. Reg. 234/94] — considered
Federal Rules of Bankruptcy Procedure (U.S.)
Generally — referred to

R. 9006(b)(1) — considered

APPEAL by creditor EC Corp. and creditors committee from judgment reported at (1999), 251 A.R. 1 (Alta. Q.B.), permitting creditors to file notices of claim, or amended claims, after expiry of claims bar date.

The judgment of the court was delivered by *Wittmann J.A.*:

Introduction

1 The *Companies' Creditors Arrangement Act*, R.S.A. 1985, c. C-36, as amended ("*CCAA*"), permits the compromise and resolution of claims of creditors against an insolvent corporation. In this appeal, as part of the ongoing resolution of the insolvency of Blue Range Resources Corporation ("Blue Range"), this Court has been asked to state the applicable criteria in considering whether to allow late claimants to file claims after a stipulated date in an order ("claims bar order").

2 In his decision below, the chambers judge determined that in the circumstances of this case it was appropriate to allow the respondents ("late claimants") to file their claims thus entitling them to participate in the *CCAA* distribution.

Facts

3 Blue Range sought and received court protection from its creditors under the *CCAA* on March 2, 1999. The claims procedure established by PriceWaterhouse Coopers Inc. ("the Monitor"), and approved by the court in a claims bar order, fixed a date of May 7, 1999 at 5:00 p.m. by which all claims were to be filed. Due to difficulties in obtaining the appropriate records, the date was extended in a second order to June 15, 1999 at 5:00 p.m., for the joint venture partners. The relevant orders stated that claims not proven in accordance with the set procedures "shall be deemed forever barred" (A.B.P.01, A.B.P.06). Under this procedure $270,000,000 in claims were filed.

4 The respondent creditors in this appeal fall into two categories: first, those who did not file their Notices of Claim before the relevant dates in the claims bar orders, and second, those who filed their initial claims in time but sought to amend their claims after the relevant dates. All of these creditors applied to the chambers judge for relief from the restriction of the date in the claims bar orders and to have their late or amended claims accepted for consideration by the Monitor.

5 The chambers judge allowed the late and amended claims to be filed. The appellants, Enron Capital Corp. ("Enron") and the Creditor's Committee, seek to have that decision overturned. I granted leave to appeal on January 14, 2000 on the following question:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result? (A.B.928).

Judgment Below

6 The chambers judge found that the applicable section of the *CCAA*, s. 12(2)(iii) did not mandate a claims procedure. He stated that preserving certainty in the *CCAA* process was not a sufficient reason to deny the late claimants a second chance. In his view, taking a strict reading of the claims bar orders would have the effect of denying creditors, who have a logical explanation for their non- compliance with the order, any recovery. While the chambers judge noted that compromise is required by creditors in a *CCAA* proceeding, he did not think it fair that these late claimants be required to compromise 100 per cent of their legitimate claims. In addition, the chambers judge was of the view that process required flexibility and should avoid pitting creditors against one another.

7 Having decided that flexibility in the process was required, the chambers judge then considered an appropriate test for allowing the filing of late claims. Although encouraged by the appellants to adopt an approach similar to that contained in the *United States Bankruptcy Code*, *Federal Rules of Bankruptcy Procedure*, for Chapter 11 Reorganization Cases, ("*U.S. Bankruptcy Rules*") the chambers judge chose to incorporate the test in place under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Specifically, he found that because the situation of Blue Range was essentially a liquidation, the approach used in the *BIA* was appropriate. Under the *BIA*, late claims are permitted under almost any circumstance provided no injustice is done to other creditors. A late filing creditor under the *BIA* may only share in undistributed assets. Therefore, the chambers judge found that the creditors should be allowed to file late claims, or to amend existing claims late.

Standard of Review

8 It has been recently held by this court that decisions of a *CCAA* supervising judge should only be interfered with in clear cases. Deference to a *CCAA* supervising judge is generally appropriate where the questions before the court deal with management issues and are of necessity matters which must be decided quickly. This issue was addressed by Macfarlane, J.A. in *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) (cited with approval by Hunt, J.A. in *Smoky River Coal Ltd., Re* (1999), 237 A.R. 326 (Alta. C.A.)) as follows at 272:

> ...I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the CCAA. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made...
>
> ...
>
> Orders depend on a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the CCAA.

The chambers judge was exercising his discretion under the *CCAA* in granting an extension of the claims bar dates. However, the criteria upon which that discretion is to be exercised is a matter of legal principle, and therefore on that issue, the standard of review is correctness.

Analysis

9 As a preliminary matter I wish to comment on the nature of the order granted and the notices sent out to the individual creditors. The order dated April 6, 1999 stated in paragraph 2:

> Claims not proven in accordance with the procedures set out in Schedules "A" and "B" shall be deemed forever barred and may not thereafter be advanced as against Blue Range in Canada or elsewhere. (A.B.P.01)

The first page of Schedule "A" stated in part:

> A Claims' Bar Date of 5:00 p.m. Calgary time on May 7, 1999 has been set by the Alberta Court of Queen's Bench. All claims received by the monitor or postmarked after the Claims' Bar Date will be forever extinguished, barred and will not participate in any voting or distributions in the CCAA proceedings.
>
> [Emphasis added] (A.B.P.03).

The language used in Schedule "A" goes beyond the text of the order. Although it may not be of practical significance, barring the right of a claimant to a remedy is fundamentally different from erasing the debt. The court under the *CCAA* has powers to compromise and determine, but only in accordance with the process prescribed in the statute.

10 It was urged before the court in oral argument by counsel for the appellants that the purpose of the wording of the claims bar orders was to "smoke out" the creditors. I am dubious that the severe wording of the claims bar orders is effective to "smoke out" the creditor who may otherwise lie dormant. The objective of making certain that all legitimate creditors come forward on a timely basis has to be balanced against the integrity and respect for the court process and its orders. Courts should not make orders that are not intended to be enforced in accordance with their terms. All counsel conceded that the court had authority to allow late filing of claims, and that it was merely a matter of what criteria the court should use in exercising that power. It necessarily follows that a claims bar order and its schedule should not purport to "forever bar" a claim without a saving provision. That saving provision could be simply worded with a proviso such as "without leave of the court", which appears to be not only what was contemplated, but what in fact occurred here.

The Appropriate Criteria

11 The appellants advocated the adoption of the criteria under the *U.S. Bankruptcy Rules*, Chapter 11, while the respondents favoured either the application of the tests under the *BIA* or some blending of the two standards.

12 Rule 9006 of the *U.S. Bankruptcy Rules* deals with the extension of time in these circumstances. The relevant portion of the Rule states:

> 9006 (b)(1) ... when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

The key phrase in this section is "excusable neglect". In *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489 (U.S. Tenn. 1993) the U.S. Supreme Court dealt with the interpretation of this phrase. In *Pioneer*, the creditor's attorney, due to disruptions in his legal practice and confusion over the form of notice, failed to file a Notice of Claim in time. The U.S. Supreme Court noted that excusable neglect may extend to "inadvertent delays" (at pg 391) and went on to identify the relevant considerations when determining whether or not a delay is excusable. The Court said at 395:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable", we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of

> the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

The American authorities also seem to reflect that the burden of meeting all of these elements, including showing the absence of prejudice, lies with the party seeking to file the late claim: e.g. *Specialty Equipment Cos. Inc., Re*, 159 B.R. 236 (U.S. Bankr. N.D. Ill. 1993).

13 The Canadian approach under the *BIA* has been somewhat different. Canadian courts have been willing to allow the filing of late or amended claims under the *BIA* when the claims are delayed due to inadvertence, (which would include negligence or neglect), or incomplete information being available to the creditors, see: *Mount James Mines (Que.) Ltd., Re* (1980), 110 D.L.R. (3d) 80 (Ont. Bktcy.). The Canadian standard under the *BIA* is, therefore, less arduous than that applied under the *U.S. Bankruptcy Rules*.

14 I accept that some guidance can be gained from the *BIA* approach to these types of cases but I find that some concerns remain. An inadvertence standard by itself might imply that there need be almost no explanation whatever for the failure to file a claim in time. In my view inadvertence could be an appropriate element of the standard if parties are able to show, in addition, that they acted in good faith and were not simply trying to delay or avoid participation in *CCAA* proceedings. But I also take some guidance from the *U.S. Bankruptcy Rules* standard because I agree that the length of delay and the potential prejudice to other parties must be considered. To this extent, I accept a blended approach, taking into consideration both the *BIA* and *U.S. Bankruptcy Rules* approaches, bolstered by the application of some of the concepts included in other areas, such as late reporting in insurance claims, and delay in the prosecution of a civil action.

15 In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.), the applicant was an unsecured creditor of Alberta Pacific Terminals Ltd. ("APCL"). Transtec Canada Ltd. was indebted to the applicant and APCL had guaranteed the obligation. APCL sought protection under the *CCAA*. Through oversight, the applicant Lindsay was not sent the relevant *CCAA* materials by APCL and was not included in the *CCAA* proceedings. He did not, therefore, have the opportunity to vote on the plan of arrangement. It is clear, however, that Lindsay at some point during the *CCAA* proceedings became aware of them, and at various stages had his lawyers contact APCL's lawyers to inquire about the process. Despite this knowledge he did not pursue the matter. Lindsay then came to the court seeking permission to sue APCL as a guarantor, potentially recovering considerably more than those creditors who participated in the *CCAA* process.

16 After reviewing all of the facts, Huddart, J. found that "Lindsay (or solicitors on his behalf) made considered, deliberate, decisions not to notify Alberta-Pacific of his claim until after the approval order and then not until after the closing of the share purchase agreement" (para 19). She then went on to conclude that Lindsay preferred not to participate in the *CCAA* process and chose to take his chances later on.

17 In deciding how to exercise her discretion, Huddart, J. applied the following factors: "the extent of the creditor's actual knowledge and understanding of the proceedings; the economic effect on the creditor and debtor company; fairness to other creditors; the scheme and purpose of the *CCAA* and the terms of the plan" (para 56). On these criteria, Huddart, J. found that it would not be equitable to allow Lindsay to pursue a claim as he was well aware of what was going on in the *CCAA* proceedings, chose not to participate, and his late action would cause serious prejudice both to the debtor company and to the other creditors.

18 While *Lindsay* is clearly distinguishable on its facts from the within appeal, the case does highlight the issues of the conduct of the late claimants and the potential prejudice to other creditors and the debtor. Lindsay was the classic creditor "lying in the weeds", waiting for the appropriate moment to pounce. He did not act in good faith and his conduct was potentially prejudicial to other creditors and the debtor company. By avoiding the *CCAA* proceedings, Lindsay was attempting to gain an advantage not available to other creditors.

19 There is further support for a blended approach in several other areas of the law where courts have had to deal with the impact of delays and late filings. In particular, I have considered the courts' treatment of delays in the prosecution of actions and the late filing of notices of claim to insurers.

20 In *Lethbridge Motors Co. v. American Motors (Can.) Ltd.* (1987), 53 Alta. L.R. (2d) 326 (Alta. C.A.) the court had to decide whether or not to allow an action to continue where no steps had been taken by the plaintiff for five years. In deciding that the action could continue, Laycraft, C.J.A. relied on the following test from the English Court of Appeal in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543 (Eng. C.A.) where Salmon L.J. said at 561:

> In order for the application to succeed the defendant must show:
>
> (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.
>
> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
>
> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

Relying on this test, as well as additional refinements, the Court found that the fundamental rule was that it was "necessary for a defendant to show serious prejudice before the court will exercise its jurisdiction to strike out an action for want of prosecution" (at pg. 331). The onus of showing serious prejudice has now been substantially altered as the result of amendments to the *Alberta Rules of Court* in 1994. Rule 244(4) now states that proof of inordinate and inexcusable delay constitutes *prima facie* evidence of serious prejudice: *Kuziw v. Kucheran Estate*, 2000 ABCA 226 (Alta. C.A.).

21 Similar questions can arise in an insurance context where an insured is required to file a proof of loss or other notice of claim within a certain time period under a contract of insurance. For example, s. 205 of the *Insurance Act*, R.S.A. 1980, c. I-5 states:

> 205 [w]here there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to by done or omitted by the insured with respect to the loss and the consequent forfeiture or avoidance of the insurance in whole or in part and the Court considers it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against forfeiture or avoidance on such terms as it considers just.

22 Similar wording is also found in ss. 211 and 385 of the *Insurance Act* and similar legislation exists throughout the common law provinces.

23 When deciding whether to grant relief from forfeiture in an insurance context the Alberta courts have generally adopted a two part test, see: *Hogan v. Kolisnyk* (1983), 25 Alta. L.R. (2d) 17 (Alta. Q.B.). In *Hogan* the court found it appropriate to look first at the conduct of the insured to determine whether the insured is guilty of fraud or wilful misconduct. Second, the court considered whether the insurer had been seriously prejudiced by the imperfect compliance with the statutory provision (at 35). The "noncomplying" party can show that there was no prejudice by showing that the innocent party had actual knowledge of the events in question and was thereby able to investigate the situation.

24 Considering whether the insurer has suffered any prejudice, the court in *Hogan* quoted from a decision of Stevenson, D.C.J. in *W. Schoeler Trucking Ltd. v. Markel Insurance Co. of Canada* (1979), 9 Alta. L.R. (2d) 232 (Alta. Dist. Ct.) at 237 where Stevenson, D.C.J. said "[t]he root of the question is whether or not it (the insurer) would have acted any differently if it had been given notice of the loss when it should have been given notice". In *312630 British Columbia Ltd. v. Alta Surety Co.* (1995), 10 B.C.L.R. (3d) 84 (B.C. C.A.) the B.C. Court of Appeal set out a more recent formulation of the test, namely whether the insurer by reason of the late notice had lost a realistic opportunity to do anything that it might otherwise have done.

25 These authorities arise in a clearly different context from that which I am dealing with in this case, but they demonstrate that there is a somewhat consistent approach in a variety of areas of the law when dealing with the impact of late notice or delays in particular processes.

26 Therefore, the appropriate criteria to apply to the late claimants is as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

27 In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.

National-Oilwell Canada Ltd. ("National")

28 National, and National as the successor in interest to Dosco Supply, a division of Westburne Industrial Enterprises Ltd. ("Dosco") indicate that their claims were filed late due to the unexpected illness and resulting lengthy absence of their credit manager who was in charge of the Blue Range accounts receivable. National submitted the National and Dosco notices of claims on June 7, 1999 (AB V, pgs 538 and 542). National's claim is $58,211.00 and Dosco's claim is $390,369.13. National and Dosco clearly acted in good faith and provided the Notices of Claim as soon as the relevant personnel became aware of the situation.

Campbell's Industrial Supply Ltd. ("Campbell's")

29 Campbell's initial claim in the amount of $14,595.22 was filed prior to the date in the relevant claims bar order. Campbell's then amended its claim on June 25, 1999 and again on July 8, 1999 to $23,318.88. The claim was amended after the relevant date as a result of a representative from Blue Range informing Campbell's that its claim should include invoices sent to Trans Canada Midstream, Berkley Petroleum, Big Bear Exploration and Blue Range Resources Corporation (A.B. 495-496). In addition, there appears to have been some delay due to the Notices of Claim not being sent to the correct Campbell's office. Campbell's acted in good faith throughout and it is in fact arguable that any delay in the proper filing of its claims was actually due to errors on the part of Blue Range rather than its own doing.

TransAlta Utilities Corporation ("TransAlta")

30 TransAlta did not comply with the dates in the claims bar orders. It contends that it did not receive the claims package prior to the relevant dates. It is apparent from the evidence that the claims package was sent to TransAlta at its accounts receivable office, rather than the registered office for service (A.B.432-434). TransAlta was permitted to file its total claim of $120,731.00 by order of the chambers judge dated September 7, 1999. There is no evidence that TransAlta was attempting to circumvent the *CCAA* process. On the contrary, as soon as the appropriate personnel became aware of the situation, TransAlta took the necessary steps to have its Notice of Claim filed.

Petro-Canada Oil and Gas ("PCOG")

31 PCOG filed extensive claims material with the Monitor prior to the relevant dates showing several unsecured claims. The Monitor's draft third interim report indicated that four of PCOG's claims should properly have been classified as secured. The mistake by PCOG was the result of a misapprehension of how operator's liens functioned under the CAPL Operating Procedures

incorporated into the contracts giving rise to the claims. PCOG then sought to amend its claims and have them changed from unsecured to secured status (A.B. 554), on July 7, 1999. The change in status would result in claims of $137,981.30 being amended from unsecured to secured. There was no lack of good faith.

Barrington Petroleum Ltd. ("Barrington")

32 Barrington was acquired by Sunoma Energy Corp ("Sunoma") in about September, 1998. An affidavit filed by Sunoma's controller indicates that the financial records of Barrington were found to have been in complete disarray. Barrington's initial Notice of Claim in the amount of $223,940.06 was submitted prior to the relevant date. Barrington received a Notice of Dispute of Claim which approved the claim to the extent of $57,809.37, but disputed the remainder. On reviewing the issue, Barrington's controller determined that Blue Range was correct, but at the same time she identified additional invoices of which she had been unaware (A.B.549-551). On discovering the additional invoices, Barrington then submitted an amended Notice of Claim on July 22, 1999 and an objection to the Notice of Dispute of Claim. Barrington acted in good faith.

Rigel Oil & Gas Ltd. ("Rigel")

33 The full amount of Rigel's Notice of Claim was $146,429.68. This Claim was filed prior to the relevant date and the amount was approved by Blue Range. After the relevant date, on August 12, 1999, Rigel moved to amend and to allege that, despite Blue Range's claims to the contrary, its claim was secured, rather than unsecured. The only issue for Rigel on appeal is if their claim is properly secured can it be accepted because it was not claimed as secured until August 12, 1999.

Halliburton Group Canada Inc. ("Haliburton")

34 Halliburton was in the process of attempting to collect on accounts receivable owed by Big Bear Exploration Ltd. through May and June, 1999. They subsequently became aware, after the relevant date, that a claim in the amount of $11,309.90 was in fact against Blue Range, and should properly have been filed as a Notice of Claim in the *CCAA* proceedings (A.B. 497-499). On making this discovery, Halliburton wrote to the Monitor on July 14, and July 26, 1999 requesting that its claim be included in the *CCAA* proceeding. The Monitor disputed this claim as having been filed too late (A.B. 498). It appears that Halliburton acted in good faith.

Founders Energy Ltd. ("Founders")

35 Founders filed its claim prior to the relevant date, but, due to an oversight, claimed as an unsecured rather than a secured creditor. After filing its initial Notice of Claim, Founders received a Notice of Dispute from Blue Range. Within the 15 day appeal period, but outside the claims bar date, Founders then filed an amended Notice of Claim claiming a secured interest in the sum of $365,472.39, on July 26, 1999.

Prejudice

36 The timing of these proceedings is a key element in determining whether any prejudice will be suffered by either the debtor corporation or other creditors if the late and late amended claims are allowed. The total of all late and amended claims of the late claimants, secured and unsecured, is approximately $1,175,000. As set out above, in the initial claims bar order, the relevant date was 5:00 p.m. May 7, 1999. This date was extended for joint venture partners to 5:00 p.m. on June 15, 1999. The Plan of Arrangement, sponsored by Canadian Natural Resources Ltd. ("CNRL"), was voted on and passed on July 23, 1999. Status as a creditor, the classification as secured or unsecured, and the amount of a creditor's claim, are relevant to voting: s.6 *CCAA*.

37 Enron and the Creditor's Committee claim that they would be prejudiced if the late claims were allowed because, had they known late claims might be permitted without rigorous criteria for allowance, they might have voted differently on the Plan of Arrangement. Enron in particular submits that it would have voted against the CNRL Plan of Arrangement, thus effectively vetoing the plan, if it had known that late claims would be allowed. This bald assertion after the fact was not sufficient to compel the chambers judge to find this would in fact have been Enron's response. Nowhere else in the evidence is there any indication that late claimants being allowed would have impacted the voting on the different proposed Plans of Arrangement. In addition,

materiality is relevant to the issue of prejudice. The relationship of $1,175,000 (which is the total of late claims) to $270,000,000 (which is the total of claims filed within time) is .435 per cent.

38 Also, the contrary is indicated in the Third Interim Report of the Monitor where it is shown in Schedule D-1 (A.B.269) that $2 million was held as an estimate of unsecured disputed claims. Therefore, when considering which Plan of Arrangement to vote for, Enron, and all of the creditors, would have been aware that $2 million could still be legitimately allowed as unsecured claims, and would have been able to assess that potential effect on the amount available for distribution.

39 Further, the late claimants were well known to the Monitor and all of the other creditors. The evidence discloses that officials at Enron received an e-mail from the Monitor on May 18, 1999 indicating that there were several creditors who had filed late, after the first deadline of May 7, and the Monitor thought that even though they were late the court would likely allow them (A.B.1040). Finally, all of the late claimants were on the distribution list as having potential claims. (A.B. 9-148). It cannot be said that these late claimants were lying in the weeds waiting to pounce. On the contrary, all parties were fully aware of who had potential claims, especially Enron and the Creditors Committee.

40 In a *CCAA* context, as in a *BIA* context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the *CCAA* involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: *Cohen, Re* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in *312630 British Columbia Ltd*. It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

Summary of Criteria

41 In considering claims filed or amended after a claims bar date in a claims bar order, a *CCAA* supervising judge should proceed as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

Conclusion

42 Applying the criteria established, I find that the conclusion reached by the chambers judge ought not to be disturbed, and the late claims filed by the respondents should be permitted under the *CCAA* proceedings. The appeal is dismissed.

Appeal dismissed.

End of Document

TAB 4

Action No. 0801-08510

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

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 SEMCANADA CRUDE COMPANY, SEMCAMS ULC, SEMCANADA ENERGY COMPANY, A.E. SHARP LTD., CEG ENERGY OPTIONS, INC., 3191278 NOVA SCOTIA COMPANY and 1380331 ALBERTA ULC

APPLICANT

BEFORE THE HONOURABLE	)	AT THE LAW COURTS, IN THE CITY
MADAM JUSTICE B.E.C. ROMAINE	)	OF CALGARY, IN THE PROVINCE OF
IN CHAMBERS	)	ALBERTA, ON WEDNESDAY, THE 22nd
	)	DAY OF OCTOBER, 2008

I hereby certify this to be a true copy of the original order
Dated this 22 day of Oct 2008
for Clerk of the Court

CLAIMS PROCESS ORDER

UPON the application of SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 3191278 Nova Scotia Company and 1380331 Alberta ULC (collectively, the "**Applicants**") for an Order approving a claims process (the "**Claims Process**") outlined in Schedule "A" hereto and bar date for Creditors of the Applicants; **AND UPON** all capitalized terms not otherwise defined herein having the meaning assigned to them in the Claims Process; **AND UPON** having read (i) the Notice of Motion, filed, (ii) the Affidavit of Darren Marine sworn October 20, 2008, filed, and (iii) the Seventh Report of the court appointed monitor Ernst & Young Inc. (the "**Monitor**") dated October 20, 2008; **AND UPON** hearing counsel for the Applicants, the Monitor, Bank of America, and counsel present for other parties; **AND UPON** being satisfied that the Applicants have acted and continue to act in good faith and with due diligence and that the circumstances exist that make this Order appropriate; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the Notice of Motion dated October 20, 2008 and materials in support thereof is hereby abridged, if necessary, this application is properly returnable today and further service of the Notice of Motion, other than to those listed on the Service List attached to the Notice of Motion, is hereby dispensed with.

APPROVAL OF CLAIMS PROCESS

2. The Claims Process set forth in the attached Schedule "A" for determining claims of creditors is hereby approved, and the Applicants, in consultation with the Monitor, are authorized and directed to implement the Claims Process.

3. The form of Instruction Letter, Proof of Claim, Notice of Revision or Disallowance, Notice of Dispute and Newspaper Notice, set forth in the attached Schedule "B", Schedule "C", Schedule "D", Schedule "E" and Schedule "F", respectively, are hereby approved.

CLAIMS BAR

4. Any Creditor who fails to file a Proof of Claim in respect of a Pre-Filing Claim, in accordance with this Order and the Claims Process on or before the Claims Bar Date, shall:

   (a) be forever barred, estopped and enjoined from asserting or enforcing any Pre-Filing Claim (or filing a Proof of Claim with respect to such Pre-Filing Claim) against any of the Applicants and such Pre-Filing Claim shall be forever extinguished; and

   (b) not be entitled to receive further notice in these proceedings.

5. Any Creditor who fails to file a Proof of Claim in respect of a Subsequent Claim in accordance with this Order and the Claims Process on or before the Subsequent Claims Bar Date, shall:

(a) be forever barred, estopped and enjoined from asserting or enforcing any Subsequent Claim (or filing a Proof of Claim with respect to such Subsequent Claim) against any of the Applicants and such Subsequent Claim shall be forever extinguished; and

(b) not be entitled to receive further notice in these proceedings.

CLAIMS OFFICER

6. The Applicants (or anyone of them) are authorized to appoint a Claims Officer under such terms as may be approved by the Monitor and enter into an agreement with a Claims Officer fixing the reasonable remuneration of the Claims Officer's fees, as the Monitor deems reasonable and appropriate. For greater certainty, the Applicants (or any one of them) are authorized to appoint more than one Claims Officer should the relevant Applicant(s) and the Monitor deem such appointment reasonable and appropriate.

7. Subject to further order of the Court, each Claims Officer shall determine the manner in which evidence may be brought before him or her as well as any other procedural matters which may arise in respect of the determination of any Pre-Filing Claim or Subsequent Claim.

NOTICE SUFFICIENT

8. The publication of the Newspaper Notice and the mailing to the Creditors of the Claims Package in accordance with the Claims Process and the requirements of this Order shall constitute good and sufficient service and delivery of (i) notice of this Order, (ii) the Claims Bar Date and (iii) the Subsequent Claims Bar Date, on all Persons who may be entitled to receive notice and who may wish to assert Pre-Filing Claims or Subsequent Claims and no other notice or service need be given or made and no other document or material need be sent to or served upon any Person in respect of this Order.

FILING OF PROOFS OF CLAIM

9. A Proof of Claim shall be deemed timely filed only if delivered by registered mail, personal delivery, courier, e-mail (in PDF format) or facsimile transmission so as to actually be received by the Monitor on or before the applicable Bar Date.

10. The Bondholder Trustee shall be authorized to file a Proof of Claim on behalf of Bondholders in respect of the aggregate amount of the Bonds for which such Bondholder Trustee acts. Provided the Bondholder Trustee files a Proof of Claim on their behalf, Bondholders are not required to file individual Proofs of Claim in respect of Pre-Filing Claims pursuant to their Bonds. Should the Bondholder Trustee fail to file a Proof of Claim on behalf of any Bondholders, each such Bondholder will be responsible for filing an individual Proof of Claim by the Claims Bar Date, and shall be subject to having its Pre-Filing Claim barred and extinguished if such Bondholder fails to do so.

NOTICE OF TRANSFEREES

11. If a Creditor or any subsequent holder of a Pre-Filing Claim or Subsequent Claim who has been acknowledged by the relevant Applicant, with the consent of the Monitor, as the holder of the Pre-Filing Claim or Subsequent Claim transfers or assigns that Pre-Filing Claim or Subsequent Claim to another Person neither the relevant Applicant nor the Monitor shall be required to give notice to or to otherwise deal with the transferee or assignee of the Pre-Filing Claim or Subsequent Claim as the holder of such Pre-Filing Claim or Subsequent Claim unless and until actual notice of transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been delivered to the relevant Applicant and the Monitor. Thereafter, such transferee or assignee shall, for all purposes hereof, constitute the holder of such Pre-Filing Claim or Subsequent Claim and shall be bound by notices given and steps taken in respect of such Pre-Filing Claim or Subsequent Claim in accordance with the provisions of this Order.

12. If a Creditor or any subsequent holder of a Pre-Filing Claim or Subsequent Claim who has been acknowledged by the relevant Applicant, with the consent of the Monitor, as the holder of the Pre-Filing Claim or Subsequent Claim transfers or assigns the whole of such

Pre-Filing Claim to more than one Person or part of such Pre-Filing Claim or Subsequent Claim to another Person or Persons, such transfers or assignments shall not create separate Pre-Filing Claims or Subsequent Claims and such Pre-Filing Claims and Subsequent Claims shall continue to constitute and be dealt with as a single Pre-Filing Claim or Subsequent Claim notwithstanding such transfers or assignments. Neither the relevant Applicant nor the Monitor shall, in each such case, be required to recognize or acknowledge any such transfers or assignments and shall be entitled to give notices to and to otherwise deal with such Pre-Filing Claim or Subsequent Claim only as a whole and then only to and with the person last holding such Pre-Filing Claim or Subsequent Claim provided such Creditor may, by notice in writing delivered to the relevant Applicant and the Monitor, direct that subsequent dealings in respect of such Pre-Filing Claim or Subsequent Claim, but only as a whole, shall be dealt with by a specified Person and in such event, such Person shall be bound by any notices given or steps taken in respect of such Pre-Filing Claim or Subsequent Claim with such Creditor in accordance with the provisions of this Order.

NOTICES AND COMMUNICATION

13. Except as otherwise provided herein, the Applicants and the Monitor may deliver any notice or other communication to be given under this Order to Creditors or other interested Persons by forwarding true copies thereof by ordinary mail, courier, personal delivery, facsimile or e-mail to such Creditors or Persons at the address last shown on the books and records of the Applicants, and that any such service or notice by courier, personal delivery, facsimile or e-mail shall be deemed to be received on the next Business Day following the date of forwarding thereof, or if sent by ordinary mail on the third Business Day after mailing within Alberta, the fifth Business Day after mailing within Canada, and the tenth Business Day after mailing internationally.

14. Any notice or other communication to be given under this Order by a Creditor to the Monitor or any of the Applicants shall be in writing in substantially the form, if any, provided for in this Order and will be sufficiently given only if delivered by registered mail, courier, e-mail (in PDF format), personal delivery or facsimile transmission addressed to:

The Monitor
Ernst & Young Inc., the Court-appointed Monitor of SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 3191278 Nova Scotia Company and 1380331 Alberta ULC
Attn: Jessica Caden
Ernst &Young Tower
1000, 440-2nd Avenue S.W.
Calgary, Alberta
T2P 5E9
E-mail: jessica.caden@ca.ey.com
Telephone: (403) 206-5153
Fax: (403) 206-5075

15. In the event that the day on which any notice or communication required to be delivered pursuant to the Claims Process is not a Business Day then such notice or communication shall be required to be delivered on the next Business Day.

16. In the event of any strike, lock-out or other event which interrupts postal service in any part of Canada, all notices and communications during such interruption may only be delivered by personal delivery or courier and any notice or other communication given or made by prepaid mail within the five (5) Business Day period immediately preceding the commencement of such interruption, unless actually received, shall be deemed not to have been delivered.

AID AND ASSISTANCE OF OTHER COURTS

17. This court hereby requests the aid and recognition (including assistance pursuant to section 17 of the CCAA, as applicable) of any court or any judicial, regulatory or administrative body in any province or territory of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province or any court or any judicial, regulatory or administrative body of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

GENERAL

18. The Applicants, with the consent of the Monitor, are hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which Proofs of Claim and Notices of Dispute are completed and executed, and may, if they are satisfied that a Pre-Filing Claim or Subsequent Claim has been adequately proven, waive strict compliance with the requirements of the Claims Process and this Order as to the completion and execution of Proofs of Claim and Notices of Dispute.

19. The Monitor, in addition to its prescribed rights and obligations under the CCAA and under the Initial Order, shall assist the Applicants in connection with the administration of the Claims Process, and is hereby authorized and directed to take such other actions and fulfill such other roles as are contemplated by the Claims Process and this Order.

20. References in this Order to the singular shall include the plural, references to the plural shall include the singular and to any gender shall include the other gender.

21. Notwithstanding the terms of this Order, the Applicants may apply to this Court from time to time for such further order or orders as it considers necessary or desirable to amend, supplement or replace the Claims Process or this Order and to establish a process for the determination of the Excluded Claims.

J.C.Q.B.A.

ENTERED THIS 23
day of October, 2008.

V.A. BRANDT (COURT SEAL)
Clerk of the Court

SCHEDULE "A"

CLAIMS PROCESS

DEFINITIONS

1. For purposes of this Claims Process the following terms shall have the following meanings:

   (a) "**Applicants**" means SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, 1380331 Alberta ULC, CEG Energy Options, Inc., A.E. Sharp Ltd. and 3191278 Nova Scotia Company and "Applicant" shall mean any one of foregoing;

   (b) "**Amended and Restated Initial Order**" means the Amended and Restated Initial Order granted by Madam Justice B.E.C. Romaine on July 30, 2008 in Action No. 0801-08510, as amended by subsequent Orders of the Court (including the Order granted on September 11, 2008), and as may be amended by further order of the Court;

   (c) "**Bar Dates**" means the Claims Bar Date and Subsequent Claims Bar Date;

   (d) "**Bond**" means a bond or debenture issued pursuant to the Bond Indenture and any bonds issued in substitution or replacement thereof;

   (e) "**Bondholder**" means a registered or beneficial holder of a Bond;

   (f) "**Bondholder Trustee**" means the trustee appointed to act under the Bond Indenture;

   (g) "**Bond Indenture**" means an indenture dated as of November 18, 2005 among SemGroup L.P. and SemGroup Finance Corp., as issuers, Semoperating G.P., L.L.C., Eaglewing, L.P., SemCanada, L.P., SemCanada II, L.P., SemCrude, L.P., SemFuel, L.P., SemGas, L.P., SemMaterials, L.P., SemPipe, L.P., SemStream, L.P., SemTrucking, L.P., SemManagement, L.L.C., Greyhawk Gas Storage Company, L.L.C., SemKan, L.L.C., SemGas Gathering, L.L.C., SemGas Storage, L.L.C., Steuben Development Company, L.L.C., Wyckoff Gas Storage Company, LLC, SemCams Midstream Company, Seminole Canada Energy Company, Seminole Canada Gas Company, Central Midstream (1) Company, Central Midstream (2) Company, Central Alberta Midstream (1) Company, Central Alberta Midstream (2) Company, Cams Midstream Services ULC, Central Alberta Midstream Services, K.C. Asphalt L.L.C., Chemical Petroleum Exchange, Incorporated, SemMexico Materials HC, S. de R.L. de C.V., SemMaterials HC Mexico, S. de R.L. de C.V., SemMaterials Mexico, S. de R.L. de C.V., SemMaterials SC Mexico, S. de R.L. de C.V. and Halron Transport of Green Bay, L.L.C. as guarantors and Wells Fargo Bank, N.A. as trustee, providing for the issuance of 8.75% unsecured notes due 2015;

(h) "**Business Day**" means a day, other than a Saturday or a Sunday, on which banks are generally open for business in Calgary, Alberta;

(i) "**CCAA**" means the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended;

(j) "**Claim**" means (i) any right or claim of any Person that may be asserted or made in whole or in part against any of the Applicants, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including without limitation, by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including, without limitation, any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature including, without limitation, any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action whether existing at present or commenced in the future, together with any other rights or claims of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the BIA had the Applicants become bankrupt, and (ii) any Tax Claim; For greater certainty, a Creditor entitled to claim for interest under its applicable agreement with the Applicants may claim for interest that has accrued on its Claim as of the Filing Date, but no claim for interest shall be made for interest accruing after that date;

(k) "**Claims Bar Date**" means 5:00 p.m. (Mountain Time) on December 1, 2008, or such other date as may be ordered by the Court;

(l) "**Claims Officer**" means any individual appointed by the Applicants (or any one of them), under such terms as are approved by the Monitor or further order of the Court, to act as a claims officer for purposes of and in accordance with the Claims Process;

(m) "**Claims Package**" means the document package which shall include a copy of the Instruction Letter, a Proof of Claim and such other materials as the Applicants or the Monitor consider necessary or appropriate;

(n) "**Claims Process**" means the procedures outlined herein in connection with the assertion of Pre-Filing Claims or Subsequent Claims against one or more of the Applicants;

(o) "**Claims Process Order**" means the Order granted by Madam Justice B.E.C. Romaine of the Alberta Court of Queen's on October 22, 2008 approving the Claims Process.

(p) "**Court**" means the Alberta Court of Queen's Bench;

(q) "**Credit Agreement**" means the Amended and Restated Credit Agreement dated as of October 18, 2005 among SemCrude, L.P. and SemCams Midstream Company, as borrowers, SemGroup, L.P. and SemOperating G.P., L.L.C., as guarantors, Bank of America, N.A., as the administrative agent and L/C issuer, and the other lenders party thereto, as lenders, including Bank of Montreal dba Harris Nesbitt, as amended to date;

(r) "**Creditor**" means any Person asserting a Pre-Filing Claim or Subsequent Claim and for greater certainty excludes the Secured Lenders;

(s) "**Dispute Package**" means, with respect to any Pre-Filing Claim or Subsequent Claim, a copy of the related Proof of Claim, Notice of Revision or Disallowance and Notice of Dispute;

(t) "**Excluded Claim**" means (i) any Claim secured by the Administration Charge, the Inter-Company Advances Charge, the Financial Advisor Charge, and the Directors' Charge (as each of the foregoing terms are defined in the applicable Initial Order); (ii) any Claim secured by the Crude ERP Charge, the CAMS ERP Charge, and the Energy KERP Charge (as each of the foregoing terms are defined in the Order granted on August 21, 2008 by Madam Justice B.E.C. Romaine of the Alberta Court of Queen's Bench); (iii) any Claim by the Secured Lenders; (iv) any Claim of Creditors with respect to goods and/or services provided to the Applicants on or after the applicable Filing Date; (v) that portion of a Claim arising from a cause of action for which the relevant Applicant is covered by insurance, only to the extent of such coverage; and (vi) any other Claims arising solely as a result of events occurring after the Filing Date (other than Subsequent Claims).

(u) "**Filing Date**" means, in respect of:

(i) SemCanada Crude Company and SemCAMS ULC – July 22, 2008;

(ii) SemCanada Energy Company, CEG Energy Options, Inc. and A.E. Sharp Ltd. – July 24, 2008; and

(iii) 3191278 Nova Scotia Company and 1380331 Alberta ULC – July 30, 2008;

(v) "**Initial Order**" means, collectively, the:

(i) Initial Orders granted on July 22, 2008 by Madam Justice B.E.C. Romaine of the Alberta Court of Queens Bench in the proceedings of

SemCanada Crude and SemCAMS ULC, respectively, Action No. 0801-08510 and Action No. 0801-08685; and

(ii) the Amended and Restated Initial Order;

(w) "**Instruction Letter**" means the letter regarding completion of a Proof of Claim, which letter shall be substantially in the form attached hereto as Schedule "B";

(x) "**Known Creditors**" means Creditors which the books and records of the Applicants disclose were owed money by the Applicants, or any one of them, as of the applicable Filing Date which obligation remains unpaid in whole or in part;

(y) "**Monitor**" means Ernst & Young Inc., in its capacity as the Court-appointed Monitor of the Applicants;

(z) "**Newspaper Notice**" means the notice of the Claims Process to be published in the newspapers in accordance with the Claims Process in substantially the form attached to the Claims Process Order as Schedule "F";

(aa) "**Notice of Dispute**" means the notice that may be delivered by a Creditor who has received a Notice of Revision or Disallowance disputing such Notice of Revision or Disallowance, which notice shall be substantially in the form attached to the Claims Process Order as Schedule "E";

(bb) "**Notice of Repudiation or Disclaimer**" means a written notice in any form issued on or after the applicable Filing Date by any of the Applicants advising a Person of the disclaimer or repudiation of any contract, lease, employment agreement, or other arrangement or agreements of any nature whatsoever, whether oral or written, and any amending agreement(s) related thereto. For the purposes of the Claims Process Order only, an agreement on or after the applicable Filing Date restructuring or amending a contract, lease, employment agreement, or other arrangement or agreement of any nature whatsoever, which by its terms expressly provides for a reservation of a Subsequent Claim in these proceedings, shall be deemed to be a Notice of Repudiation or Disclaimer;

(cc) "**Notice of Revision or Disallowance**" means the notice that may be delivered to a Creditor revising or rejecting such Creditor's Pre-Filing Claim or Subsequent Claim as set out in its Proof of Claim in whole or in part, which notice shall be substantially in the form attached to the Claims Process Order as Schedule "D";

(dd) "**Person**" shall be broadly interpreted and includes an individual, firm, partnership, joint venture, venture capital fund, limited liability company, unlimited liability company, association, trust, corporation, unincorporated association or organization, syndicate, committee, the government of a country or any political subdivision thereof, or any agency, board, tribunal, commission, bureau, instrumentality or department of such government or political subdivision, or any other entity, howsoever designated or constituted, including

any Taxing Authority, and the trustees, executors, administrators, or other legal representatives of an individual;

(ee) "**Pre-Filing Claim**" means any Claim other than (i) an Excluded Claim, and a (ii) Subsequent Claim.

(ff) "**Proof of Claim**" means the form to be completed and filed by a Creditor setting forth its Pre-Filing Claim or Subsequent Claim, which proof of claim shall be substantially in the form attached to the Claims Process Order as Schedule "C";

(gg) "**Proven Claim**" means the amount, status and/or validity of the Claim of a Creditor as finally determined in accordance with this Claims Process (a Proven Claim will be "finally determined" in accordance with this Claims Process when (i) it has been accepted by the relevant Applicant, with the consent of the Monitor, (ii) the applicable time period for filing a Notice of Dispute in response to a Notice of Revision or Disallowance issued by the relevant Applicant has expired and no Notice of Dispute has been filed in accordance with this Order, (iii) a Notice of Dispute has been filed and a Claims Officer has been appointed with respect to such Notice of Dispute and the Claims Officer has issued his/her determination with respect to the amount, status and/or validity of a Claim submitted to the Claims Officer for adjudication, and the time within which either party may file an appeal of such determination has expired and no appeal has been filed, or (iv) any court of competent jurisdiction has made a determination with respect to the amount, status and/or validity of the Claim and no appeal or motion for leave to appeal therefrom shall have been taken or served on either party, or if any appeal(s) or motion(s) for leave to appeal or further appeal shall have been taken therefrom or served on either party, any (and all) such appeal(s) or motion(s) shall have been dismissed, determined or withdrawn.

(hh) "**Secured Lenders**" means any member of the syndicate of secured lenders under the Credit Agreement, as part of the syndicate of secured lenders under the Credit Agreement or in their capacity as an individual claimant for any amount claimed to be secured by the Credit Agreement (including without limitation any "Lender Swap Obligation"), regardless of whether or not any such amount is ultimately secured under the Credit Agreement;

(ii) "**Subsequent Claim**" means any Claim arising after the applicable Filing Date as a result of the disclaimer or repudiation after the applicable Filing Date of any contract, lease, employment agreement, or other arrangement or agreements of any nature whatsoever, whether oral or written, and any amending agreement related thereto;

(jj) "**Subsequent Claims Bar Date**" means the later of: (i) the Claims Bar Date; and (ii) 5:00 p.m. (Mountain Time) on the day which is 30 days after the date of the Notice of Repudiation or Disclaimer;

(kk) "**Tax**" or "**Taxes**" means any and all amounts subject to a withholding or remitting obligation and any and all taxes, duties, fees, and other governmental charges, duties, impositions and liabilities of any kind whatsoever whether or not assessed by the Taxing Authorities (including any Claims by any of the Taxing Authorities), including all interest, penalties, fines, fees, other charges and additions with respect to such amount;

(ll) "**Taxing Authorities**" means Her Majesty the Queen, Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of any province or territory of Canada, the Canada Revenue Agency, any similar revenue or taxing authority of each and every province or territory of Canada and any political subdivision thereof, and any Canadian or foreign governmental authority, and "Taxing Authority" means any one of the Taxing Authorities;

(mm) "**Tax Claim**" means any Claim against the Applicants for any Taxes in respect of any taxation year or period ending on or prior to the applicable Filing Date, and in any case where a taxation year or period commences on or prior to the Filing Date, for any Taxes in respect of or attributable to the portion of the taxation period commencing prior to the Filing Date and up to and including the Filing Date. For greater certainty, a Tax Claim shall include, without limitation, any and all Claims of any Taxing Authority in respect of transfer pricing adjustments and any Canadian or non-resident Tax related thereto; and

(nn) "**Website**" shall mean the Monitor's website located at www.ey.com/ca/SemCanada

NOTICE OF CLAIMS PROCESS

2. The Monitor shall cause a Claims Package to be sent to each Known Creditor by regular prepaid mail, fax, or email on or before October 29, 2008.

3. The Monitor shall cause the Newspaper Notice to be published in the Globe and Mail (National Edition), the Edmonton Journal and the Calgary Herald on or prior to October 31, 2008.

4. The Monitor shall cause the Claims Package to be posted on the Monitor's Website commencing on October 29, 2008.

5. The Monitor shall cause the Claims Package to be sent to each Creditor with a Subsequent Claim by regular prepaid mail, fax, or email within 5 days of the date of the Notice of Repudiation or Disclaimer.

6. The Monitor shall cause a copy of the Claims Package to be sent to any Person requesting such material as soon as practicable.

FILING OF PROOFS OF CLAIM

7. Every Creditor asserting a Pre-Filing Claim against an Applicant shall set out its aggregate Pre-Filing Claim in a written Proof of Claim and deliver that Proof of Claim so that it is received by the Monitor no later than the Claims Bar Date.

8. Every Creditor asserting a Subsequent Claim against an Applicant shall set out its aggregate Subsequent Claim in a Proof of Claim and deliver that Proof of Claim so that it is received by the Monitor no later than the Subsequent Claims Bar Date.

FORM OF PROOFS OF CLAIM

9. Each Creditor shall file a separate Proof of Claim in respect of each Applicant.

10. Any Pre-Filing Claim or Subsequent Claim set out in a Proof of Claim shall be denominated in Canadian dollars, failing which such Pre-Filing Claim or Subsequent Claim shall be converted to and shall constitute obligations in Canadian dollars and such calculation will be effected using the noon spot rate of the Bank of Canada as at the Filing Date for the applicable Applicant.

DETERMINATION OF CLAIMS AND SUBSEQUENT CLAIMS

Review of Proofs of Claim

11. The relevant Applicant shall review each Proof of Claim received by the Claims Bar Date or Subsequent Claims Bar Date, as applicable, and subject to paragraph 12 shall accept, revise or disallow the Pre-Filing Claim or Subsequent Claim with the consent of the Monitor.

12. The relevant Applicant may attempt to consensually resolve the classification and amount of any Pre-Filing Claim or Subsequent Claim with the Creditor prior to the relevant Applicant accepting, revising or disallowing such Pre-Filing Claim or Subsequent Claim with the consent of the Monitor.

13. If the relevant Applicant, with the consent of the Monitor, accepts the Pre-Filing Claim or Subsequent Claim, then such Pre-Filing Claim or Subsequent Claim shall be a Proven Claim.

14. If any Creditor asserts in its Proof of Claim that its Pre-Filing Claim or Subsequent Claim has priority over (or ranks *pari passu* with) any portion of the security granted to the Secured Lenders pursuant to the Credit Agreement then the relevant Applicant shall give the "Administrative Agent" (as defined in the Credit Agreement), any uniquely affected Secured Lenders and any other of the Secured Lenders granted leave by order of the Court, notice of such claim and the Administrative Agent and such Secured Lenders shall be entitled to participate in the determination of such Pre-Filing Claim or Subsequent Claim, including the decision to accept, revise or disallow the Pre-Filing Claim or Subsequent Claim, any effort to consensually resolve the Pre-Filing Claim or

Subsequent Claim, any hearing before any Claims Officer, any hearing before the Court or any appeal.

Notices of Revision or Disallowance

15. If any of the Applicants, with the consent of the Monitor, determine to revise or disallow a Pre-Filing Claim or Subsequent Claim the Monitor shall send a Notice of Revision or Disallowance to the Creditor.

Notice of Dispute

16. Any Creditor who disputes the classification or amount of its Pre-Filing Claim or Subsequent Claim as set forth in a Notice of Revision or Disallowance shall deliver a Notice of Dispute to the Monitor by 5:00 p.m. (Mountain Time) on the day which is fourteen (14) days after the date of the Notice of Revision or Disallowance.

17. Any Creditor who fails to deliver a Notice of Dispute by the deadline set forth in paragraph 16 shall be deemed to accept the classification and the amount of its Pre-Filing Claim or Subsequent Claim as set out in the Notice of Revision or Disallowance and such Pre-Filing Claim or Subsequent Claim as set out in the Notice of Revision or Disallowance shall constitute a Proven Claim.

Resolution of Claims and Subsequent Claims

18. Upon receipt of a Notice of Dispute, the relevant Applicant may (i) attempt to consensually resolve the classification and amount of the Pre-Filing Claim or Subsequent Claim with the Creditor, (ii) deliver a Dispute Package to a Claims Officer appointed in accordance with the Claims Process Order, or (iii) if no Claims Officer has been appointed, bring a motion before the Court in these proceedings to determine the classification and/or amount of the Pre-Filing Claim or Subsequent Claim.

19. If the Applicant and the Creditor consensually resolve the classification and amount of the Pre-Filing Claim or Subsequent Claim, the Applicant may accept, with the consent of the Monitor, a revised Pre-Filing Claim or Subsequent Claim, and such Pre-Filing Claim or Subsequent Claim will constitute a Proven Claim.

20. If a Dispute Package is delivered to the Claims Officer, the Applicant shall schedule, and conduct a hearing before the Claims Officer to determine the classification and/or amount of the Pre-Filing Claim or Subsequent Claim, and the Claims Officer shall as soon as practicable after the hearing notify the relevant Applicant, the Monitor and the Creditor of his or her determination.

21. The relevant Applicant or the Creditor may within fourteen (14) days of receipt of notification of the Claims Officer's determination appeal such determination to the Court by serving on the other party and filing with the Court a Notice of Motion, failing which the Claims Officer's determination shall be deemed to be final and binding on the relevant Applicant and the Creditor and shall constitute a Proven Claim.

22. Should a Claims Officer not be appointed with respect to the disputed Pre-Filing or Subsequent Claim, the Applicant may bring a motion before the Court in these proceedings to determine the classification and/or amount of such Pre-Filing Claim or Subsequent Claim by serving on the other party and filing with the Court a Notice of Motion.

SCHEDULE "B"

INSTRUCTION LETTER FOR THE CLAIMS PROCESS OF THE APPLICANTS LISTED HEREIN
(hereinafter referred to as the "Applicants")

Applicants:
SemCanada Crude Company
SemCAMS ULC
SemCanada Energy Company
A.E. Sharp Ltd.
CEG Energy Options, Inc.
3191278 Nova Scotia Company
1380331 Alberta ULC

A. Claims Process

By order of the Honourable Madam Justice B.E.C. Romaine dated October 22, 2008 (the **"Claims Process Order"**), which is attached hereto without Schedules (other than Schedule "A"), under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the **"CCAA"**), the Applicants have been authorized to conduct a claims process (the **"Claims Process"**). A copy of the Claims Process Order may be found on the Monitor's website at: **www.ey.com/ca/SemCanada.**

This letter provides instructions for completing the Proof of Claim. For your information, there is currently no proposed plan under the CCAA or any other contemplated distribution. The Applicants are still assessing their various options. Defined terms which are not defined herein shall have the meaning ascribed thereto in the Claims Process Order.

The Claims Process is intended for any Person asserting a Pre-Filing Claim of any kind or nature whatsoever against one or more of the Applicants arising before the applicable Filing Date, and any Subsequent Claim arising after the applicable Filing Date as a result of a disclaimer or repudiation after the applicable Filing Date of any contract, lease, employment agreement, or other arrangement or agreements of any nature whatsoever, whether oral or written, and any amending agreement related thereto.

If you have any questions regarding the Claims Process, please contact the Court-appointed Monitor at the address provided below.

All enquiries with respect to the Claims Process should be addressed to:

The Monitor
Ernst & Young Inc., the Court-appointed Monitor of SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 3191278 Nova Scotia Company and 1380331 Alberta ULC
Attn: Jessica Caden
Ernst &Young Tower

1000, 440-2nd Avenue S.W.
Calgary, Alberta
T2P 5E9
E-mail: jessica.caden@ca.ey.com
Telephone: (403) 206-5153
Fax: (403) 206-5075

B. For Creditors Submitting a Proof of Claim

To avoid the barring and extinguishment of any Pre-Filing Claim you may have against an Applicant you are required to file a Proof of Claim, in the form attached hereto so as to be received by 5:00 p.m. (Mountain Time) on December 1, 2008 (the "**Claims Bar Date**").

To avoid the barring and extinguishment of any Subsequent Claim you may have against an Applicant, you are required to file a Proof of Claim, in the form attached hereto, so as to be received by the later of: (a) the Claims Bar Date, and (b) 5:00 p.m. (Mountain Time) on the day which is 30 days after the date of the applicable repudiation or disclaimer (the "**Subsequent Claims Bar Date**").

A separate Proof of Claim must be filed for a Claim against each of the Applicants.

Additional Proof of Claim forms can be found on the Monitor's website at www.ey.com/ca/SemCanada or obtained by contacting the Monitor at the address indicated above and providing particulars as to your name, address, facsimile number and e-mail address. Once the Monitor has this information, you will receive, as soon as practicable, additional Proof of Claim forms.

PROOFS OF CLAIM WHICH ARE NOT RECEIVED BY THE CLAIMS BAR DATE OR SUBSEQUENT CLAIMS BAR DATE, AS APPLICABLE, WILL BE BARRED AND EXTINGUISHED FOREVER.

SCHEDULE "C"

PROOF OF CLAIM AGAINST THE APPLICANTS LISTED HEREIN (hereinafter referred to as the "Applicants")

Applicants:
SemCanada Crude Company
SemCAMS ULC
SemCanada Energy Company
A.E. Sharp Ltd.
CEG Energy Options, Inc.
3191278 Nova Scotia Company
1380331 Alberta ULC

Please read the enclosed Instruction Letter carefully prior to completing this Proof of Claim. Defined terms not defined within this Proof of Claim form shall have the meaning ascribed thereto in the Claims Process Order dated October 22, 2008 as may be amended from time to time.

A. Particulars of Creditor

1. Full Legal Name of Creditor: _____ (the **"Creditor"**) (*Full legal name should be the name of the original Creditor of the relevant Applicant, regardless of whether an assignment of a Claim has been made, or a portion thereof, has occurred prior to or following the applicable Filing Date.*)

2. Full Mailing Address of the Creditor (*the original Creditor, not the Assignee*):

_____
_____
_____
_____

3. Telephone Number: _____

   Facsimile Number: _____

   Attention (Contact Person): _____

4. Has the Claim been sold, transferred or assigned by the Creditor to another party?

   Yes: [___]

   No: [___]

B. Particulars of Assignee(s) (If any):

1. Full Legal Name of Assignee(s): _____ (*If a portion of the Claim has been assigned, insert full legal name of assignee(s) of the Claim. If there is more than one assignee, please attach a separate sheet with the required information.*)

2. Full Mailing Address of Assignee(s): _____

3. Telephone Number of Assignee(s): _____

4. Facsimile Number of Assignee(s): _____

5. Attention (Contact Person): _____

C. Proof of Claim:

I, _____ (*name of individual Creditor or Representative of Corporate Creditor*), of _____(*City, Province or State*) do hereby certify:

(a) that I

[____] am the Creditor of the Applicant; OR

[____] am _____ *(state position or title)* of _____ *(name of Creditor)*

(b) that I have knowledge of all the circumstances connected with the Claim referred to below;

(c) the Creditor asserts its claim against _____ (*Insert name of the Applicant against whom the Claim is alleged. A separate proof of claim must be filed against each Applicant against whom a claim is alleged.*)

(d) The Applicant was and still is indebted to the Creditor as follows;

(i) PRE-FILING CLAIM:

CDN$ _____ (*insert $ value of Claim*)

(ii) SUBSEQUENT CLAIM:

CDN$ _____ (*insert $ value of Claim*) (*Claim arising after the applicable Filing Date resulting from the disclaimer or repudiation after the applicable Filing Date of any contract, lease, employment agreement, or other arrangement or agreements of any*

nature whatsoever, whether oral or written, and any amending agreement related thereto)

(iii) TOTAL CLAIM(S) $_____

(Note: Claims in a foreign currency are to be converted to Canadian Dollars at the noon spot rate of the Bank of Canada as at the applicable Filing Date.)

D. Nature of Claim:

(Check and complete appropriate category)

[___] A. UNSECURED CLAIM OF $_____. That in respect of this debt, no assets of the Applicants are pledged as security and *(Check appropriate description)*

[___] Regarding the amount of $_____, I do not claim a right to priority.

[___] Regarding the amount of $_____, I claim a right to a priority under section 136 of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") or would claim such a priority if this Proof of Claim was being filed in accordance with the BIA (please see attached schedule setting out section 136 of the BIA).

(Set out on an attached sheet details to support priority claim.)

[____] B. SECURED CLAIM OF $_____.

That in respect of this debt, assets of the Applicant valued at $_____ are pledged to me as security, particulars of which are as follows:

(Give full particulars of the security, including the date on which the security was given and the value at which you assess the security, and attach a copy of the security documents.)

E. Particulars of Claims:

Other than as already set out herein, the particulars of the undersigned's total Pre-Filing Claim and/or Subsequent Claim are attached.

(Provide all particulars of the claims and supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the claims, name of any guarantor which has guaranteed the claims, and amount of invoices, particulars of all credits, discounts, etc. claimed, description of the security, if any, granted by the relevant Applicant to the Creditor and estimated value of such security, particulars of any restructuring claim.)

F. Filing of Claims:

This Proof of Claim must be received by no later than 5:00 p.m. (Mountain Time) on December **1, 2008 (the "Claims Bar Date").**

Proofs of Claim for Subsequent Claims arising after the applicable Filing Date resulting from a disclaimer or repudiation after the applicable Filing Date of any contract, lease, employment agreement, or other arrangement or agreements of any nature whatsoever, whether oral or written, and any amending agreement related thereto, must be received by the later of: **(a) the Claims Bar Date, and (b) by 5:00 p.m. (Mountain Time) on the day which is 30 days after the date of the applicable repudiation or disclaimer (the "Subsequent Bar Date").**

FAILURE TO FILE YOUR PROOF OF CLAIM AS DIRECTED BY THE CLAIMS BAR DATE OR SUBSEQUENT CLAIMS BAR DATE, AS APPLICABLE, WILL RESULT IN YOUR CLAIM BEING BARRED AND EXTINGUISHED FOREVER, AND YOU WILL BE PROHIBITED FROM MAKING OR ENFORCING A CLAIM AGAINST THE APPLICANTS.

This Proof of Claim must be delivered by registered mail, personal delivery, e-mail (in PDF format), courier or facsimile transmission at the following addresses:

The Monitor
Ernst & Young Inc., the Court-appointed Monitor of SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 3191278 Nova Scotia Company and 1380331 Alberta ULC
Attn: Jessica Caden
Ernst &Young Tower
1000, 440-2nd Avenue S.W.
Calgary, Alberta
T2P 5E9
E-mail: jessica.caden@ca.ey.com
Telephone: (403) 206-5153
Fax: (403) 206-5075

DATED this _____ day of _____, 20__.

_____
Witness:

Per: _____

Print name of Creditor:

_____

If Creditor is other than an individual, print name and title of authorized signatory

Name: _____

Title: _____

Schedule to the Proof of Claim Form

Bankruptcy and Insolvency Act
PART V: ADMINISTRATION OF ESTATES
Scheme of Distribution

Priority of claims

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(*a*) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal representative or, in the Province of Quebec, the successors or heirs of the deceased bankrupt;

(*b*) the costs of administration, in the following order,

(i) the expenses and fees of any person acting under a direction made under paragraph 14.03(1)(*a*),

(ii) the expenses and fees of the trustee, and

(iii) legal costs;

(*c*) the levy payable under section 147;

(*d*) wages, salaries, commissions or compensation of any clerk, servant, travelling salesman, labourer or workman for services rendered during the six months immediately preceding the bankruptcy to the extent of two thousand dollars in each case, together with, in the case of a travelling salesman, disbursements properly incurred by that salesman in and about the bankrupt's business, to the extent of an additional one thousand dollars in each case, during the same period, and for the purposes of this paragraph commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for within the six month period, shall be deemed to have been earned therein;

(*d*.1) claims in respect of debts or liabilities referred to in paragraph 178(1)(*b*) or (*c*), if provable by virtue of subsection 121(4), for periodic amounts accrued in the year before the date of the bankruptcy that are payable, plus any lump sum amount that is payable;

(*e*) municipal taxes assessed or levied against the bankrupt, within the two years immediately preceding the bankruptcy, that do not constitute a secured claim against the real property or immovables of the bankrupt, but not exceeding the value of the interest or, in the Province of Quebec, the value of the right of the bankrupt in the property in respect of which the taxes were imposed as declared by the trustee;

(*f*) the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

(*g*) the fees and costs referred to in subsection 70(2) but only to the extent of the realization from the property exigible thereunder;

(*h*) in the case of a bankrupt who became bankrupt before the prescribed date, all indebtedness of the bankrupt under any Act respecting workers' compensation, under any Act respecting unemployment insurance or under any provision of the *Income Tax Act* creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, rateably;

(*i*) claims resulting from injuries to employees of the bankrupt in respect of which the provisions of any Act respecting workers' compensation do not apply, but only to the extent of moneys received from persons guaranteeing the bankrupt against damages resulting from those injuries; and

(*j*) in the case of a bankrupt who became bankrupt before the prescribed date, claims of the Crown not mentioned in paragraphs (*a*) to (*i*), in right of Canada or any province, rateably notwithstanding any statutory preference to the contrary.

Payment as funds available

(2) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, payment in accordance with subsection (1) shall be made as soon as funds are available for the purpose.

Balance of claim

(3) A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him.

R.S., 1985, c. B-3, s. 136; 1992, c. 1, s. 143(E), c. 27, s. 54; 1997, c. 12, s. 90; 2001, c. 4, s. 31; 2004, c. 25, s. 70.

SCHEDULE "D"

NOTICE OF REVISION OR DISALLOWANCE
OF THE APPLICANTS LISTED HEREIN
(hereinafter referred to as the "Applicants")

Applicants:
SemCanada Crude Company
SemCAMS ULC
SemCanada Energy Company
A.E. Sharp Ltd.
CEG Energy Options, Inc.
3191278 Nova Scotia Company
1380331 Alberta ULC

Name of Claimant:

Reference #: _____

Pursuant to the order of the Honourable Madam Justice B.E.C. Romaine dated October 22, 2008, Ernst & Young Inc. in its capacity as Monitor of the Applicants, hereby gives you notice that _____ (*name of the Applicant*) has reviewed your Proof of Claim and has revised or rejected your Claim as follows:

Applicant	Proof of Pre-Filing Claim or Subsequent Claim as Submitted ($CDN)	Revised Pre-Filing Claim or Subsequent Claim as Accepted ($CDN)	Secured ($CDN)	Unsecured ($CDN)
Total Claim				

Reason for the Revision or Disallowance:

_____
_____
_____
_____
_____
_____
_____
_____
_____

If you do not agree with this Notice of Revision or Disallowance please take notice of the following:

1. If you intend to dispute a Notice of Revision or Disallowance, you must, by 5:00 p.m. (Mountain Time) on the day which is fourteen (14) days after the date of this Notice of Revision or Disallowance, deliver a Notice of Dispute, in the form attached hereto, by registered mail, personal service, e-mail (in PDF format), facsimile or courier to the address indicated herein. The form of Notice of Dispute is attached to this Notice.

2. If you do not deliver a Notice of Dispute in the time specified, the value of your Pre-Filing Claim or Subsequent Claim shall be determined to be as set out in this Notice of Revision or Disallowance.

Address for Service of Notices of Dispute:

The Monitor
Ernst & Young Inc., the Court-appointed Monitor of SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 3191278 Nova Scotia Company and 1380331 Alberta ULC
Attn: Jessica Caden
Ernst &Young Tower
1000, 440-2nd Avenue S.W.
Calgary, Alberta
T2P 5E9
E-mail: jessica.caden@ca.ey.com
Telephone: (403) 206-5153
Fax: (403) 206-5075

IF YOU FAIL TO TAKE ACTION WITHIN THE PRESCRIBED TIME PERIOD, THIS NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU.

Dated at _____ this _____ day of _____, 2008.

ERNST & YOUNG INC.

In its capacity as Court-Appointed Monitor of the Applicants

Per: _____

Encl.

SCHEDULE "E"

NOTICE OF DISPUTE OF THE APPLICANTS LISTED HEREIN
(hereinafter referred to as the "Applicants")

Applicants:
SemCanada Crude Company
SemCAMS ULC
SemCanada Energy Company
A.E. Sharp Ltd.
CEG Energy Options, Inc.
3191278 Nova Scotia Company
1380331 Alberta ULC

Pursuant to the order of the Honourable Madam Justice B.E.C. Romaine dated October 22, 2008, we hereby give you notice of our intention to dispute the Notice of Revision or Disallowance bearing Reference Number _____ and dated _____ issued by Ernst & Young Inc. in its capacity as Monitor of the Applicants in respect of our Claim.

Name of Creditor: _____

Applicant	Reviewed Claim as Accepted ($CDN)	Reviewed Claim as Disputed ($CDN)	Secured ($CDN)	Unsecured ($CDN)
Total Claim				

Reasons for Dispute (attach additional sheet and copies of all supporting documentation if necessary):

_____

_____

_____

_____

Signature of Individual: _____

Date: _____

(Please print name): _____

Telephone Number: (____) _____

Facsimile Number: (____) _____

Email Address: _____

Full Mailing Address:

_____

_____

THIS FORM AND SUPPORTING DOCUMENTATION TO BE RETURNED BY REGISTERED MAIL, PERSONAL SERVICE, E-MAIL (IN PDF FORMAT), FACSIMILE OR COURIER TO THE ADDRESS INDICATED HEREIN AND TO BE RECEIVED BY 5:00 P.M. (MOUNTAIN TIME) ON THE DAY WHICH IS FOURTEEN (14) DAYS AFTER THE DATE OF THE NOTICE OF REVISION OR DISALLOWANCE.

Address for Service of Notices of Dispute:

The Monitor
Ernst & Young Inc., the Court-appointed Monitor of SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 3191278 Nova Scotia Company and 1380331 Alberta ULC
Attn: Jessica Caden
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1000, 440-2nd Avenue S.W.
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T2P 5E9
E-mail: jessica.caden@ca.ey.com
Telephone: (403) 206-5153
Fax: (403) 206-5075

SCHEDULE "F"

NEWSPAPER NOTICE

NOTICE TO CREDITORS OF THE APPLICANTS LISTED HEREIN
(hereinafter referred to as the "Applicants")

Applicants:
SemCanada Crude Company
SemCAMS ULC
SemCanada Energy Company
A.E. Sharp Ltd.
CEG Energy Options, Inc.
3191278 Nova Scotia Company
1380331 Alberta ULC

RE: NOTICE OF CLAIMS PROCESS FOR THE APPLICANTS PURSUANT TO THE *COMPANIES' CREDITORS ARRANGEMENT ACT* ("CCAA")

This notice is being published pursuant to an order of the Honourable Madam Justice B.E.C. Romaine of the Court of Queen's Bench of Alberta dated October 22, 2008 (the "**Claims Process Order**").

Any person having a Pre-Filing Claim against an Applicant arising prior to the applicable Filing Date of such Applicant, should send a Proof of Claim to such Applicant c/o Ernst & Young Inc., in its capacity as the court appointed Monitor of the Applicants, to be received by no later than **5:00 p.m. (Mountain Time) on December 1, 2008** (the "**Claims Bar Date**").

Proofs of Claim for Subsequent Claims arising after the applicable Filing Date as a result of a disclaimer or repudiation after the applicable Filing Date of any contract, lease, employment agreement, or other arrangement or agreements of any nature whatsoever, whether oral or written, and any amending agreement related thereto, must be received by the later of: (a) the Claims Bar Date, and (b) 5:00 p.m. (Mountain Time) on the day which is 30 days after the date of the applicable repudiation or disclaimer.

The Filing Date in respect of (i) SemCanada Crude Company and SemCAMS ULC is July 22, 2008; (ii) SemCanada Energy Company, CEG Energy Options, Inc. and A.E. Sharp Ltd. is July 24, 2008; and (iii) 3191278 Nova Scotia Company and 1380331 Alberta ULC is July 30, 2008.

A separate Proof of Claim must be filed for a Claim against each of the Applicants.

PROOFS OF CLAIM WHICH ARE NOT RECEIVED BY THE APPLICABLE BAR DATES SPECIFIED HEREIN WILL BE BARRED AND EXTINGUISHED FOREVER.

Action No. 0801-08510 2008

IN THE COURT OF QUEEN'S BENCH
OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

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 SEMCANADA CRUDE COMPANY, SEMCAMS ULC, SEMCANADA ENERGY COMPANY, A.E. SHARP LTD., CEG ENERGY OPTIONS, INC., 3191278 NOVA SCOTIA COMPANY and 1380331 ALBERTA ULC

Applicants

ORDER

BLAKE, CASSELS & GRAYDON LLP
Barristers and Solicitors
3500, 855 - 2nd Street S.W.
Calgary, Alberta
T2P 4J8

A. Robert Anderson, Q.C./Linc Rogers
Phone: (403) 260-9624
Fax: (403) 260-9700

File No: 86684/22

TAB 5

2012 ABQB 489
Alberta Court of Queen's Bench

SemCanada Crude Co., Re

2012 CarswellAlta 1399, 2012 ABQB 489, [2012] A.W.L.D. 4492, 219 A.C.W.S. (3d) 755, 546 A.R. 203, 93 C.B.R. (5th) 188

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 SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options Inc. and 1380331 Alberta ULC

B.E. Romaine J.

Judgment: July 31, 2012 *
Docket: Calgary 0801-08510

Counsel: A. Robert Anderson, Q.C., Doug Schweitzer for SemCAMS ULC
Anthony Jordan, Q.C. for Celtic Exploration Ltd.
Ashley John Taylor for Bank of America, N.A.

Subject: Insolvency; Natural Resources; Property; Public
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.ii Contractual rights
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Contractual rights
Contract between company and creditor was suspended upon initial order being made under Act — Creditor applied to file late claim for damages arising from suspension for period from initial order to implementation of plan of arrangement (POA) — Creditor further applied for declaration that its claims for damages subsequent to POA were not affected claims, or alternatively, to file late claims therefore — Company cross-applied to strike out creditor's statement of claim — Application dismissed, cross-application granted — Post-POA claims were subject to arrangement pursuant to s. 19(1) of Act as relating to contingent liabilities even though damages could not be ascertained at time proceedings commenced — Affected claims may result not only from repudiated contract but by virtue of proceedings themselves — All of creditor's claims were subject to POA that was given effect by sanction order — Application was made 2 $^{1}/_{2}$ years after claims bar date and 1 $^{1}/_{2}$ years after POA implementation — Failure to make timely claims was neither inadvertent nor in good faith and allowing application would prejudice other creditors and bring proceedings into disrepute.
Table of Authorities
Cases considered by *B.E. Romaine J.*:
Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp. (1992), [1992] 4 W.W.R. 309, 125 A.R. 45, 14 W.A.C. 45, 1 Alta. L.R. (3d) 257, 89 D.L.R. (4th) 84, 11 C.B.R. (3d) 193, 1992 CarswellAlta 281 (Alta. C.A.) — considered
Algoma Steel Corp. v. Royal Bank (1992), 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303, 11 C.B.R. (3d) 11, 1992 CarswellOnt 163 (Ont. C.A.) — considered

BA Energy Inc., Re (2010), 70 C.B.R. (5th) 24, 2010 CarswellAlta 1598, 2010 ABQB 507 (Alta. Q.B.) — considered
Blue Range Resource Corp., Re (2000), 2000 ABCA 285, 2000 CarswellAlta 1145, [2001] 2 W.W.R. 477, (sub nom. *Enron Canada Corp. v. National-Oilwell Canada Ltd.)* 193 D.L.R. (4th) 314, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352 (Alta. C.A.) — followed
Confederation Treasury Services Ltd., Re (1997), 43 C.B.R. (3d) 4, (sub nom. *Confederation Treasury Services Ltd. (Bankrupt), Re)* 96 O.A.C. 75, 1997 CarswellOnt 31 (Ont. C.A.) — referred to
SemCanada Crude Co., Re (2010), 2010 ABQB 531, 2010 CarswellAlta 1702, 495 A.R. 367, 71 C.B.R. (5th) 176, 33 Alta. L.R. (5th) 245 (Alta. Q.B.) — referred to
SemCanada Crude Co., Re (2010), 76 C.B.R. (5th) 1, 100 C.P.C. (6th) 221, 48 Alta. L.R. (5th) 58, (sub nom. *Celtic Exploration Ltd. v. SemCAMS ULC)* 510 A.R. 101, (sub nom. *Celtic Exploration Ltd. v. SemCAMS ULC)* 527 W.A.C. 101, 2010 CarswellAlta 2459, 2010 ABCA 403 (Alta. C.A.) — referred to
West Bay SonShip Yachts Ltd., Re (2009), 49 C.B.R. (5th) 159, 71 C.C.E.L. (3d) 45, (sub nom. *West Bay SonShip Yachts Ltd. v. Esau)* 446 W.A.C. 203, (sub nom. *West Bay SonShip Yachts Ltd. v. Esau)* 265 B.C.A.C. 203, 306 D.L.R. (4th) 294, 89 B.C.L.R. (4th) 82, [2009] 4 W.W.R. 415, 2009 BCCA 31, 2009 CarswellBC 139 (B.C. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 121(1) — considered

s. 121(2) — considered

s. 135 — considered

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

Generally — referred to

s. 2(1) — referred to

s. 2(1) "claim" — referred to

s. 12 — considered

s. 19 — considered

s. 19(1) — considered

s. 19(1)(a) — considered

s. 19(1)(a)(i) — considered

s. 19(1)(b) — considered

s. 19(2) — considered

s. 20(1)(a) — considered

APPLICATION by creditor to file late amended claims in proceedings under *Companies' Creditors Arrangment Act*; CROSS-APPLICATION by company to strike out creditor's statement of claim.

***B.E. Romaine J.*:**

Introduction

1 Celtic Exploration Ltd. applies for relief arising from the suspension of an inlet gas purchase agreement (the "IGPA") that it had entered into with SemCAMS ULC. The IGPA was suspended in July, 2008 in connection with SemCAMS' filing for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, and was the subject of reasons for decision dated August 27, 2010, cited as [*SemCanada Crude Co., Re*] 2010 ABQB 531 (Alta. Q.B.) (the "IGPA decision"). Leave to appeal the IGPA decision was denied on December 17, 2010 [*SemCanada Crude Co., Re*, 2010 CarswellAlta 2459 (Alta. C.A.)].

2 Celtic seeks an order (i) permitting it to file a late amended claim for damages arising from the suspension of the IGPA for the period from July 22, 2008 (the date of the Initial Order in the CCAA proceedings) to and including November 30, 2009 when the Plan of Arrangement (the "Plan") came into effect and SemCAMS emerged from the protection of the CCAA (the "CCAA Period"), and (ii) declaring that its claims for suspension damages for the periods from December 1, 2009 to and including September 30, 2009 (the "Post Plan Implementation Period") and from October 1, 2010 onwards (the "Post October 2010 Period") are not Affected Claims compromised, barred and released by the Plan or otherwise.

3 Alternatively, in the event that the Court finds that the suspension damages claims for the Post Plan Implementation Period and the Post October 2010 Period are subject to the claims process established under the CCAA proceedings (the "Claims Process") and are therefore Affected Claims as defined in the Plan, Celtic seeks an order permitting it to file a late amended claim for those damages.

4 SemCAMS objects to Celtic's application and, in response, has brought an application pursuant to which it seeks an order declaring that (i) Celtic's proposed damages claim, including its claim for suspension damages arising from the CCAA Period, the Post Plan Implementation Period and the Post October 2010 Period, is subject to the Claims Process, (ii) the proposed damages claim is an Affected Claim within the meaning of the Plan that was comprised, released and barred by the Plan and the order approving and sanctioning the Plan dated October 27, 2009 (the "Sanction Order"), and (iii) Celtic is precluded from filing a late or amended claim. SemCAMS also seeks an order declaring the Statement of Claim filed by Celtic with respect to the proposed damages claim to be a breach of the Plan and the Sanction Order, and directing that it be struck out.

5 The Bank of America (the "BA") as Agent on behalf of the Secured Lenders of SemCAMS (as defined in the Plan) supports SemCAMS' application in so far that it submits that, if the proposed damages claim by Celtic is an Affected Claim, it should be declared to be barred, extinguished and released by the Plan and Sanction Order and Celtic should not be allowed to file any late or amended claim.

Issues

6 The main issues arising from these applications are as follows:

> a) Are Celtic's claims for suspension damages for the Post Plan Implementation Period and/or the Post October 2010 Period "Affected Claims" under the CCAA proceedings, and therefore subject to the Claims Process?
>
> b) Should Celtic be allowed to file a late amended claim for suspension damages during the CCAA Period? If Celtic's claims for suspension damages for the Post Plan Implementation Period and/or the Post October 2010 Period are "Affected Claims", should Celtic be allowed to file a late claim for these damages?
>
> c) Should Celtic's Statement of Claim be struck out?

Analysis

a) Are Celtic's claims for suspension damages for the Post Plan Implementation Period and/or the Post October 2010 Period "Affected Claims" under the CCAA proceedings and therefore subject to the Claims Process?

7 As part of a Settlement Agreement dated March 18, 2011 and approved by the Court, Celtic agreed that, if its claim for suspension damages for the CCAA Period was found not to be barred by the Claims Process Order, it would not take the position

that this portion of its damages claim would be other than an unsecured claim compromised by the Plan. Thus, the only issue with respect to any damages that Celtic submits it may have a claim to during the CCAA Period is whether Celtic should be allowed to amend its previously filed Proof of Claim to include damages arising from the suspension of the IGPA during this period. This issue will be discussed later in this decision.

8 However, Celtic submits that its claims for damages arising from the suspension of the IGPA for the Post Plan Implementation Period and/or the Post October 2010 Period are not subject to compromise under the Plan.

Relevant Facts

9 To understand the submissions that have been made on this issue, it is necessary to refer to some of the long and complicated history of this claim and the prior litigation between the parties. I described in paragraphs 3 through 53 of the IGPA decision the nature of the contractual relationship between SemCAMS and Celtic and what occurred between July 22, 2008, the date of the Initial Order under the CCAA, and February, 2010 when the application that resulted in that decision was heard, and those paragraphs are incorporated into this decision for clarity.

10 I found in the IGPA decision that an agreement had been reached between SemCAMS and Celtic to suspend the IGPA because of SemCAMS' inability to market sales gas and related product as a result of the CCAA proceedings: para. 103. I found that parties to a contract may by mutual agreement suspend a contract even if the contract itself does not specifically provide for suspension: para. 110. Specifically, I found that Celtic purported to suspend the IGPA, given SemCAMS' anticipatory breach of its obligations to market the sales gas and products, and that SemCAMS agreed to the suspension.

11 Celtic submits that I made a finding of fact in the IGPA decision that Celtic had exercised a right under the IGPA to suspend delivery of natural gas, and identifies that right as arising from Section 10.2 of the Gas EDI Base Contract for Sale and Purchase of Natural Gas that forms part of the IGPA. This is an out-of-context interpretation of paragraph 111 of the IGPA decision. Section 10.2 of the Gas EDI Base Contract was not in issue before me at the time of the IGPA decision, and I made no finding that the mutual agreement to suspend the contract arose from any right specifically referred to in the IGPA. At any rate, as SemCAMS notes, the precondition of notice of the intention to exercise Section 10.2 required by the contract was never given by Celtic to SemCAMS at the time of suspension. There was only an anticipatory, and not an actual, breach of the IGPA at the point of suspension. In its submissions on this point, Celtic ignores the fact that Section 10.2 of the Gas EDI Base Contract only allows a short-term suspension, and not the lengthy suspension that I found the parties had agreed to. This provision has no connection or application to the finding of suspension I made in the IGPA decision.

12 Celtic submits that it had a unilateral right to reinstate performance under the IGPA effective October 1, 2010 for various reasons. SemCAMS disagrees, but submits that whether or not Celtic had that unilateral right makes no difference to the issue of whether the damages claims for either the Post Plan Implementation Period or the Post October 2010 Period are subject to the CCAA proceedings and should have been part of the Claims Process, or whether these claims were released and discharged by the Plan and the Plan Sanction Order. I agree that, given the decisions I have reached on these issues, it is not necessary that I make any findings with respect to the merits of the reinstatement issue, other than the comments I have made with respect to the applicability of Section 10.2 of the Gas EDI Base Contract and comments made in the IGPA decision.

13 Prior to the Claims Bar Date of December 1, 2008 set out in the Claims Process Order, Celtic filed a Proof of Claim against SemCAMS that did not include a contingent or other claim for suspension damages arising from the IGPA.

14 SemCAMS held a meeting of its creditors to consider the Plan on October 8, 2009. It received the requisite creditor support and applied for, and was granted, the Sanction Order on October 26, 2009. Celtic voted on the Plan and was served with a copy of the Sanction Order. The Plan Implementation Date was November 30, 2009.

15 After the application that resulted in the IGPA decision was heard, but before a decision was released, Celtic purchased an interest in the KA Plant and became a party to the CO & O Agreement with SemCAMS and the other joint owners of the KA Plant. In July, 2010, correspondence was exchanged between SemCAMS and Celtic on the issue of whether gas delivered by Celtic to the KA Plant would thenceforth be processed pursuant to the CO & O Agreement or the IGPA. Celtic advised

SemCAMS on September 7, 2010 that it proposed to reinstate deliveries under the IGPA effective October 1, 2010 for all of its gas other than gas that was dedicated to the KA Plant by reason of the CO & O Agreement. On September 30, 2010, SemCAMS advised Celtic that Celtic's change in status to a joint owner of the KA Plant and a counterparty to the CO & O Agreement made it impossible to reinstate the IGPA unless it was first amended to address certain issues, including exclusion of Plant Area Gas. Further correspondence followed.

16 On October 15, 2010, SemCAMS set out the terms of an amended IGPA that at the time SemCAMS was willing to execute. Celtic did not accept these offered terms.

17 On February 14, 2011, Celtic advised SemCAMS that it took the position that it had unilaterally reinstated performance of the IGPA effective October 1, 2010, and that SemCAMS was therefore in breach of the agreement. The following day, it filed a Statement of Claim alleging that the granting of the Initial Order under the CCAA Proceedings was an event of default under the IGPA, and that Celtic, as the non-defaulting party, suspended performance of all transactions under the IGPA with the agreement of SemCAMS. Celtic claims damages arising from this suspension.

18 SemCAMS advised Celtic on March 17, 2011 that, in its opinion, the IGPA could not be reinstated unilaterally, and restated its pervious position. SemCAMS also advised Celtic that, if it was found that Celtic could unilaterally reinstate the IGPA effective October 1, 2010 (which SemCAMS denied was the case), SemCAMS gave notice of termination of the IGPA effective March 31, 2013.

19 Pursuant to the Settlement Agreement, SemCAMS and Celtic jointly instructed the Monitor to hold the amount of $900,000 of surplus funds in the SemCAMS' Ordinary Creditors Pool under the Plan as a reserve for the damages claims. The Settlement Agreement also provides that in the event the damages claims, or any portion of such claims, are determined to be Affected Claims compromised by the Plan and that such Affected Claims are not determined to be barred by the Claims Process Order, the Plan or the Plan Sanction Order, Celtic will only be entitled to a distribution from the damages reserve of the lesser of 4% of such proven damages claim and the amount in the damages reserve, if any. The Monitor is currently holding the damages reserve.

Analysis

20 On the issue of whether the damages claims for the Post Plan Implementation Period and the Post October 2010 Period are compromised or otherwise affected by the CCAA proceedings, Celtic references Section 19 of the CCAA, the Plan itself, the Plan Sanction Order and what it refers to as the purpose of the CCAA.

21 The relevant portions of Section 19(1) of the CCAA are as follows:

> 19.(1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are
>
> (a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of
>
> (i) the day on which proceedings commenced under this Act, and
>
> . . . . .
>
> (b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) ...
>
> [emphasis added]

Section 19(2) does not apply in this case.

22 As noted by SemCAMS, Section 19(1) was not proclaimed in force until September 18, 2009, which was after the Initial Order was granted, but prior to the Sanction Order. It may thus be argued that Section 19(1) does not apply to this issue, but I am

satisfied that it would not make a difference to Celtic's application if former Section 12 was the applicable statutory provision, and I have conducted the analysis under Section 19.

23 Celtic submits that Section 19(1) permits the compromise of debts and liabilities in respect of two time periods: the period up to commencement of proceedings under the CCAA and claims that relate to debts or liabilities to which the debtor may become subject before the Sanction Order in respect of obligations incurred by the debtor before the commencement of proceedings.

24 This interpretation of Section 19(1) ignores the words "that relate to liabilities, present or future" that modify the term "claims". It is clear that SemCAMS was subject to the possibility of liability under the IGPA before the CCAA proceedings commenced. The claims for suspension damages are claims that relate to the IGPA and to the suspension of the IGPA that occurred as a result of the CCAA proceedings. Section 19(1) does not limit the claims that may be dealt with by a Plan under the CCAA to presently existing liabilities. This is made clear by the addition of the word "future" in both Section 19(1)(a) and Section 19(1)(b).

25 The claims relating to the suspension of the IGPA during the CCAA Period and beyond are exactly the kind of anticipatory, future claims that are referenced in Section 19(1). A "claim" for the purpose of the CCAA includes any indebtedness, liability or obligation that would be provable under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended: Section 2(1) of the CCAA. Section 121(1) of the BIA defines "provable claims" as being:

> ... (a)ll debts and liabilities, present and future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt, or to which the bankrupt may become subject before the bankrupt's discharge by reasons of any obligation incurred before the day on which the bankrupt becomes bankrupt ...

26 Section 121(2) of the BIA makes it clear that this includes contingent or unliquidated claims, with the procedure for evaluating contingent or unliquidated claims described in Section 135. Section 20(1)(a) of the CCAA describes how the amount of an unsecured claim that is a provable claim under the BIA may be determined by a court on summary application if it is not admitted by the debtor company.

27 It may well have been difficult to value a contingent claim for future suspension damages that was filed before the Claims Bar Date, but that is often the nature of a contingent or future claim. In particular, there may have been issues relating to when the IGPA could reasonably be reinstated. As noted by SemCAMS, contingent claims are routinely filed in CCAA proceedings and in proceedings under the BIA.

28 In *Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp.*, [1992] 4 W.W.R. 309 (Alta. C.A.), a fact scenario that occurred after the date of bankruptcy based on a prebankruptcy contract was held to give rise to a claim provable in the bankruptcy. The issue was whether mortgagees could claim in the bankruptcy for costs incurred after the date of bankruptcy, where the claims for costs were based on indemnities by the bankrupt found in prebankruptcy mortgages.

29 The trustee in *Abacus Cities* submitted that future claims had to be limited to those that could be valued before they arise, and that a future liability that could not be calculated in advance could not be a provable claim. The Court commented as follows at page 318:

> I agree that this rule can limit future claims that otherwise fall within the scope of entitlement. In fact, some may not be provable when the trustee calls for proof ...
>
> One must take care not to overstate the rule. It does not eliminate contingent or future claims. It merely subjects them to a valuation process: ...

30 SemCAMS concedes that Celtic would not have known by the Claims Bar Date if and when the IGPA would be reinstated, but argues that Celtic could have claimed damages on the assumption that the IGPA would not be reinstated. There could have been a summary determination of the claim or a reservation for the full amount of claimed damages. Or, the Court may have

determined that the contingent claim was too remote or speculative to be properly considered a contingent claim and thus not a provable claim: *Confederation Treasury Services Ltd., Re*, 1997 CarswellOnt 31, 43 C.B.R. (3d) 4, *(*sub nom. *Confederation Treasury Services Ltd. (Bankrupt), Re)* 96 O.A.C. 75 (Ont. C.A.) at para. 4.

31 Celtic submits that, if this was an ordinary action alleging breach of contract, it could not claim continuing damages for any future period of time in the absence of a repudiation of the contract. It therefore submits that it would not have a claim for the alleged suspension damages after the Plan Implementation Date that could be subject to compromise. While it may be true that a creditor cannot sue for contingent damages in the ordinary course, the legislative framework of the CCAA and the BIA allows debtor companies to deal with contingent claims in insolvency proceedings. There was no reason why Celtic could not have filed such a claim.

32 In a similar argument, Celtic submits that, in order for its claim for suspension damages to be a claim that arises prior to the Plan Implementation Date, it must be an amount of damages that Celtic would have been entitled to recover within the CCAA Period. Again, this ignores the fact that the provisions of the CCAA and the BIA allow the debtor to deal with future and contingent claims within the ambit of the CCAA proceedings.

33 Celtic also submits that its claim for suspension damages does not fall within the type of claim that can be compromised as set out in Section 19(1) because it is not a "debt". That is true, but a provable claim may be a "debt" or a "liability". As noted by the British Columbia Court of Appeal in *West Bay SonShip Yachts Ltd., Re*, 2009 CarswellBC 139, 2009 BCCA 31, [2009] B.C.W.L.D. 1230, 71 C.C.E.L. (3d) 45, 49 C.B.R. (5th) 159, [2009] 4 W.W.R. 415, 89 B.C.L.R. (4th) 82, 265 B.C.A.C. 203, 446 W.A.C. 203, 306 D.L.R. (4th) 294 (B.C. C.A.) at para. 22, "liability" is a broad term that is most often used to describe an unliquidated or unspecified legal obligation, and "debt" is a narrower term that means a specific kind of obligation for a liquidated or certain sum. The definition of "claim" under the CCAA includes both.

34 Celtic relies in its submissions on the fact that the IGPA was not repudiated. Section 19(1) does not restrict the type of claims that may be compromised under CCAA proceedings to claims arising solely from repudiated contracts. Section 19(1)(b) anticipates that claims may arise by virtue of the CCAA proceedings themselves, and allows the debtor company to put forward for approval by its creditors an arrangement that would compromise those claims. The claim for damages for suspension of the IGPA is that type of claim. It arises from and relates to the suspension of the IGPA that occurred by reason of the CCAA filing, and the inability of SemCAMS as a result of such filing to continue to market the Celtic gas.

35 Celtic itself concedes that there is no basis in the IGPA itself to distinguish its right to damages before the Plan Implementation Date of November 30, 2009 and after. The obligation to pay damages arising from the suspension is not a a new breach of the IGPA that occurred after the Plan Implementation Date, but a claim of continuing damages that arise from the suspension of the IGPA, whether or not Celtic has the right to unilaterally reinstate the agreement.

36 I find that the claim for suspension damages as it relates to the Post Plan Implementation Period is a claim that may be dealt with by a compromise under Section 19(1) of the CCAA.

37 Celtic seeks to distinguish its claim for suspension damages for the Post October 2010 Period onward on the basis that SemCAMS' alleged refusal to accept deliveries under the IGPA after Celtic unilaterally purported to reinstate the agreement was a "distinct" breach of the IGPA, and not the same as either the failure to make payments under the IGPA which precipitated the suspension, or the suspension itself which gives rise to an obligation to pay damages as long as it remains in effect.

38 I cannot agree that this alleged refusal to reinstate the IGPA was a fresh breach, even if Celtic was entitled to act unilaterally. The issue of reinstatement of the IGPA and whether it could be accomplished unilaterally or required the consent of both parties is an issue that arises from the suspension, and is not a new issue under the IGPA. Celtic seeks to distinguish the IGPA as an executory contract, the non-performance of which can give rise to new breaches, but it is not the non-performance of a properly reinstated executory contract that is at issue here, but when and how the IGPA is to be reinstated. The damages claimed for the alleged breach in the Post October 2010 Period are the same type of damages claimed for the preceding periods. It is not necessary for the analysis of the issue before me that I decide whether Celtic was entitled to unilaterally reinstate the IGPA, and

I do not do so. However, I find that the claim for suspension damages in the Post October 2010 Period also is a "claim" that may be dealt with by a compromise under Section 19(1) as this claim does not arise from a fresh breach.

39 I turn next to the portions of the Plan that may be relevant to the issue of whether the damages claim for the Post Plan Implementation Period and the Post October 2010 Period were compromised; Section 8.1 of the Plan states as follows:

> On the Plan Implementation Date ... the Company ...shall be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages ...on account of any liability, obligation, demand or cause of action of whatever nature which any Creditor or other Person may be entitled to assert ...whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the Plan Implementation Date in any way relating to, arising out of or in connect with the Claims, the business and affairs of the Company whenever or however conducted, the Plan, the CCAA Proceedings, any Claim that has been barred or extinguished by the Claims Process Order and all Claims arising out of such actions or omissions shall be forever waived and released, all to the full extent permitted by Law; ...

40 As I have found that the claim for suspension damages during the Post Implementation Period and the Post October 2010 Period are claims that may be subject to compromise under Section 19(1) of the CCAA, it is clear that they are caught by Section 8.1 of the Plan. Paragraphs 28 and 45 of the Sanction Order give effect to Section 8.1 as follows:

> 28. Pursuant to and in accordance with the Plan, any and all Affected Claims of any nature against the Company, ... shall be forever compromised, discharged and released, and the ability of any Person to proceed against the Company in respect of or relating to any Affected Claims shall be forever discharged and restrained, and all proceedings with respect to, in connection with or relating to such Affected Claims are hereby permanently stayed, subject only to the right of Affected Creditors to receive the distributions pursuant to the Plan and this Plan Sanction Order in respect of their Affected Claims.
>
> . . . . .
>
> 45. Pursuant to and in accordance with Section 8.1 of the Plan, on the Plan Implementation Date the Released Parties shall be released and discharged from any and all demands, claims, actions, causes of action ...on account of any liability, obligation, demand or cause of action of whatever nature which any Creditor or other Person may be entitled to assert...whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the Plan Implementation Date in any way relating to, arising out of or in connection with the Claims, the business and affairs of the Company whenever or however conducted ...any Claim that has been barred or extinguished by the Claims Process Order and all Claims arising out of such actions or omissions shall be forever waived and released, all to the full extent permitted by Law: ...

41 As noted by SemCAMS, the only potential events of default under the IGPA at the time it was suspended were SemCAMS' insolvency and its commencement of CCAA proceedings. Any claim for damages arising from the suspension constitute an Affected Claim. Those potential events of default were cured by the stay imposed under the Initial Order and by the Sanction Order, which provided for a waiver of all defaults. The Affected Claims are caught by the release and discharge contained in section 8.1 of the Plan, which was given effect by the Sanction Order.

42 Celtic submits that it would be inconsistent with the general purposes of the CCAA if SemCAMS and its counterparties remained bound by existing contracts, but SemCAMS could not be compelled to fully perform its obligations as they arise as a result of the Sanction Order. That would certainly be true if it was in fact the case. However, while Celtic and SemCAMS have not been able to resolve their difference over what is required or necessary to reinstate the IGPA, that does not mean that SemCAMS has been relieved of its obligations under the agreement, or relieved from a claim for damages arising from the suspension.

43 The fact that the IGPA was suspended by mutual agreement and not terminated implies an obligation to reinstate the agreement when the impediment to performance, here the CCAA proceedings, has ceased to exist. However, changes in the

status and positions of the parties in the interim must also be taken into consideration, and it is on that issue that the parties are unable to agree. If SemCAMS failed to agree to the reinstatement of the IGPA on terms that adequately reflected the changed circumstances, the continued suspension would give rise to a damages claim.

44 However, such a claim would be an Affected Claim within the meaning of the CCAA proceeding that could be, and was, compromised by the Plan and the Sanction Order.

b) Should Celtic be allowed to file a late amended claim for suspension damages during the CCAA Period? If Celtic's claims for suspension damages for the Post Plan Implementation Period and/or the Post October 2010 Period are "Affected Claims", should Celtic be allowed to file a late claim for these damages?

45 Celtic submits that, in the event its claims for suspension damages are found to be Affected Claims under the CCAA proceedings, it should be permitted to amend its previouslyfiled Proof of Claim to claim such damages. While Celtic divides its claims into three periods: the period it characterizes as the "CCAA Period", the Post Plan Implementation Period and the Post October 2010 Period, I have found that the claims for damages for suspension of the IGPA for all of these periods fall within the definition of "claims" for the purpose of Section 19 and were thus subject to compromise by the Plan and the Sanction Order.

46 The only distinction that may be made among these three periods of time with respect to a late filing application relates to whether the claim for suspension damages for the CCAA Period would be an amendment to the Proof of Claim filed by Celtic on November 28, 2008 or a new claim.

47 I find that the claims for suspension damages for all three periods of time are new claims. The previously filed Proof of Claim related to amounts owing for the delivery of raw gas to the KA Plant in the months prior to the Initial Order. The proposed claims for suspension damages relate to losses incurred as a result of the suspension of the IGPA after the Initial Order was granted, arising from Celtic's inability to sell its gas to third parties at the same price it would have received under the IGPA. Thus, there is no reason to distinguish among the three periods of time with respect to the question of whether Celtic should be allowed to file a late claim.

48 I must agree with the BA and SemCAMS that Celtic's application to file a claim or claims for suspension damages at this late date is extraordinary. Celtic did not file its application until April, 2011, approximately two and a half years after the Claims Bar Date of December 1, 2008 and approximately one and a half years after the Plan Implementation Date of November 30, 2009.

49 In para. 26 of *Blue Range Resource Corp., Re*, 2000 ABCA 285 (Alta. C.A.), the Court of Appeal set out the appropriate criteria to apply to late claims in CCAA proceedings:

> 1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
>
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
>
> 3. If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?
>
> 4. If relevant prejudice is found that cannot be alleviated, are there any other considerations that may nonetheless warrant an order permitting late filing?

50 As I noted in *BA Energy Inc., Re*, 2010 ABQB 507 (Alta. Q.B.) at para. 34:

> ...in identifying these criteria and applying them to specific late claims, Wittmann, J.A. favoured a "blended approach", taking into consideration both the standards set out under the *Bankruptcy and Insolvency Act*, and the U. S. Bankruptcy Rules, and informed by concepts drawn from the approaches taken in a variety of areas of law when dealing with late

> notice or delays in process. It is clear from the nature of the criteria that the question of whether a late claim should be accepted is an equitable consideration, taking into account the specific circumstances of each case.

1. Inadvertence and Good Faith

51 Celtic submits that "inadvertence" should not be taken too literally. However, Wittmann, J.A. noted at para. 27 of *Blue Range Resource Corp., Re* that "inadvertence" in the context of the first criterion includes carelessness, negligence or accident and is unintentional.

52 Celtic's failure to make a timely claim was not unintentional. It submits that it "simply" did not perceive it had a right to damages because it did not believe that the IGPA had been suspended. Celtic was aware of the CCAA proceedings from the time of the Initial Order and retained counsel with respect to the proceedings throughout. It filed a Proof of Claim for a different kind of claim. It cannot argue that its failure to file a claim was careless, negligent or accidental: it was Celtic's deliberate choice, acting with the advice of counsel, to maintain its position that the IGPA had not been suspended, but amended, without providing for the possibility that this position would be found to be incorrect and that it may have a claim for damages arising from a suspension. The financial implications to Celtic if the IGPA was found to be suspended were made clear to it when it received draft third party gas processing agreements from SemCAMS on August 26, 2008. In fact, Celtic itself calculated its suspension losses for the period from July 22, 2008 to September 30, 2009 in an affidavit filed in response to the application that resulted in the IGPA decision.

53 Celtic submits that the possibility of suspension damages must also have been apparent to SemCAMS and the BA before the Plan was negotiated and presented to creditors. That is beside the point: the Claims Process in CCAA proceedings requires creditors to identify and to file their claims or be barred from pursuing them. It is not up to the debtor company to guess at potential claims, or whether creditors will decide to pursue them.

54 Celtic also submits that its claims for suspension damages are not claims for a "debt". While this is true, the Claims Process provides for contingent claims for liabilities and that is what SemCAMS submits Celtic should have filed.

55 The Claims Process Order of October 22, 2008, which was served on Celtic and its counsel, makes it clear that "claim" includes contingent claims, defining "claim" as including:

> ... any ... claim ... made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including without limitation ... by reasons of any breach of contract or other agreement (oral or written) ... and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown ... and whether or not any right or claim is executory or anticipatory in nature including ... with respect to any matter, action, cause or chose in action whether existing at present or commenced in the future ... [emphasis added]

The Monitor's Seventh Report dated October 21, 2008 provided a thorough summary of the claims process.

56 Had Celtic filed its claim for suspension damages, current and future, such claim would have been determined during the Claims Process or there would have been a reservation for the full amount of its claimed damages.

57 The first criterian of the *Blue Range Resource Corp., Re* analysis requires that I consider whether Celtic acted in good faith.

58 SemCAMS and the BA submit that Celtic knew it had a potential claim for damages arising from the suspension of the IGPA as early as August 28, 2008, more than three months prior to the Claims Bar Date, or at any rate, by September 22, 2008, when it sent a letter to SemCAMS asserting that it had not in fact suspended the sale of gas under the IGPA. Celtic had by August 21, 2009 received the Plan and the Monitor's 20th Report, which identifies and alerts stakeholders to the fact that Affected Claims, which by definition include contingent claims, will be compromised, discharged and released under the Plan. Certainly, the question of suspension damages was a live issue during the application that led to the IGPA decision of August

27, 2010, and Celtic was well aware from submissions that were made that SemCAMS took the position that any such claim was barred by the Claims Process Order and compromised under the Plan. Despite all this, Celtic did not bring its application to file a late claim until April, 2011. I cannot find that Celtic acted in good faith by delaying its claim.

2. Prejudice Caused by the Delay

59 Celtic submits that, since during the application that gave rise to the IGPA decision, SemCAMS has indicated that it may, under certain conditions, consider agreeing to a late - filed claim for suspension damages. It argues that this is an indication that there is in fact no prejudice to SemCAMS or the ordinary creditors from its late claims. SemCAMS' offer to accept a late filed claim was made at a far earlier date than this application for leave to file a late claim, and at a time when the claim was for far less than the amount now claimed.

60 SemCAMS points out that several of the conditions to this offer to accept a late claim have not been met. The mere fact that SemCAMS considered agreeing to a late claim at an earlier time and under different circumstances does not indicate lack of prejudice now.

61 Celtic concedes that a late claim will prejudice the BA and its group of secured creditors, but submits that this should not be a factor since the BA has already agreed to an Ordinary Creditors' Pool, and the size of that pool will not increase as a result of granting leave to Celtic to amend its Proof of Claim.

62 As I indicated in *BA Energy Inc., Re*, the objective of a claims procedure order is to attempt to ensure that all legitimate creditors come forward on a timely basis. A claims procedure provides the debtor company and the Monitor with the information necessary to fashion a plan that may prove acceptable to the requisite majority of creditors, given the financial circumstances of the debtor, and that may be sanctioned by the Court. The fact that accurate information relating to the amount and nature of claims is essential for the formulation of a successful plan requires that the specifics of a claims procedure order should generally be observed and enforced, and that the acceptance of a later claim should not be an automatic outcome. The applicant for such an order must provide some explanation for the late filing and the reviewing court must consider any prejudice caused by the delay.

63 The claims procedure process was developed to give creditors a level playing field with respect to their claims and to discourage tactics that would give some creditors an unjustified advantage. Situations that give rise to concerns of improper manipulation of the process by a creditor must be carefully considered.

64 Celtic's proposed suspension damages claim would represent an approximately 22% increase in the total value of Ordinary Claims filed against SemCAMS. The new claim increases Celtic's total claims by about 66%. The Plan and the Monitor's Report made it clear that the Secured Lenders represented by the BA agreed to refrain from making a claim against SemCAMS in respect of their first-ranking, fully secured claim in part because they would receive the surplus remaining in the Ordinary Creditors Pool after the claims of ordinary creditors had been satisfied. It is a reasonable inference that this decision was made on the basis of claims that had been filed as of the Claims Bar Date, which did not include the Celtic $22.5 million suspension damages claim.

65 One of the tests for prejudice is whether a late claim causes another creditor to lose a realistic opportunity to do something it might otherwise have done: *Blue Range Resource Corp., Re* at para. 40. While it is true that the secured lenders as represented by the BA were likely aware that Celtic may have a potential claim for suspension damages, they were also entitled to rely on the Claims Bar Process, the release provisions of the Plan and the Sanction Order to expect some finality.

66 In *Blue Range Resource Corp., Re*, the applications to accept late claims were made within a few months of the plan sanction order. Here, the delay is much longer, and the decision in *Blue Range Resource Corp., Re* is clear that the timing of the late claim with respect to the stage of proceedings is a key consideration: para. 36.

67 If Celtic is able to file a late claim for suspension damages, the Secured Lenders could receive up to $900,000 less than they otherwise would. This is a material and significant claim, in contrast to the relatively minor value of late claims in *Blue Range Resource Corp., Re* that were filed after that plan was implemented.

68 It is noteworthy that the Secured Lenders did not have to consent to the amount that was made available to Ordinary Creditors in the Ordinary Creditors' Pool, as they had clear priority for their claim of approximately US $2.939 billion.

69 This application also gives rise to a potential issue of unequal treatment among creditors. There were other unsecured creditors with claims arising from inlet gas purchase agreements. If Celtic's application is successful, it is not impossible that such creditors would seek to file similar late claims for suspension damages.

70 I find that there is relevant prejudice to other creditors arising from the delay, and I am not satisfied that such prejudice can be alleviated by attaching any conditions to an order permitting late filing.

3. Other Considerations

71 It is relevant that Celtic brings its application to file a late claim after the Plan has been sanctioned and implemented. In *Re T. Eaton Company Limited et al*, May 5, 1999 98-CL-2586, Blair J. noted, in a case where notification of the claims bar process had "fallen through the cracks" with respect to one creditor such that she had no opportunity to file a claim, that permitting a creditor to file a late claim after plan sanction and implementation "is tantamount to altering or modifying the Plan", and that the jurisdiction to allow such a late claim should thus be "exercised sparingly and in exceptional circumstances only", citing *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11 (Ont. C.A.). While these comments pre-dated *Blue Range*, which is now the law in Alberta on this issue, the timing of such an application with reference to plan implementation is relevant to the issue of prejudice.

72 As previously described, this claim would be paid out of the Ordinary Creditors' Pool. It is clear that this large claim was not anticipated when the Pool was structured as part of the Plan and the BA consented to the Plan. The Plan specifically provides that it cannot be modified without the prior consent of BA as Agent of the secured creditors, acting reasonably, and, in the circumstances, it cannot be said that BA is acting unreasonably in opposing the application.

73 SemCAMS and the BA submit that to allow a creditor with full knowledge of the CCAA Proceedings and the Claims Process to ignore the Claims Bar Date and file a significant new claim more than two years after such date would throw the entire CCAA restructuring process into disrepute. I must agree. Celtic has no good or satisfactory reason to offer as to why it failed to file a contingent claim for suspension damages within a reasonable time. It decided on this strategy for its own reasons, and at its own peril. None of the factors set out in *Blue Range* or in *BA Energy Inc., Re* favour its application. The policy reasons that emphasize the need for certainty and finality in an approved and sanctioned plan and fairness of treatment to all creditors outweigh the prejudice to Celtic of disallowing a late claim. The application to file a late claim for suspension damages is thus dismissed.

c) Should Celtic's Statement of Claim be struck out?

74 Celtic alleges in its Statement of Claim that the granting of the Initial Order in the CCAA Proceedings was an event of default under the IGPA and that Celtic, as non-defaulting party, suspended performance of all transactions under the IGPA with the agreement of SemCAMS. I have found that the suspension damages claimed under the Statement of Claim are Affected Claims that may be, and were, compromised by the Plan and the Plan Sanction Order. Paragraph 44 of the Plan Sanction Order provides as follows:

> Any and all Persons shall be and are hereby stayed from commencing, taking, applying for or issuing or continuing any and all steps or proceedings ... declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against any Released Party in respect of all Claims and any other matter which is released pursuant to paragraphs 45 to 47, inclusive, of this Plan Sanction Order and Article 8 of the Plan.

75 The filing of the Statement of Claim is thus a breach of the Plan Sanction Order and accordingly is struck out.

Conclusion

76 In summary, I find that Celtic's claims for damages arising from the suspension of the IGPA, whether they arose during the CCAA Period, the Post Plan Implementation Period or the Post October 2010 Period are "Affected Claims" under the CCAA proceedings, subject to the Claims Process and to being compromised by the Plan. I dismiss Celtic's application to file an amended or new late claim for these damages. I find the Statement of Claim claiming such suspension damages to be a breach of the Sanction Order and, accordingly, I direct that it be struck out.

77 If the parties are unable to agree on costs, that issue may be addressed through written submissions filed with 45 days.

Application dismissed; cross-application granted.

Footnotes

* Leave to appeal refused at *SemCanada Crude Co., Re* (2012), 2012 ABCA 313, 2012 CarswellAlta 1829 (Alta. C.A.).

TAB 6

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

R.S.C. 1985, c. C-36, s. 11.02

S 11.02

Currency

11.02

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 10 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.

11.02(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.

11.02(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.

11.02(4)Restriction

Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Amendment History
2005, c. 47, s. 128; 2019, c. 29, s. 137

Currency
Federal English Statutes reflect amendments current to April 28, 2021
Federal English Regulations are current to Gazette Vol. 155:8 (April 14, 2021)

End of Document

TAB 7

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

9354-9186 Québec inc. v. Callidus Capital Corp.

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10,
1 B.L.R. (6th) 1, 317 A.C.W.S. (3d) 532, 444 D.L.R. (4th) 373, 78 C.B.R. (6th) 1

9354-9186 Québec inc. and 9354-9178 Québec inc. (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Rowe, Kasirer JJ.

Heard: January 23, 2020
Judgment: May 8, 2020
Docket: 38594

Proceedings: reasons in full to *9354-9186 Québec inc. v. Callidus Capital Corp.* (2020), 2020 CarswellQue 237, 2020 CarswellQue 236, Abella J., Côté J., Karakatsanis J., Kasirer J., Moldaver J., Rowe J., Wagner C.J.C. (S.C.C.); reversing *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), 2019 QCCA 171, EYB 2019-306890, 2019 CarswellQue 94, Dumas J.C.A. (ad hoc), Dutil J.C.A., Schrager J.C.A. (C.A. Que.)

Counsel: Jean-Philippe Groleau, Christian Lachance, Gabriel Lavery Lepage, Hannah Toledano, for Appellants / Interveners, 9354-9186 Québec inc. and 9354-9178 Québec inc.
Neil A. Peden, for Appellants / Interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)
Geneviève Cloutier, Clifton P. Prophet, for Respondent, Callidus Capital Corporation
Jocelyn Perreault, Noah Zucker, François Alexandre Toupin, for Respondents, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier
Joseph Reynaud, Nathalie Nouvet, for Intervener, Ernst & Young Inc.
Sylvain Rigaud, Arad Mojtahedi, Saam Pousht-Mashhad, for Interveners, Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements

XIX.3.e Miscellaneous

Headnote

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

Debtor sought protection under Companies' Creditors Arrangement Act (CCAA) — Debtor brought application seeking authorization of funding agreement and requested placement of super-priority charge in favour of lender — After its first plan of arrangement was rejected, secured creditor submitted second plan and sought authorization to vote on it — Supervising judge dismissed secured creditor's application, holding that secured creditor was acting with improper purpose — After reviewing terms of proposed financing, supervising judge found it met criteria set out by courts — Finally, supervising judge imposed super-priority charge on debtor's assets in favour of lender — Secured creditor appealed supervising judge's order — Court of Appeal allowed appeal, finding that exercise of judge's discretion was not founded in law nor on proper treatment of facts — Debtor and lender, supported by monitor, appealed to Supreme Court of Canada — Appeal allowed — By seeking authorization to vote on second version of its own plan, secured creditor was attempting to circumvent creditor democracy CCAA protects — By doing so, secured creditor acted contrary to expectation that parties act with due diligence in insolvency proceeding and was properly barred from voting on second plan — Supervising judge considered proposed financing to be fair and reasonable and correctly determined that it was not plan of arrangement — Therefore, supervising judge's order should be reinstated.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Divers

Débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — Débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement et a demandé l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur — Après que son premier plan d'arrangement ait été rejeté, la créancière garantie a soumis un deuxième plan et a demandé l'autorisation de voter sur ce plan — Juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie agissait dans un but illégitime — Après en avoir examiné les modalités, le juge surveillant a conclu que le financement proposé respectait le critère établi par les tribunaux — Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés d'une charge super-prioritaire en faveur du prêteur — Créancière garantie a interjeté appel de l'ordonnance du juge surveillant — Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits — Débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — En cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la créancière garantie tentait de contourner la démocratie entre les créanciers que défend la LACC — Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité et a été à juste titre empêchée de voter sur le nouveau plan — Juge surveillant a estimé que le financement proposé était juste et raisonnable et a eu raison de conclure que le financement ne constituait pas un plan d'arrangement — Par conséquent, l'ordonnance du juge surveillant devrait être rétablie.

The debtor manufactured, distributed, installed, and serviced electronic casino gaming machines. The debtor sought financing from a secured creditor, the debt being secured in part by a share pledge agreement. Over the following years, the debtor lost significant amounts of money, and the secured creditor continued to extend credit. Eventually, the debtor sought protection under the Companies' Creditors Arrangement Act (CCAA). In its petition, the debtor alleged that its liquidity issues were the result of the secured creditor taking de facto control of the corporation and dictating a number of purposefully detrimental business decisions in order to deplete the corporation's equity value with a view to owning the debtor's business and, ultimately, selling it. The debtor's petition succeeded, and an initial order was issued. The debtor then entered into an asset purchase agreement with the secured creditor whereby the secured creditor would obtain all of the debtor's assets in exchange for extinguishing almost the entirety of its secured claim against the debtor. The agreement would also permit the debtor to retain claims for damages against the creditor arising from its alleged involvement in the debtor's financial difficulties. The asset purchase agreement was approved by the supervising judge. The debtor brought an application seeking authorization of a proposed third-party litigation funding agreement (LFA) and the placement of a super-priority charge in favour of the lender. The secured creditor submitted a plan of arrangement along with an application seeking the authorization to vote with the unsecured creditors.

The supervising judge dismissed the secured creditor's application, holding that the secured creditor should not be allowed to vote on its own plan because it was acting with an improper purpose. He noted that the secured creditor's first plan had been rejected and this attempt to vote on the new plan was an attempt to override the result of the first vote. Under the circumstances, given that the secured creditor's conduct was contrary to the requirements of appropriateness, good faith, and due diligence, allowing the secured creditor to vote would be both unfair and unreasonable. Since the new plan had no reasonable prospect of success, the supervising judge declined to submit it to a creditors' vote. The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third-party litigation funding set out by the courts. Finally, the supervising judge imposed the litigation financing charge on the debtor's assets in favour of the lender. The secured creditor appealed the supervising judge's order.

The Court of Appeal allowed the appeal, finding that the exercise of the judge's discretion was not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention was justified. In particular, the Court of Appeal identified two errors. First, the Court of Appeal was of the view that the supervising judge erred in finding that the secured creditor had an improper purpose in seeking to vote on its plan. The Court of Appeal relied heavily on the notion that creditors have a right to vote in their own self-interest. Second, the Court of Appeal concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to the debtor's commercial operations. In light of this perceived error, the Court of Appeal substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. The debtor and the lender, supported by the monitor, appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Wagner C.J.C., Moldaver J. (Abella, Karakatsanis, Côté, Rowe, Kasirer JJ. concurring): Section 11 of the CCAA empowers a judge to make any order that the judge considers appropriate in the circumstances. A high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably. This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the CCAA proceedings they oversee.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the CCAA that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. One such constraint arises from s. 11 of the CCAA, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. For example, a creditor acts for an improper purpose where the creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the objectives of the CCAA. Supervising judges are best placed to determine whether the power to bar a creditor from voting should be exercised. Here, the supervising judge made no error in exercising his discretion to bar the secured creditor from voting on its plan. The supervising judge was intimately familiar with the debtor's CCAA proceedings and noted that, by seeking an authorization to vote on a second version of its own plan, the first one having been rejected, the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the CCAA protects. By doing so, the secured creditor acted contrary to the expectation that parties act with due diligence in an insolvency proceeding. Hence, the secured creditor was properly barred from voting on the second plan.

Interim financing is a flexible tool that may take on a range of forms, and third-party litigation funding may be one such form. Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best placed to answer. Here, there was no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context. While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the CCAA individually before reaching his conclusion, this was not itself an error. It was apparent that the supervising judge was focused on the fairness at stake to all parties, the specific objectives of the CCAA, and the particular circumstances of this case when he approved the LFA as interim financing. The supervising judge correctly determined that the LFA was not a plan of arrangement because it did not propose any compromise of the creditors' rights. The super-priority charge he granted to the lender did not convert the LFA into a plan of arrangement by subordinating creditors' rights. Therefore, he did not err in the exercise of his discretion, no intervention was justified and the supervising judge's order should be reinstated.

La débitrice fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. La débitrice a demandé du financement à la créancière garantie que la débitrice a garanti partiellement en signant une entente par laquelle elle mettait en gage ses actions. Au cours des années suivantes, la débitrice a perdu d'importantes sommes d'argent et la créancière garantie a continué de lui consentir du crédit. Finalement, la débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC). Dans sa requête, la débitrice a fait valoir que ses problèmes de liquidité découlaient du fait que la créancière garantie exerçait un contrôle de facto à l'égard de son entreprise et lui dictait un certain nombre de décisions d'affaires dans l'intention de lui nuire et de réduire la valeur de ses actions dans le but de devenir propriétaire de l'entreprise de la débitrice et ultimement de la vendre. La requête de la débitrice a été accordée et une ordonnance initiale a été émise. La débitrice a alors signé une convention d'achat d'actifs avec la créancière garantie en vertu de laquelle la créancière garantie obtiendrait l'ensemble des actifs de la débitrice en échange de l'extinction de la presque totalité de la créance garantie qu'elle détenait à l'encontre de la débitrice. Cette convention prévoyait également que la débitrice se réservait le droit de réclamer des dommages-intérêts à la créancière garantie en raison de l'implication alléguée de celle-ci dans ses difficultés financières. Le juge surveillant a approuvé la convention d'achat d'actifs. La débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement du litige par un tiers (AFL) et l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur. La créancière garantie a soumis un plan d'arrangement et une requête visant à obtenir l'autorisation de voter avec les créanciers chirographaires.

Le juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie ne devrait pas être autorisée à voter sur son propre plan puisqu'elle agissait dans un but illégitime. Il a fait remarquer que le premier plan de la créancière garantie avait été rejeté et que cette tentative de voter sur le nouveau plan était une tentative de contourner le résultat du premier vote. Dans les circonstances, étant donné que la conduite de la créancière garantie était contraire à l'opportunité, à la bonne foi et à la diligence requises, lui permettre de voter serait à la fois injuste et déraisonnable. Comme le nouveau plan n'avait aucune possibilité raisonnable de recevoir l'aval des créanciers, le juge surveillant a refusé de le soumettre au vote des créanciers. Le juge surveillant a décidé qu'il n'était pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agissait pas d'un plan d'arrangement. Après en avoir examiné les modalités, le juge surveillant a conclu que l'AFL respectait le critère d'approbation applicable en matière de financement d'un litige par un tiers établi par les tribunaux. Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés de la charge liée au financement du litige en faveur du prêteur. La créancière garantie a interjeté appel de l'ordonnance du juge surveillant.

La Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits, de sorte que, peu importe la norme de contrôle appliquée, il était justifié d'intervenir en appel. En particulier, la Cour d'appel a relevé deux erreurs. D'une part, la Cour d'appel a conclu que le juge surveillant a commis une erreur en concluant que la créancière garantie a agi dans un but illégitime en demandant l'autorisation de voter sur son plan. La Cour d'appel s'appuyait grandement sur l'idée que les créanciers ont le droit de voter en fonction de leur propre intérêt. D'autre part, la Cour d'appel a conclu que le juge surveillant a eu tort d'approuver l'AFL en tant qu'accord de financement provisoire parce qu'à son avis, il n'était pas lié aux opérations commerciales de la débitrice. À la lumière de ce qu'elle percevait comme une erreur, la Cour d'appel a substitué son opinion selon laquelle l'AFL était un plan d'arrangement et que pour cette raison, il aurait dû être soumis au vote des créanciers. La débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C., Moldaver, J. (Abella, Karakatsanis, Côté, Rowe, Kasirer, JJ., souscrivant à leur opinion) : L'article 11 de la LACC confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée dans les circonstances. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la LACC commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable. Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la LACC dont il assure la supervision.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la LACC qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Une telle limite découle de l'art. 11 de la LACC, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Par exemple,

un créancier agit dans un but illégitime lorsque le créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner les objectifs de la LACC ou à aller à l'encontre de ceux-ci. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer le pouvoir d'empêcher le créancier de voter. En l'espèce, le juge surveillant n'a commis aucune erreur en exerçant son pouvoir discrétionnaire pour empêcher la créancière garantie de voter sur son plan. Le juge surveillant connaissait très bien les procédures fondées sur la LACC relatives à la débitrice et a fait remarquer que, en cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la première ayant été rejetée, la créancière garantie tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la LACC. Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité. Ainsi, la créancière garantie a été à juste titre empêchée de voter sur le nouveau plan.

Le financement temporaire est un outil souple qui peut revêtir différentes formes, et le financement d'un litige par un tiers peut constituer l'une de ces formes. Au bout du compte, la question de savoir s'il y a lieu d'approuver le financement temporaire projeté est une question à laquelle le juge surveillant est le mieux placé pour répondre. En l'espèce, il n'y avait aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs, le juge surveillant a estimé que l'AFL était juste et raisonnable. Bien que le juge surveillant n'ait pas examiné à fond chacun des facteurs énoncés à l'art. 11.2(4) de la LACC de façon individuelle avant de tirer sa conclusion, cela ne constituait pas une erreur en soi. Il était manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la LACC et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'AFL à titre de financement temporaire. Le juge surveillant a eu raison de conclure que l'AFL ne constituait pas un plan d'arrangement puisqu'il ne proposait aucune transaction visant les droits des créanciers. La charge super-prioritaire qu'il a accordée au prêteur ne convertissait pas l'AFL en plan d'arrangement en subordonnant les droits des créanciers. Par conséquent, il n'a pas commis d'erreur dans l'exercice de sa discrétion, aucune intervention n'était justifiée et l'ordonnance du juge surveillant devrait être rétablie.

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Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230, 1999 ABCA 178 (Alta. C.A.) — referred to

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314, 96 O.T.C. 272 (Ont. Gen. Div. [Commercial List]) — referred to

Schenk v. Valeant Pharmaceuticals International Inc. (2015), 2015 ONSC 3215, 2015 CarswellOnt 8651, 74 C.P.C. (7th) 332 (Ont. S.C.J.) — referred to

Stanway v. Wyeth Canada Inc. (2013), 2013 BCSC 1585, 2013 CarswellBC 2630, 41 C.P.C. (7th) 209, [2014] 3 W.W.R. 808, 56 B.C.L.R. (5th) 192 (B.C. S.C.) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 75 O.R. (3d) 5 (Ont. C.A.) — referred to

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — referred to

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

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc. (2019), 2019 ONCA 508, 2019 CarswellOnt 9683, 70 C.B.R. (6th) 181, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 11 P.P.S.A.C. (4th) 11 (Ont. C.A.) — referred to

1078385 Ontario Ltd., Re (2004), 2004 CarswellOnt 8034, 16 C.B.R. (5th) 152, (sub nom. *1078385 Ontario Ltd. (Receivership), Re)* 206 O.A.C. 17 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 4.2 [en. 2019, c. 29, s. 133] — referred to

s. 43(7) — referred to

s. 50(1) — referred to

s. 54(3) — considered

s. 108(3) — referred to

s. 187(9) — considered

Champerty, Act respecting, R.S.O. 1897, c. 327

Generally — referred to

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

Generally — referred to

s. 2(1) "debtor company" — referred to

s. 3(1) — referred to

s. 4 — referred to

s. 5 — referred to

s. 6 — referred to

s. 6(1) — considered

s. 11 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(2) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4)(a) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(b) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(c) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(d) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(e) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(f) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(g) [en. 2007, c. 36, s. 65] — considered

s. 11.2(5) [en. 2005, c. 47, s. 128] — considered

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

s. 11.8 [en. 1997, c. 12, s. 124] — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — considered

s. 22(1) — referred to

s. 22(2) — referred to

s. 22(3) — considered

s. 23(1)(d) — referred to

s. 23(1)(i) — referred to

ss. 23-25 — referred to

s. 36 — considered

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

Generally — referred to

s. 6(1) — referred to

APPEAL by debtor from judgment reported at *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), EYB 2019-306890, 2019 CarswellQue 94, 2019 QCCA 171 (C.A. Que.), finding that debtor's scheme amounted to plan of arrangement and that funding request should be submitted to creditors for approval.

POURVOI formé par la débitrice à l'encontre d'une décision publiée à *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), EYB 2019-306890, 2019 CarswellQue 94, 2019 QCCA 171 (C.A. Que.), ayant conclu que la proposition de la débitrice constituait un plan d'arrangement et que la demande de financement devrait être soumise aux créanciers pour approbation.

Wagner C.J.C., Moldaver J. **(Abella, Karakatsanis, Côté, Rowe and Kasirer JJ. concurring):**

I. Overview

1 These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

2 Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

3 For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

4 In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

5 In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately $24 million to Bluberi. This debt was secured in part by a share pledge agreement.

6 Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately $86 million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets

7 On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues were the result of Callidus taking *de facto* control of the corporation and dictating a number

of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

8 Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the *CCAA*. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

9 Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately $135.7 million. Callidus would maintain an undischarged secured claim of $3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims"). [1] Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over $200 million in damages.

10 The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

11 Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's $3 million claim.

B. The Initial Competing Plans of Arrangement

12 On September 11, 2017, Bluberi filed an application seeking the approval of a $2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

13 However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a $2.5 million (later increased to $2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those creditors with claims worth less than $3000; creditors with larger claims were to receive, on average, 31 percent of their respective claims.

14 The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded $20 million.

15 On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. Creditors' Vote on Callidus's First Plan

16 On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the *CCAA* provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors — that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting unsecured creditors, 92 creditors (representing $3,450,882 of debt) voted in favour, and 8 voted against (representing $2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did

not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

17 Callidus did not vote on the First Plan — despite the Monitor explicitly stating that Callidus could have "vote[d] ... the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. Bluberi's Interim Financing Application and Callidus's New Plan

18 On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham"). Bluberi's application also sought the placement of a $20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

19 The LFA contemplated that Bentham would fund Bluberi's litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi's litigation to fail, Bentham would lose all of its invested funds. The LFA also provided that Bentham could terminate the litigation of the Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

20 Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style themselves the "Creditors' Group") contested Bluberi's application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote. [2]

21 On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors' vote ("New Plan"). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by $250,000 (from $2.63 million to $2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its $3 million claim at *nil*. Callidus was of the view that this valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge's permission to vote on the New Plan with the other unsecured creditors. Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

22 The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

III. Decisions Below

A. Quebec Superior Court (2018 QCCS 1040 (C.S. Que.)) (Michaud J.)

23 The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

24 With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48). He acknowledged that creditors are generally entitled to vote in their own self-interest. However, given that the First Plan — which was almost identical to the New Plan — had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

> Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when its vote would very likely result in the New Plan meeting the two thirds threshold for approval under the CCAA.

> As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.
>
> It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

25 The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both "unfair and unreasonable" (para. 47). He also observed that Callidus's conduct throughout the *CCAA* proceedings "lacked transparency" (at para. 41) and that Callidus was "solely motivated by the [pending] litigation" (para. 44). In sum, he found that Callidus's conduct was contrary to the "requirements of appropriateness, good faith, and due diligence", and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services], at para. 70).

26 Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

27 With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1) whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3) if so, whether the $20 million Litigation Financing Charge should be imposed on Bluberi's assets.

28 The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement or compromise between a debtor and its creditors" (para. 71, citing *Crystallex International Corp., Re*, 2012 ONCA 404, 293 O.A.C. 102 (Ont. C.A.), at para. 92 ("*Crystallex*")). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

29 After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2013 ONSC 4974, 117 O.R. (3d) 150 (Ont. S.C.J.), at para. 41, and *Hayes v. Saint John (City)*, 2016 NBQB 125 (N.B. Q.B.), at para. 4 (CanLII). In particular, he considered Bentham's percentage of return to be reasonable in light of its level of investment and risk. Further, the supervising judge rejected Callidus and the Creditors' Group's argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the *CCAA* context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332 (Ont. S.C.J.), at para. 23).

30 Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi's assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham's financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

31 Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

B. Quebec Court of Appeal (2019 QCCA 171 (C.A. Que.)) (Dutil and Schrager JJ.A. and Dumas J. (ad hoc))

32 The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 CanLII)). In particular, the court identified two errors of relevance to these appeals.

33 First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Blackburn Developments Ltd., Re*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199 (B.C. S.C.), at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

34 Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

35 In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

36 Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

37 These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. Preliminary Considerations

38 Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

(1) The Evolving Nature of CCAA Proceedings

39 The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

40 Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving

and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

41 Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

42 That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, 139 O.R. (3d) 1 (Ont. C.A.), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416 (Ont. C.A.), at para. 70).

43 Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.), at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

44 *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93 (Alta. C.A.), at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204 (Alta. Q.B.), at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

45 However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business. [3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed,

in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

46 Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150 (S.C.C.), at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in CCAA Proceedings

47 One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

48 The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing 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. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc., Re* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

49 The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

50 The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

> **Good faith**
>
> **18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith — powers of court**
>
> **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>
> (See also *BIA*, s. 4.2; *Budget Implementation Act*, *2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

51 The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 (B.C. C.A.), at paras. 21-23; *BA Energy Inc., Re*, 2010 ABQB 507, 70 C.B.R. (5th) 24 (Alta. Q.B.); *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]), at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701 (B.C. C.A.), at paras. 51-52, in which the courts seized on a party's failure to act diligently).

52 We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp-566 and 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

53 A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426 (Ont. C.A.), at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175 (C.A. Que.), at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338 (B.C. C.A.), at para. 20).

54 This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Edgewater Casino Inc., Re*, 2009 BCCA 40, 305 D.L.R. (4th) 339 (B.C. C.A.) ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

> ... one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. ... *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

55 With the foregoing in mind, we turn to the issues on appeal.

B. Callidus Should Not Be Permitted to Vote on Its New Plan

56 A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

57 Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at N§149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 296 D.L.R. (4th) 135 (Ont. C.A.), at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at N§45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

58 Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the *CCAA* barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

59 Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the *CCAA* reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

> **Related creditors**
>
> **(3)** A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that, under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

60 We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are "related to the [debtor] company". These words are "precise and unequivocal" and, as such, must "play a dominant role in the interpretive process" (*Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.), at para. 10). In our view, the appellants' analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

61 While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at N§33, *Red Cross*; *1078385 Ontario Ltd., Re* (2004), 206 O.A.C. 17 (Ont. C.A.)). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 59; see also *Third Eye Capital Corporation*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording

of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

62 Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

63 Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of *debtor companies* to organize a restructuring plan that confers additional benefits to *related parties*" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis*, developed by Industry Canada, last updated March 24, 2015 (online), cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

64 Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors' vote. Although we reject the appellants' interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

(2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

65 There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: "courts [must] 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" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

66 Applying this approach, we conclude that jurisdiction exists under s. 11 of the *CCAA* to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

67 Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). Section 11 states:

> **General power of court**
>
> **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.

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

68 Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

69 Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on

a plan may nonetheless be barred from voting. Nor is there any provision in the *CCAA* which suggests that a creditor has an absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

70 Thus, it is apparent that s. 11 serves as the source of the supervising judge's jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

71 The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc., Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.). In *Laserworks Computer Services Inc.*, the Nova Scotia Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

72 While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

73 First, this conclusion would be consistent with this Court's recognition that the *CCAA* "offers a more flexible mechanism with *greater* judicial discretion" than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

74 Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the *BIA* (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283 (Ont. C.A.), at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd., Re*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks Computer Services Inc.* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

75 We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation .... If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.

("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

76 Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) The Supervising Judge Did Not Err in Prohibiting Callidus From Voting

77 In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's *CCAA* proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

78 The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it do so[4] . The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of $250,000 — none of the factual circumstances relating to Bluberi's financial or business affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

79 Indeed, as the Monitor observes, "Once a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors' meeting to vote on a substantially similar plan would not advance the policy objectives of the CCAA, nor would it serve and enhance the public's confidence in the process or otherwise serve the ends of justice" (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of $200,000 (see supervising judge's reasons, at para. 72).

80 We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

81 As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to

Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its New Plan would succeed where its First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

82 In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

83 Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

C. Bluberi's LFA Should Be Approved as Interim Financing

84 In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the CCAA

85 Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]), at paras. 7, 9 and 24; *Boutiques San Francisco inc., Re* [2003 CarswellQue 13882 (C.S. Que.)], 2003 CanLII 36955, at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing at its core enables the preservation and realization of the value of a debtor's assets.

86 Since 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

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

87 The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard form or terms. [5] It simply provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

88 The supervising judge may also grant the lender a "super-priority charge" that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

Priority — secured creditors

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

89 Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-229 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-4).

90 Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA* sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of factors:

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

(*CCAA*, s. 11.2(4))

91 Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges (*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

92 As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

(2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

93 Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs, in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L. J.* 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364 (Ont. S.C.J.); *Musicians' Pension Fund of Canada (Trustee of)*).

94 Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and maintenance. [6] The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1885), 7 O.R. 644 (Ont. Div. Ct.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

95 Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte c. Banque de Montréal*, 2015 QCCS 1915 (C.S. Que.), at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321 (Ont. S.C.J.), at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Ont. Div. Ct.); see also *Stanway v. Wyeth Canada Inc.*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192 (B.C. S.C.), at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

96 That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

97 We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

98 The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. Crystallex eventually

became insolvent and (similar to Bluberi) was left with only a single significant asset: a US$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection, Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

99 A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

100 There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

> A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (P.C.).
>
> (Houlden, Morawetz and Sarra, at N§33)

101 The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in C*rystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away ... their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

> A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.
>
> (*Crystallex International Corp., Re*, 2012 ONSC 2125, 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]), at para. 50)

102 Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

103 We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with

a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

104 None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

105 In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Musicians' Pension Fund of Canada (Trustee of)*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of *CCAA* proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

106 While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the *CCAA* individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's *CCAA* proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));

- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (at para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));

- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));

- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, *the only potential recovery* lies with the lawsuit that the Debtors will launch" (at para. 91 (emphasis added); s. 11.2(4)(f)); and

- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

107 In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion. Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

108 To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

109 First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

110 Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

111 We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577 (B.C. C.A.)).

112 This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

> The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.
>
> . . . . .
>
> ... While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

113 We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

114 We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors

like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

115 Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement with a plan is a discretionary decision for the supervising judge to make.

116 Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

VI. Conclusion

117 For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeal allowed.

Pourvoi accueilli.

Footnotes

1 Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040 (C.S. Que.), at para. 10 (CanLII)).

2 Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.

3 We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

4 It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.

5 A further exception has been codified in the 2019 amendments to the *CCAA*, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.

6 The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Pole Lite ltée c. Banque Nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009 (C.A. Que.); G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

End of Document

TAB 8

Most Negative Treatment: Distinguished
Most Recent Distinguished: Bauscher-Grant Farms Inc. v. Lake Diefenbaker Potato Corp. | 1998 CarswellSask 335, 167 Sask. R. 14, [1998] S.J. No. 344, 80 A.C.W.S. (3d) 62, [1998] 8 W.W.R. 751 | (Sask. Q.B., May 11, 1998)

1993 CarswellOnt 183
Ontario Court of Justice (General Division — Commercial List)

Lehndorff General Partner Ltd., Re

1993 CarswellOnt 183, [1993] O.J. No. 14, 17 C.B.R. (3d) 24, 37 A.C.W.S. (3d) 847, 9 B.L.R. (2d) 275

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Courts of Justice Act, R.S.O. 1990, c. C-43; Re plan of compromise in respect of LEHNDORFF GENERAL PARTNER LTD. (in its own capacity and in its capacity as general partner of LEHNDORFF UNITED PROPERTIES (CANADA), LEHNDORFF PROPERTIES (CANADA) and LEHNDORFF PROPERTIES (CANADA) II) and in respect of certain of their nominees LEHNDORFF UNITED PROPERTIES (CANADA) LTD., LEHNDORFF CANADIAN HOLDINGS LTD., LEHNDORFF CANADIAN HOLDINGS II LTD., BAYTEMP PROPERTIES LIMITED and 102 BLOOR STREET WEST LIMITED and in respect of THG LEHNDORFF VERMÖGENSVERWALTUNG GmbH (in its capacity as limited partner of LEHNDORFF UNITED PROPERTIES (CANADA))

Farley J.

Heard: December 24, 1992
Judgment: January 6, 1993
Docket: Doc. B366/92

Counsel: *Alfred Apps, Robert Harrison* and *Melissa J. Kennedy* , for applicants.
L. Crozier , for Royal Bank of Canada.
R.C. Heintzman , for Bank of Montreal.
J. Hodgson, Susan Lundy and *James Hilton* , for Canada Trustco Mortgage Corporation.
Jay Schwartz , for Citibank Canada.
Stephen Golick , for Peat Marwick Thorne * Inc., proposed monitor.
John Teolis , for Fuji Bank Canada.
Robert Thorton , for certain of the advisory boards.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.i General principles
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — Stay of proceedings

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Stay of proceedings — Stay being granted even where it would affect non-applicants that were not companies within meaning of Act — Business operations of applicants and non-applicants being so intertwined as to make stay appropriate.

The applicant companies were involved in property development and management and sought the protection of the *Companies' Creditors Arrangement Act* ("CCAA") in order that they could present a plan of compromise. They also sought a stay of all proceedings against the individual company applicants either in their own capacities or because of their interest in a larger group of companies. Each of the applicant companies was insolvent and had outstanding debentures issued under trust deeds. They proposed a plan of compromise among themselves and the holders of the debentures as well as those others of their secured and unsecured creditors deemed appropriate in the circumstances.

A question arose as to whether the court had the power to grant a stay of proceedings against non-applicants that were not companies and, therefore, not within the express provisions of the CCAA.

Held:

The application was allowed.

It was appropriate, given the significant financial intertwining of the applicant companies, that a consolidated plan be approved. Further, each of the applicant companies had a realistic possibility of being able to continue operating even though each was currently unable to meet all of its expenses. This was precisely the sort of situation in which all of the creditors would likely benefit from the application of the CCAA and in which it was appropriate to grant an order staying proceedings.

The inherent power of the court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Clearly, the court had the jurisdiction to grant a stay in respect of any of the applicants that were companies fitting the criteria in the CCAA. However, the stay requested also involved limited partnerships where (1) the applicant companies acted on behalf of the limited partnerships, or (2) the stay would be effective against any proceedings taken by any party against the property assets and undertakings of the limited partnerships in which they held a direct interest. The business operations of the applicant companies were so intertwined with the limited partnerships that it would be impossible for a stay to be granted to the applicant companies that would affect their business without affecting the undivided interest of the limited partnerships in the business. As a result, it was just and reasonable to supplement s. 11 and grant the stay.

While the provisions of the CCAA allow for a cramdown of a creditor's claim, as well as the interest of any other person, anyone wishing to start or continue proceedings against the applicant companies could use the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain the stay. In such a motion, the onus would be on the applicant companies to show that it was appropriate in the circumstances to continue the stay.

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Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) , affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. refused (1991), 7 C.B.R. (3d) 164 (note), 55 B.C.L.R. (2d) xxxiii (note), 135 N.R. 317 (note) — *referred to*
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Slavik, Re (1992), 12 C.B.R. (3d) 157 (B.C. S.C.) — *considered*
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Statutes considered:

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s. 85

s. 142

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

s. 2

s. 3

s. 4

s. 5

s. 6

s. 7

s. 8

s. 11

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

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Limited Partnerships Act, R.S.O. 1990, c. L.16 —

s. 2(2)

s. 3(1)

s. 8

s. 9

s. 11

s. 12(1)

s. 13

s. 15(2)

s. 24

Partnership Act, R.S.A. 1980, c.P-2 — Pt. 2

s. 75

Rules considered:

Ontario, Rules of Civil Procedure —

r. 8.01

r. 8.02

Application under Companies' Creditors Arrangement Act to file consolidated plan of compromise and for stay of proceedings.

***Farley J.*:**

1 These are my written reasons relating to the relief granted the applicants on December 24, 1992 pursuant to their application under the *Companies' Creditors Arrangement Act* , R.S.C. 1985, c. C-36 ("CCAA") and the *Courts of Justice Act* , R.S.O. 1990, c. C.43 ("CJA"). The relief sought was as follows:

(a) short service of the notice of application;

(b) a declaration that the applicants were companies to which the CCAA applies;

(c) authorization for the applicants to file a consolidated plan of compromise;

(d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;

(e) a stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and

(f) certain other ancillary relief.

2 The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issues under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermögensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany. Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership registered under the *Limited Partnership Act* , R.S.O. 1990, c. L.16 ("Ontario LPA"). LPC and LPC II are limited partnerships registered under Part 2 of the *Partnership Act* , R.S.A. 1980, c. P-2 ("Alberta PA") and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately $370 million, LPC $45 million and LPC II $7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group's indebtedness as to Canadian matters (including that of the applicants) was approximately $543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtanua Investments Limited, a minor secured lendor also made a demand. An interim standstill agreement was worked out following a meeting of July 7, 1992. In conjunction with Peat Marwick Thorne Inc. which has been acting as an informal monitor to date and Fasken Campbell Godfrey the applicants have held multiple meetings with their senior secured creditors over the past half year and worked on a restructuring plan. The business affairs of the applicants (and the Limited Partnerships) are significantly intertwined as there are multiple instances of intercorporate debt, cross-default provisions and guarantees and they operated a centralized cash management system.

3 This process has now evolved to a point where management has developed a consolidated restructuring plan which plan addresses the following issues:

(a) The compromise of existing conventional, term and operating indebtedness, both secured and unsecured.

(b) The restructuring of existing project financing commitments.

(c) New financing, by way of equity or subordinated debt.

(d) Elimination or reduction of certain overhead.

(e) Viability of existing businesses of entities in the Lehndorff Group.

(f) Restructuring of income flows from the limited partnerships.

(g) Disposition of further real property assets aside from those disposed of earlier in the process.

(h) Consolidation of entities in the Group; and

(i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

Formal meetings of the beneficial limited partners of the Limited Partnerships are scheduled for January 20 and 21, 1993 in Germany and an information circular has been prepared and at the time of hearing was being translated into German. This application was brought on for hearing at this time for two general reasons: (a) it had now ripened to the stage of proceeding with what had been distilled out of the strategic and consultative meetings; and (b) there were creditors other than senior secured

lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtauna Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA may be made on an ex parte basis (s. 11 of the CCAA; *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) ; *Re Keppoch Development Ltd.* (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) . The court will be concerned when major creditors have not been alerted even in the most minimal fashion (*Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

4 "Instant" debentures are now well recognized and respected by the courts: see *Re United Maritime Fishermen Co-operative* (1988), 67 C.B.R. (N.S.) 44 (N.B. Q.B.) , at pp. 55-56, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.) , reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 (N.B. C.A.) , at pp. 165-166; *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) at pp. 250-251; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v. Comiskey*) (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); *Ultracare Management Inc. v. Zevenberger (Trustee of)* (sub nom. *Ultracare Management Inc. v. Gammon*) (1990), 1 O.R. (3d) 321 (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

5 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659 at p. 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75 ; *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.) at pp. 219-220; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Q.B.) , at pp. 12-13 (C.B.R.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.) , at pp. 310-311, affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.) .; *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra, at p. 307 (O.R.); *Fine's Flowers v. Fine's Flowers (Creditors of)* (1992), 7 O.R. (3d) 193 (Gen. Div.) , at p. 199 and "Reorganizations Under The Companies' Creditors Arrangement Act", Stanley E. Edwards (1947) 25 Can. Bar Rev. 587 at p. 592.

6 The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. see *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra at pp. 297 and 316; *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)* , supra, at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see *Meridian Developments*

Inc. v. Toronto Dominion Bank , supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.) , at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252.

7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the *Bankruptcy Act* , R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the *Bankruptcy and Insolvency Act* ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the BIA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 318 and *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) at pp. 245, reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.) . It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Re Associated Investors of Canada Ltd.* , supra, at p. 318; *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) at pp. 187-188 (C.B.R.).

8 It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

9 Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act* , whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a*) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

10 The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* , supra, at pp. 12-17 (C.B.R.) and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 296-298 (B.C. S.C.) and pp. 312-314 (B.C. C.A.) and *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 320 where Gibbs J.A. for the court stated:

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

11 The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see *Gaz Métropolitain v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) at pp. 290-291 and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 311-312 (B.C. C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see *Feifer v. Frame Manufacturing Corp.* (1947), 28 C.B.R. 124 (C.A. Que.)). Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

> 8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 312-314 (B.C.C.A.).

12 It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see *Re Slavik* , unreported, [1992] B.C.J. No. 341 [now reported at 12 C.B.R. (3d) 157 (B.C. S.C.)]. However in the *Slavik* situation the individual guarantors were officers and shareholders of two companies which had sought and obtained CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact [at p. 159]:

> 5. The order provided further that all creditors of Norvik Timber Inc. be enjoined from making demand for payment upon that firm or upon any guarantor of an obligation of the firm until further order of the court.

The CCAA reorganization plan involved an assignment of the claims of the creditors to "Newco" in exchange for cash and shares. However the basis of the stay order originally granted was not set forth in this decision.

13 It appears to me that Dickson J. in *International Donut Corp. v. 050863 N.D. Ltd.* , unreported, [1992] N.B.J. No. 339 (N.B. Q.B.) [now reported at 127 N.B.R. (2d) 290, 319 A.P.R. 290] was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated [at p. 295 N.B.R.]:

> In August 1991 the limited partnership, through its general partner the plaintiff, applied to the Court under the *Companies' Creditors Arrangement Act* , R.S.C., c. C-36 for an order delaying the assertion of claims by creditors until an opportunity could be gained to work out with the numerous and sizable creditors a compromise of their claims. An order was obtained but it in due course expired without success having been achieved in arranging with creditors a compromise. *That effort may have been wasted, because it seems questionable that the federal Act could have any application to a limited partnership in circumstances such as these* . (Emphasis added.)

14 I am not persuaded that the words of s. 11 which are quite specific as relating as to a *company* can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in *Campeau v. Olympia & York Developments Ltd.* unreported, [1992] O.J. No. 1946 [now reported at 14 C.B.R. (3d) 303 (Ont. Gen. Div.)] at pp. 4-7 [at pp. 308-310 C.B.R.].

The Power to Stay

The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) , and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act* , R.S.O. 1990, c. C.43, which provides as follows:

> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Recently, Mr. Justice O'Connell has observed that this discre tionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 24127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure* . The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows.

The Power to Stay in the Context of C.C.A.A. Proceedings

By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) , and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is *a discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period* .

(emphasis added)

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating

> the compromise or arrangement. [In this respect, see also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77.]
>
> I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance* , supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from *Empire-Universal Films Limited v. Rank*, [1947] O.R. 775 (H.C.) that McRuer C.J.H.C. considered that *The Judicature Act* [R.S.O. 1937, c. 100] then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 (H.C.) and *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60 (H.C.) at pp. 65-66.

15 Montgomery J. in *Canada Systems* , supra, at pp. 65-66 indicated:

> Goodman J. (as he then was) in *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in *Edmeades v. Thames Board Mills Ltd.*, [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in *Edmeades* was approved by Lord Justice Davies in *Lane v. Willis; Lane v. Beach (Executor of Estate of George William Willis)*, [1972] 1 All E.R. 430, *(*sub nom. *Lane v. Willis; Lane v. Beach)* [1972] 1 W.L.R. 326 (C.A.) .
>
> . . . . .
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> In *Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 , appeal allowed by consent without costs *(*sub nom. *Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.)* 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.) , Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:
>
> > The principles which must govern in these matters are clearly stated in the case of *Empire Universal Films Ltd. et al. v. Rank et al.*, [1947] O.R. 775 at p. 779, as follows [quoting *St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al.*, [1936] 1 K.B. 382 at p. 398]:
> >
> > > (1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

16 Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-à-vis any proceedings taken by any party against the property assets and undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the "Property") as set out in the terms of the stay provisions of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. [Appendix omitted.] I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in this CCAA proceedings and

how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

17 A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Hepburn, *Limited Partnerships* , (Toronto: De Boo, 1991), at p. 1-2 and p. 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.

18 A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario *Rules of Civil Procedure* , O. Reg. 560/84, Rules 8.01 and 8.02.

19 It appears that the preponderance of case law supports the contention that contention that a partnership including a limited partnership is not a separate legal entity. See *Lindley on Partnership* , 15th ed. (London: Sweet & Maxwell, 1984), at pp. 33-35; *Seven Mile Dam Contractors v. R.* (1979), 13 B.C.L.R. 137 (S.C.) , affirmed (1980), 25 B.C.L.R. 183 (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad A. Milne, (1985) 23 Alta. L. Rev. 345, at pp. 350-351. Milne in that article made the following observations:

> The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in *Re Thorne* between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in *Ruzicks* unless it appeared that the Legislature clearly intended that the limited partnership should have a separate legal existence. A review of the various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the *Canada Business Corporation Act* [S.C. 1974-75, c. 33, as am.] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity.

20 It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, "The Control Test of Investor Liability in Limited Partnerships" (1983) 21 Alta. L. Rev. 303; E. Apps, "Limited Partnerships and the 'Control' Prohibition: Assessing the Liability of Limited Partners" (1991) 70 Can. Bar Rev. 611; R. Flannigan, "Limited Partner Liability: A Response" (1992) 71 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited

partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner — the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: *Control Test* , (1992), supra, at pp. 524-525. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-à-vis any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

21 It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the CCAA would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners in such. It also appears that the applicants are well on their way to presenting a reorganization plan for consideration and a vote; this is scheduled to happen within the month so there would not appear to be any significant time inconvenience to any person interested in pursuing proceedings. While it is true that the provisions of the CCAA allow for a cramdown of a creditor's claim (as well as an interest of any other person), those who wish to be able to initiate or continue proceedings against the applicants may utilize the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain that particular stay. It seems to me that in such a comeback motion the onus would be upon the applicants to show that in the circumstances it was appropriate to continue the stay.

22 The order is therefore granted as to the relief requested including the proposed stay provisions.

Application allowed.

Footnotes

* As amended by the court.

End of Document

TAB 9

2018 QCCS 1657
Cour supérieure du Québec

Arrangement relatif à Bloom Lake

2018 CarswellQue 2860, 2018 QCCS 1657, 291 A.C.W.S. (3d) 235, 39 C.C.P.B. (2nd) 161, EYB 2018-293478

In the matter of the plan of compromise or arrangement of: Bloom Lake General Partner Limited, Quinto Mining Corporation, 8568391 Canada Limited, Cliffs Québec Iron Mining ULC, Wabush Iron Co. Limited and Wabush Resources Inc. (Petitioners) and The Bloom Lake Iron Ore Mine Limited Partnership, Bloom Lake Railway Company Limited, Wabush Mines, Arnaud Railway Company, Wabush Lake Railway Company Limited (Mises en cause) and FTI Consulting Canada Inc. (Monitor) v. Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson, Syndicat des métallos, local 6254, Syndicat des métallos, local 6285, Syndicat des métallos, local 9996 (Objecting parties)

Hamilton J.C.S.

Heard: 16 april 2018
Judgment: 20 april 2018
Docket: C.S. Montréal 500-11-048114-157

Counsel: Mtre Bernard Boucher, Mtre Natalie Bussière, Mtre Emily Hazlett, for Petitioners and Mises-en-cause
Mtre Sylvain Rigaud, Mtre Crystal Ashby, for Monitor
Mtre Andrew J. Hatnay, Mtre Mark Meland, for Objecting parties Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson
Mtre Daniel Boudreault, for Objecting parties Syndicat des Métallos Section locale 6254, 6285 et 9996
Mtre Edward Bechard-Torres, for Superintendent of Pensions of Newfoundland
Mtre Antoine Lippé, for Attorney General of Canada
Mtre Louis Robillard, for Retraite Québec
Mtre Gerry Apostolatos, for Quebec North Shore and Labrador Railway Company Inc.
Mtre Gabriel Serena, for Ville de Fermont
Mtre Martin Roy, for Ville de Sept-Îles
Mtre Ouassim Tadlaoui, for Groupe UNNU-EBC S.E.N.C.

Subject: Insolvency; Labour
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by creditors
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by creditors
Debtor operated in mining sector and faced financial difficulties — Debtor sought protection under Companies' Creditors Attangement Act — Initial order was granted and renewed several times and monitor was appointed — Debtor then sold its assets and, as result, monitor held substantial funds — Debtor prepared plan for distribution of liquidation proceeds — Debtor brought motion seeking order requiring meeting for approval of plan — Motion granted — Monitor and, for most part, creditors agreed with plan — Only remaining issue concerned voting right of employees — Principle of exclusive representation did not give union right to vote on behalf of employees — However, each employee and retiree was entitled to vote on plan — For

that purpose, deemed proxies could be held by counsel on behalf of employees — Therefore, holding of meeting was ordered for approval of debtor's plan.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Approbation par les créanciers

Débitrice exploitait une entreprise minière et éprouvait des ennuis financiers — Débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Ordonnance initiale a été émise et renouvelée plusieurs fois et un contrôleur a été nommé — Débitrice a ensuite vendu ses biens à la suite de quoi, le contrôleur s'est retrouvé à détenir des fonds importants — Débitrice a préparé un plan en vue de la distribution du produit de la liquidation — Débitrice a déposé une requête visant à obtenir une ordonnance exigeant la tenue d'une réunion en vue de l'approbation du plan — Requête accordée — Contrôleur et, en grande partie, les créanciers étaient d'accord avec le plan — Seule question qui restait à trancher concernait le droit de vote des employés — Principe de la représentation exclusive ne donnait pas au syndicat le droit de voter au nom des employés — Toutefois, chaque employé et retraité était en droit de se prononcer à l'égard du plan — Aussi, des procurations présumées pouvaient être détenues par les avocats au nom des employés — Par conséquent, une assemblée a été ordonnée en vue de l'approbation du plan.

Table of Authorities

Cases considered by *Hamilton J.C.S.*:

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

Désir c. Québec (Procureur général) (2008), 2008 QCCA 1755, 2008 CarswellQue 8977, [2008] R.J.D.T. 1442 (C.A. Que.) — referred to

Fracmaster Ltd., Re (1999), 1999 CarswellAlta 461, 245 A.R. 102, 11 C.B.R. (4th) 204, 1999 ABQB 379 (Alta. Q.B.) — referred to

Kerr Interior Systems Ltd., Re (2011), 2011 ABQB 214, 2011 CarswellAlta 508, 79 C.B.R. (5th) 1, [2011] 10 W.W.R. 159, 43 Alta. L.R. (5th) 386, 517 A.R. 186 (Alta. Q.B.) — referred to

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

Société d'énergie de la Baie James c. Noël (2001), 2001 SCC 39, 2001 CarswellQue 1270, 2001 CarswellQue 1271, (sub nom. *Noël v. Société d'énergie de la Baie James)* 202 D.L.R. (4th) 1, (sub nom. *Noël v. Société d'énergie de la Baie James)* 271 N.R. 304, (sub nom. *Noël v. Société d'énergie de la Baie James)* [2001] 2 S.C.R. 207, (sub nom. *Noël v. Société d'énergie de la Baie James)* 2002 C.L.L.C. 220-012, 2001 CSC 39 (S.C.C.) — considered

U.S. Steel Canada Inc., Re (2017), 2017 ONSC 1967, 2017 CarswellOnt 5825 (Ont. S.C.J.) — referred to

Unique Broadband Systems Inc., Re (2013), 2013 ONSC 676, 2013 CarswellOnt 1466, 98 C.B.R. (5th) 218, 12 B.L.R. (5th) 146 (Ont. S.C.J.) — referred to

Statutes considered:

Code du travail, RLRQ, c. C-27

art. 69 — considered

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

Generally — referred to

Labour Relations Act, R.S.N. 1990, c. L-1

Generally — referred to

s. 50 — considered

s. 50(a) — considered

MOTION by debtor seeking order requiring meeting for approval of plan pursuant to *Companies' Creditors Arrangement Act*.

***Hamilton J.C.S.*:**

OVERVIEW

1 The CCAA Parties seek the issuance of a Plan Filing and Meetings Order (the "Meetings Order") which would, *inter alia*, authorize the CCAA Parties to (1) file the Joint Plan of Compromise and Arrangement dated April 16, 2018 (the "Plan") and (2) convene meetings of their creditors for the purpose of considering and voting on the Plan.

2 The creditors of the CCAA Parties are, for the most part, in agreement that the proposed Meetings Order should be issued.

3 The Representative Employees and the Union ask the Court to amend the proposed Meetings Order to give their counsel a deemed proxy to vote in counsel's discretion the claims of the salaried employees and retirees and the unionized employees and retirees respectively, unless the employee or retiree opts out by advising the Monitor that he or she will attend the meeting in person or appoints a different person to act as proxy.

CONTEXT

4 The CCAA Parties [1] sought and received Court protection under the *Companies' Creditors Arrangement Act* [2] on January 27, 2015 (for the Bloom Lake CCAA Parties) and May 20, 2015 (for the Wabush CCAA Parties). That protection has been extended by the Court on a number of occasions. FTI Consulting Canada Inc. was appointed as Monitor.

5 While under Court protection, the CCAA Parties have liquidated all or virtually all of their assets with the result that the Monitor holds substantial funds. The major remaining assets are (1) the potential preference claim by Cliffs Québec Iron Mining ULC ("CQIM") against various non-filed affiliates ("NFA") arising from the reorganization of CQIM in December 2014 that included a $142 million cash payment by CQIM and the transfer of the Australian subsidiaries of CQIM, and (2) potential preference claims by other CCAA Parties against NFA arising from certain payments in an aggregate amount of approximately US$30.6 million.

6 In March 2018, the Monitor negotiated a settlement of these potential claims. Essentially, the NFA agreed to forego the benefit of any distributions or payments they may otherwise be entitled to receive as secured and unsecured creditors of the CCAA Parties [3] and to make an additional cash contribution of $5 million, in exchange for releases. The Monitor estimates that the overall increase in the aggregate amounts that would be distributed to the third party unsecured creditors of the CCAA Parties as a result of the proposed settlement and the Plan would likely be in the range of approximately $62 million to approximately $100 million. [4]

7 The Monitor consulted with Quebec North Shore and Labrador Railway Company Inc. ("QNS&L"), the largest single third party unsecured creditor of CQIM, which supports the settlement. The Monitor did not consult with any other creditor. The employees and retirees are not creditors of CQIM.

8 Based on this settlement, the CCAA Parties prepared the Plan. It is a joint plan on behalf of all of the CCAA Parties. [5] Essentially, the Plan distributes the liquidation proceeds and the settlement proceeds allocated to each CCAA Party amongst its third party unsecured creditors on a *pro rata* basis. The Plan proposes the limited substantive consolidation of certain CCAA Parties for the purposes of voting and distributions under the Plan, such that there are five classes of creditors:

a) Unsecured creditors of CQIM and Quinto Mining Corporation;

b) Unsecured creditors of Bloom Lake General Partner Limited ("BLGP") and The Bloom Lake Iron Ore Mine Limited Partnership ("BLLP");

c) Unsecured creditors of Wabush Iron Co. Limited, Wabush Resources Inc. and Wabush Mines;

d) Unsecured creditors of Arnaud Railway Company;

e) Unsecured creditors of Wabush Lake Railway Company Limited.

9 The Plan also provides for broad releases in favour of the NFA, the Monitor and the directors, officer, employees, advisors, legal counsel and agents of the CCAA Parties, the Monitor and the NFA. The Plan does not release the NFA and their directors from class actions instituted in Newfoundland and Labrador on behalf of the employees and retirees.

10 The CCAA Parties seek the issuance of the Meetings Order, which provides, *inter alia*, for:

a) authorizing the filing of the Plan;

b) authorizing the CCAA Parties to convene meetings of the third party unsecured creditors;

c) approval of (i) the notice and documentation to be sent to the third party unsecured creditors in respect of the meetings; and (ii) and the procedure for the conduct of the meetings;

d) the scheduling of a hearing for the sanctioning of the Plan on June 29, 2018;

e) approval of the exclusion of 8568391 and BLRC, which have no pre-filing creditors, and limited substantive consolidation of (i) CQIM and Quinto, (ii) BLGP and BLLP, and (iii) Wabush Iron, Wabush Resources and Wabush Mines for the purposes of voting and distributions under the Plan;

f) approval of the classification of the third party unsecured creditors of each CCAA Party; and

g) other ancillary orders and declarations.

11 The Monitor has recommended that the Motion should be granted and that the proposed Meetings Order should be issued. [6] The third party creditors of the CCAA Parties are, for the most part, in agreement.

12 The issue relates to the voting rights of the 2,400 employees and retirees of the Wabush CCAA parties. [7] On June 22, 2015, Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson (the "Representative Employees") were appointed as representatives for the non-unionized employees and retirees of the Wabush CCAA Parties. The order provided from an opt-out right, but the Court is advised that no non-unionized employee or retiree opted out of representation by the Representative Employees. The Union has acted on behalf of the unionized employees and retirees since the beginning of the CCAA proceedings pursuant to its right and duty to represent its members. There is no express order of the Court appointing it as representative, but the Court did authorize the Union to file proofs of claim on behalf of its members.

13 The employees and retirees are significant creditors of the Wabush CCAA Parties. The employees and retirees have filed 1,089 claims totalling $103.8 million against Wabush Iron, Wabush Resources and Wabush Mines, 449 claims totalling $27.9 million against Arnaud Railway and 393 claims totalling $50.5 million against Wabush Lake Railway, with respect to other post-employment benefits ("OPEBs"), including life insurance and health care. [8] In addition, four claims in the aggregate amount of approximately $3.3 million relate to employee grievances, were filed jointly and severally against Arnaud Railway and Wabush Iron, Wabush Resources and Wabush Mines. 2,376 employees and retirees are members of the Wabush pension plans. The Plan Administrator has filed claims of approximately $56 million in the aggregate against Wabush Iron, Wabush Resources and Wabush Mines, Arnaud Railway and Wabush Lake Railway with respect to the amounts owing to the Wabush pension plans, including the deficit in the plans. The issue of whether those claims are unsecured or benefit from a deemed trust is currently before the Québec Court of Appeal, with a hearing starting June 11, 2018.

POSITION OF THE PARTIES

14 As described above, the Representative Employees and the Union ask the Court to amend the proposed Meetings Order to give their counsel a deemed proxy to vote in counsel's discretion the claims of the salaried employees and retirees and the unionized employees and retirees respectively, unless the employee or retiree opts out by advising the Monitor that he or she will attend the meeting in person or appoints a different person to act as proxy.

15 The Union also argues that it has the right to vote on behalf of its members and retirees pursuant to its "monopole de représentation".

16 The Pension Plan Administrator, the Superintendent of Pensions of Newfoundland and the Attorney-General of Canada on behalf of the Office of the Superintendent of Financial Institutions support the amendment.

17 The CCAA Parties, the Monitor and QNS&L, the largest third party unsecured creditor, oppose the amendment.

ISSUES IN DISPUTE

18 The issues that the Court must decide can be summarized as follows:

1. Should it issue the Meetings Order?

2. Does the Union have the right to vote on behalf of its members and retirees?

3. Should the Court give counsel for the Representative Employees and counsel for the Union a discretionary deemed proxy to vote the claims of the employees and retirees, subject only to an opt-out right?

ANALYSIS

1. Issuance of the Meetings Order

19 The standard for issuing a meeting order is low. The Court can refuse to summon a meeting of the creditors if it determines that the plan is contrary to the creditors' interests, lacks economic reality, is unworkable and unrealistic in the circumstances, or is doomed to failure due to a lack of creditor support. [9]

20 The Monitor has reviewed the Plan and the Meetings Order and it recommends that the proposed Meetings Order be issued, based on the following considerations: [10]

- The filing of a joint plan significantly simplifies matters and creates no apparent material prejudice to any creditor;
- The limited substantive consolidation is reasonable and appropriate;
- The Plan provides significant incremental recoveries for the creditors and is in the best interests of all stakeholders;
- The granting of the Meetings Order would provide the forum for the creditors to consider and vote on the Plan;
- There is nothing about the Plan that would render it incapable of being approved by the creditors or sanctioned by the Court;
- The classification of creditors is reasonable and appropriate;
- The Meetings Order provides for reasonable and sufficient notice;
- The deadline for filing proxies is reasonable in the circumstances;
- The provisions of the Meetings Order governing the conduct of the meetings are reasonable and appropriate in the circumstances.

21 Save for the issue of the voting rights of the employees and retirees, the creditors all agree that the Meetings Order should be issued.

22 The Court concludes that there should be meetings of creditors to consider and vote on the Plan. It will grant the Meetings Order.

2. Union's right to vote

23 The Union pleads that it has the right to vote on behalf of the unionized employees and retirees pursuant to its monopoly on representation of its members.

24 The Union points to Section 69 of the Québec *Labour Code*: [11]

> **69.** A certified association may exercise all the recourses which the collective agreement grants to each employee whom it represents without being required to prove that the interested party has assigned his claim.

25 The Supreme Court refers to this as the principle of exclusive representation or the monopoly of representation:

> 41 One of the fundamental principles we find in Quebec labour law, and one which it has in common with federal law and the law of the other provinces, is the monopoly that the union is granted over representation. This principle applies in respect of a defined group of employees or bargaining unit, in relation to a specific employer or company, at the end of a procedure of certification by an administrative tribunal or agency. Once certification is granted, it imposes significant obligations on the employer, imposing on it a duty to recognize the certified union and bargain with it in good faith with the aim of concluding a collective agreement (s. 53 L.C.). Once the collective agreement is concluded, it is binding on both the employees and the employer (ss. 67 and 68 L.C.). For the purposes of administering the collective agreement, the certified association exercises all the recourses of the employees whom it represents without being required to prove that the interested party has assigned his or her claim (s. 69 L.C.). [12]
>
> [Emphasis added]

26 The Union also points to the Newfoundland and Labrador *Labour Relations Act*, [13] which is very relevant given that more than half of the employees reported for work in Labrador. Section 50 provides:

> **50.** Where a trade union or a council of trade unions is certified, under this Act, as the bargaining agent of a unit,
>
> (a) the bargaining agent so certified immediately replaces another bargaining agent of the unit and has exclusive authority to conduct collective bargaining on behalf of employees in the unit and to bind them by a collective agreement until its certification in respect of employees in the unit is revoked;
>
> [. . .]
>
> [Emphasis added]

27 Even though the language in the Newfoundland and Labrador statute relates only to the negotiation and conclusion of the collective agreement, the Court will assume that the principle of exclusive representation exists and is just as broad under the laws of Newfoundland and Labrador as it is in Québec.

28 It is clear that the principle of exclusive representation means that an individual employee or retiree does not have the right to file and to pursue a grievance with respect to a breach of the collective agreement. [14]

29 The Court is not satisfied, however, that the principle of exclusive representation gives the Union the right to vote the employees' and retirees' claims in the CCAA.

30 First, the principle of exclusive representation relates to claims under the collective agreement. It does not give the Union the right to vote for the employees and retirees in all circumstances. For example, employees retain the right to vote individually

on such important issues as the acceptance of a collective agreement or the decision to strike. The vote on a plan under the CCAA is not the exercise of a claim under the collective agreement. In some cases (although not in the present matter), the vote may determine whether the employer continues its operations and whether the employees keep their jobs.

31 Further, the Union was not able to point to any authority extending the principle of exclusive representation to voting on a proof of claim with the result that the union had the right to vote on behalf of its members without any court authorization. There are a few examples of CCAA proceedings where the court has authorized the union to vote the claims of its members, [15] but no example was given to the Court of any case where the court concluded that the union had the right to vote on behalf of its members without such authorization.

32 Finally, the Court notes that if the right to vote on behalf of the members belongs to the Union pursuant to the principle of exclusive representation, then the proposed opt-out would be a breach of that monopoly and would be invalid.

33 These arguments lead the Court to dismiss the Union's argument that it has the right to vote on behalf of the unionized employees and retirees pursuant to the principle of exclusive representation.

3. Discretionary deemed proxy

34 The Court will analyze the appropriateness of a discretionary deemed proxy by asking several questions.

3.1 Is a deemed proxy appropriate?

35 First, before giving a deemed proxy to anyone, the Court must be satisfied that there is a valid reason to do so.

36 The Representative Employees and the Union plead that the deemed proxy is necessary to ensure that all of the employees and retirees exercise their right to vote. In his affidavit, Michael Keeper, one of the Representative Employees, states the following:

> 24. Individual voting by the 690 Salaried Members, as advocated by the Monitor and CCAA Parties, is completely inappropriate for our large, vulnerable creditor group who are not sophisticated commercial creditors. The Salaried Members are spread across Canada, many in the remote regions. This will make it impossible to reach many of them with the Proposed Plan, all the related documents, and the associated ballot in time to allow them to cast their vote. Many Salaried Members are old and infirmed, living in nursing home facilities, do not have internet access or fax machines, and many cannot understand complex legal documents, such as the Proposed Plan, the court orders, and the Monitor's Reports. For many, they will not understand the nature or consequences of the Proposed Plan and how it affects them, and it is not practical for Representative Counsel nor the Representatives to contact every one of them to provide advice and answer their questions in time to ensure that they are able to make an informed decision as to their rights and how the Proposed Plan impacts them.

37 Nicolas Lapierre, the Union representative responsible for this matter, makes similar comments in his sworn declaration:

> 16. En effet, j'ai lu le Plan et l'ensemble des documents qui l'accompagnent, que je trouve compliqués et difficiles à comprendre;
>
> 17. En raison de cette complexité, plusieurs Membres ne seront pas en mesure de comprendre ce qu'ils doivent faire avec ces documents ou ce qu'ils signifient, d'autant plus que certains de ces travailleurs sont partiellement ou totalement analphabètes, alors que d'autres sont âgés et maladies à un point tel où ils ne sont plus en mesure de s'occuper de leurs affaires par eux-mêmes;
>
> 18. Il y a ainsi de réelles possibilités que les Membres ne soient pas en mesure de voter ou de désigner quelqu'un pour le faire en leur nom, ce qui équivaudrait à les priver de leur droit de vote.

38 The Court considers these concerns to be somewhat overstated. There is nothing exceptional about the Wabush employees and retirees as compared to the employees and retirees of other companies. It should be possible to reach the great majority of them. While some of them may not have access to the internet or a fax machine, the Court doubts that the number is large. While some may not have the capacity to make a decision, there is likely someone who can make a decision on their behalf. The Plan itself is a complicated legal document that uses language which is difficult to understand, but the Monitor's reports are much easier to understand and the parties have the opportunity to include in the package that goes to the creditors a letter explaining matters in even simpler terms. The decision that the employees and retirees have to take is a fairly simple yes or no decision and the consequences of each decision can be explained.

39 Nevertheless, it remains clear that a number of votes will be lost. Each employee and retiree has the right to vote on the Plan and every vote is important. One of the Court's objectives in this matter is to ensure that each employee and retiree is given the opportunity to vote and the Court's hope is that all will vote. The deemed proxy is a way to achieve that result.

40 In addition to the cases where a deemed proxy was given to the union, [16] the parties point to only three examples of cases where deemed proxies were given to vote on behalf of non-unionized employees and retirees. [17] The CCAA Parties and the Monitor distinguish those cases on the basis that the deemed proxies were to vote in favour of the plan.

41 These examples of deemed proxies confirm that the Court has jurisdiction to give deemed proxies in the present matter. That jurisdiction is not affected by whether the vote is in favour of the plan or against it.

42 The CCAA Parties and the monitor also argue that a deemed proxy gives the proxy holder too much leverage.

43 The Court does not agree. The deemed proxy simply ensures that the employees and retirees exercise the leverage that they should have, based on their numbers and the value of their claims.

44 For all of these reasons, the Court concludes that it is appropriate to give a deemed proxy.

3.2 Who should exercise the deemed proxy?

45 The Representative Employees and the Union argue that their counsel should exercise the deemed proxy.

46 The Court agrees.

47 The Representative Employees were appointed by the Court for the purpose of representing the non-unionized employees and retirees. The Union is given that role by statute. They are the appropriate representatives to exercise the deemed proxies.

48 The Court adopts the following reasoning of Justice Wilton-Siegel in the U.S. Steel CCAA proceedings:

> [15] Further, I am satisfied that it is appropriate that Representative Counsel act as the deemed proxy for the administrator for the non-unionized pension plans and for the current and former non-unionized employees having OPEB claims, given the active involvement of Representative Counsel in these proceedings to date on behalf of, and the commonality of interest of, the current and former non-unionized employees. I note as well that a procedure exists for individuals who have opted to represent themselves, and for individuals who have been represented by Representative Counsel but who choose to participate directly at the creditors meetings, to appoint an alternative proxy or to attend and vote in person at the creditors meetings. [18]

49 The CCAA Parties and the Monitor argue that there is no commonality of interest in the present matter in that not all of the employees and retirees have both a pension claim and an OPEB claim. They argue that some employees and retirees may want the pension issues pursued rather than the OPEB claims while others may want the opposite, because of their personal circumstances.

50 Those considerations may be relevant in assessing whether it is appropriate for the Representative Employees and the Union to pursue the deemed trust for the pension claims. However, that matter is not before the Court today and that issue was not raised when the matter was before the Court.

51 Moreover, these considerations are of no relevance on the deemed proxy issue: the pension issues are excluded from the Plan and the only issue being raised is whether the settlement with the NFA should have generated more for the unsecured creditors. No employee or retiree has a divergent interest on this issue.

52 The Court therefore concludes that counsel for the Representative Employees and for the Union are the appropriate persons to hold the deemed proxies.

3.3 Should the deemed proxy be discretionary?

53 The Representative Employees and the Union say that they have not yet taken a position on whether they will vote for or against the Plan. They have concerns as to whether the settlement with the NFA is the best deal that could be achieved, but they have not had any discussions with the Monitor or with anyone else. They anticipate, as do the CCAA Parties and the Monitor, that there will be further discussions and negotiations right up until the vote. In that context, the Representative Employees and the Union ask that the proxy holder be allowed to vote the claims in his or her discretion. They argue that an employee or retiree who wants to vote for or against the Plan can opt out of the deemed proxy by attending the meeting, by appointing a different proxy, or by indicating his or her vote on the proxy form.

54 The discretionary deemed proxy is fundamentally undemocratic. The deemed proxy is intended to ensure that all of the employee and retiree claims are voted. But making it discretionary has the effect of taking away the individuals' right to vote or even to know how his or her claim is being voted and giving it to someone else. This is not a good outcome.

55 The opt-out right suggested by counsel for the Representative Employees and the Union does not solve these problems. If negotiations and discussions continue right up to the vote, as the parties seem to anticipate, the employees and retirees will have to decide whether to opt out on the basis of a Plan that may not the final version and without knowing the final recommendation of the Representative Employees and the Union or the position the proxy holder will take on their behalf if they do not opt out.

56 The CCAA Parties and the Monitor argue that there is no precedent for such a discretionary deemed proxy. They argue that the few examples of deemed proxies all provide that the proxy holder will vote in favour of the plan. They found no examples of deemed proxies to vote against the plan or to vote in the discretion of the proxy holder. The Representative Employees and the Union did not submit any examples either.

57 The Representative Employees and the Union plead that there is no difference between a deemed proxy to vote in favour of the plan and a deemed proxy to vote against it. The Court agrees in principle. In the three examples of deemed proxies to vote in favour of the plan, it appears from the materials that the representatives of the employees participated or were consulted in the preparation of the plan and were prepared to support it. The practical reality is that there are no deemed proxies to vote against a plan because if the employees representatives are consulted before the plan is filed and they are opposed to the plan, the plan will likely be modified before it is filed in order to gain their support.

58 The problem in the present matter is that there were no negotiations or discussions prior to the filing of the Plan and there have been no discussions in the three weeks since the filing of the Plan. Everyone is waiting for this order before they begin serious discussions.

59 That is unfortunate. The negotiations anticipated by the parties will have the effect of depriving the employees and retirees of any real participation in the process. There will be a meeting to explain the Plan to them, but subsequent negotiations will mean that the Plan as explained to them is not the final version of the Plan. If negotiations continue up until the meeting, there will be no time to explain the final version of the Plan to the employees and retirees.

60 In other words, the justification for the discretionary deemed proxy is that the Representative Employees and the Union cannot take a final position on the Plan today and that the Plan may be amended up until the vote. The solution is to give them more time to take a final position and to ensure that the Plan is not amended after they take that final position, not to give them the right to vote the individuals' claims in their discretion.

61 For these reasons, the Court will not authorize a discretionary deemed proxy. The deemed proxy must be either a deemed proxy to vote for the Plan or a deemed proxy to vote against it. The Court will delay the mailing of the Meeting Materials to allow the parties to have the discussions and negotiations that should have taken place before now so that the Representative Employees and the Union can take a final position for or against the Plan.

CONCLUSIONS

62 As a result, the Court will order the following.

63 The date of the meetings will remain June 18, 2018. That is two months from now. There is time for the parties to discuss the current version of the Plan and either satisfy themselves that it is reasonable or negotiate changes to it. The Court will give them one month to do so.

64 The date for mailing the Meeting Materials to the creditors will be pushed back to May 21, 2018 to allow for this month of negotiations. The Meeting Materials will include the final version of the Plan as well as letters from counsel for the Representative Employees and the Union in which they must take a position for or against the Plan. The deemed proxy will be to vote in accordance with that recommendation. That way, the employees and retirees will have the opportunity to make a real choice, based on the final version of the Plan and in full knowledge of how their claim will be voted if they do not execute a proxy.

65 It follows that there can be no amendments to the Plan after May 18, 2018 without the authorization of the Court. Moreover, any amendment authorized after that date will likely involve the postponement of the creditors' meetings scheduled for June 18, 2018.

FOR THESE REASONS, THE COURT:

66 *GRANTS* the Plan Filing and Meetings Order as amended by the Court and annexed to this judgment;

67 *ORDERS* the parties not to amend the Plan after May 18, 2018 without the authorization of the Court;

68 *RESERVES* the right of the parties to make further representations to the Court with respect to the documents to be mailed to the creditors on May 21, 2018;

69 *THE WHOLE, WITHOUT COSTS.*

THE COURT:

1. **GRANTS** the Motion.

Service

2. **DECLARES** that the Petitioners have given sufficient prior notice of the presentation of this Motion to interested parties and that the time for service of the Motion herein be and is hereby abridged.

Definitions

3. DECLARES that the capitalized terms not otherwise defined in this Order shall have the meanings ascribed in **Schedule "A"** attached hereto. The following terms shall have the meanings set out below:

Joint Plan of Compromise and Arrangement

4. **ORDERS** that the Joint Plan of Compromise and Arrangement pursuant to the CCAA filed by the Participating CCAA Parties dated April 16, 2018, (as may be amended, supplemented and restated from time to time, the "**Plan**") is hereby accepted for filing, and the Participating CCAA Parties are hereby authorized to seek approval of the Plan from the Affected Unsecured Creditors in the manner set forth herein.

5. **ORDERS** that the Participating CCAA Parties, be, and they are hereby, authorized to file, in accordance with its terms, any amendment, restatement, modification of or supplement to, the Plan (each a "**Plan Modification**") prior to the first Meeting pursuant to and in accordance with the terms of the Plan, in which case any such Plan Modification shall, for all purposes, be and be deemed to form part of and be incorporated into the Plan. The Participating CCAA Parties shall give notice of any such Plan Modification at each of the Meetings prior to the vote being taken to approve the Plan. The Participating CCAA Parties may give notice of any such Plan Modification at or before any of the Meetings by notice which shall be sufficient if, in the case of notice at a Meeting, given to those Affected Unsecured Creditors present at such meeting in person or by proxy and, in the case of notice being given before a Meeting, provided to those Persons listed on the service list posted on the Website (as amended from time to time, the "*Service List*"). The Monitor shall post on the Website, as soon as practicable, any such Plan Modification, with notice of such posting forthwith provided to the Service List.

6. **ORDERS** that after the Meetings (and both prior to and subsequent to the obtaining of the Sanction Order), the Participating CCAA Parties may at any time and from time to time effect a Plan Modification pursuant to and in accordance with the terms of the Plan. The Monitor shall forthwith post on the Website any such Plan Modification, with notice of such posting forthwith provided to the Service List.

Form of Documents

7. **ORDERS** that the forms of: (i) the Notice of Creditors' Meetings and Sanction Hearing, (ii) the Creditor Letter, (iii) the Proxy, and (iv) the Resolution are each hereby approved, and the Monitor, in consultation with the Participating CCAA Parties, is authorized to make such minor changes to such forms of documents as it consider necessary or desirable to conform the content thereof to the terms of the Plan or this Order or any further Orders of the Court.

Notification Procedures

8. **ORDERS** that the Monitor shall cause to be sent, by regular mail, courier or email a copy of the Notice of Creditors' Meetings and Sanction Hearing, the Creditor Letter, the Proxy, the Resolution, the Plan, and this Order (collectively, with the Report of the Monitor to be filed in connection with the Meetings, the "**Meeting Materials**") as soon as reasonably practicable after the granting of this Order and, in any event, no later than **5:00 p.m.** (Eastern time) on May 18, 2018 to each Affected Unsecured Creditor known to the Monitor as of the date of this Order at the address for such Affected Unsecured Creditor set out in such Affected Unsecured Creditor's Proof of Claim or to such other address that has been provided to the Monitor by such Affected Unsecured Creditor pursuant to Paragraph 34 or 36.

9. **ORDERS** that the Monitor shall (i) forthwith publish on the Website an electronic copy of the Meeting Materials, (ii) send a copy of the Meeting Materials to the Service List, and (iii) provide a copy to any Affected Unsecured Creditor upon written request by such Affected Unsecured Creditor provided that such written request is received by the Monitor no later than three (3) Business Days prior to the Meetings (or any adjournment thereof).

10. **ORDERS** that the Participating CCAA Parties and the Monitor be and they are hereby authorized to provide such supplemental information ("**Additional Information**") to the Meeting Materials as the Participating CCAA Parties may determine, with the consent of the Monitor, and the Additional Information shall be distributed or made available by posting on the Website and served on the Service List, and any such other method of delivery that the Participating CCAA Parties, with the consent of the Monitor, determine is appropriate.

11. **ORDERS** that the publications and/or delivery referred to in Paragraphs 8, 9 and 10 hereof, shall constitute good and sufficient service of the Meeting Materials on all Persons who may be entitled to receive notice thereof, or of these proceedings, or who may wish to be present in person or represented by proxy at the Meeting in respect of the Unsecured Creditor Class to which each such Person belongs, or who may wish to appear in these proceedings, and no other form of notice or service need be made on such Persons, and no other document or material need be served on such Persons in respect of these proceedings.

12. **ORDERS** that the non-receipt of a copy of the Meeting Materials beyond the reasonable control of the Monitor shall not constitute a breach of this Order and the non-receipt of a copy of the Meeting Materials shall not invalidate any resolution passed or proceedings taken at the Meetings.

Employee Addresses and Information

13. **ORDERS** that the Monitor is hereby authorized to deliver to Employees with Proven or Unresolved Claims a notice that such Employees must provide their Social Insurance Numbers to the Monitor as a condition to receiving any distributions under the Plan.

Limited Substantive Consolidation of certain Participating CCAA Parties

14. **ORDERS** that the following Participating CCAA Parties shall be substantively consolidated for the purposes of voting and distribution on the Plan, and all references in this Order to Participating CCAA Parties shall mean to such Participating CCAA Parties, as so consolidated:

Classes of Unsecured Creditors

15. **ORDERS** that the Affected Unsecured Creditors with respect of each Participating CCAA Party shall be grouped into the following classes for voting (in respect of their Eligible Voting Claims) and distribution purposes (in respect of their Proven Claims) (each an "**Unsecured Creditor Class**" and together the "**Unsecured Creditor Classes**"):

Meetings

16. **DECLARES** that the Participating CCAA Parties are hereby authorized to call, hold and conduct the following Meetings, being understood that there will be a separate Meeting for each Unsecured Creditor Class listed below, in Montréal, Québec, for the purpose of voting upon, with or without variation, the Resolution to approve the Plan:

17. **DECLARES** that the only Persons entitled to notice of, to attend and speak at a Meeting are Eligible Voting Creditors of such Unsecured Creditor Class (or their respective duly appointed Proxy holders and their legal counsel), representatives of the Monitor, the Participating CCAA Parties, all such parties' financial and legal advisors, Salaried Members Representative Counsel, USW Counsel, the Chair (as defined below), the secretary and any scrutineers appointed in accordance with Paragraph 31 hereof. Any other Person may be admitted to the Meetings on invitation of the Participating CCAA Parties or the Monitor.

18. **ORDERS** that any Proxy which any Eligible Voting Creditor wishes to submit in respect of a Meeting (or any adjournment, postponement or other rescheduling thereof) must be substantially in the form attached hereto as **Schedule "D"** (or in such other form acceptable to the Monitor or the Chair).

19. **ORDERS** that any Proxy in respect of a Meeting (or any adjournment, postponement or other rescheduling thereof) must be received by the Monitor in accordance with Paragraph 36 hereof by 5:00 p.m. (Eastern time) June 14, 2018 (the "**Proxy Deadline**"), being two (2) Business Days prior to the date set for the Meetings in Paragraph 16 hereof. The Monitor is hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which a Proxy is completed.

20. **ORDERS** that, in the absence of instruction to vote for or against the approval of the Resolution in a duly signed and returned Proxy that appoints a representative of the Monitor as Proxy holder, the Proxy shall be deemed to include instructions

to vote for the approval of the Resolution, provided the Proxy holder does not otherwise revoke the Proxy by written notice to the Monitor delivered so that it is received by the Monitor no later than the Proxy Deadline.

21. **ORDERS** that the quorum required at each Meeting shall be one Eligible Voting Creditor present at each Meeting in person or by Proxy. If the (a) requisite quorum is not present at any Meeting, or (b) any Meeting is adjourned, postponed or rescheduled by the Chair (whether (i) by the request of the Participating CCAA Parties; (ii) by vote of the majority in value of Affected Unsecured Creditors holding Eligible Voting Claims in person or by Proxy at any Meeting; or (iii) otherwise as determined by the Chair), then any such Meetings shall be adjourned, postponed or rescheduled to such time(s) and place(s) as the Chair deems necessary or desirable.

22. **ORDERS** that the Chair, with the consent of the Participating CCAA Parties and the Plan Sponsors, not to be unreasonably withheld, be and he or she is hereby, authorized to adjourn, postpone or otherwise reschedule any Meeting on one or more occasions to such time(s), date(s) and place(s) as the Chair, with the consent of the Participating CCAA Parties and Plan Sponsors, not to be unreasonably withheld, deem necessary or desirable (without the need to first convene any such Meetings for the purpose of any adjournment, postponement or other rescheduling thereof). None of the Participating CCAA Parties, the Chair or the Monitor shall be required to deliver any notice of the adjournment, postponement or rescheduling of the Meeting(s) or adjourned Meeting(s), as applicable, provided that the Monitor shall:

23. **DECLARES** that the only Persons entitled to vote at a Meeting shall be Eligible Voting Creditors of such Unsecured Creditor Class or their Proxy holders. Each Eligible Voting Creditor will be entitled to a vote with a value equal to the value in dollars of its Voting Claim, and/or the value in dollars of its Unresolved Voting Claim, if any, as determined in accordance with this Paragraph 23 of this Order.

24. **ORDERS** that the dollar value of an Unresolved Voting Claim for voting purposes at the applicable Meeting shall be: (i) the amount set out in such Creditor's Proof of Claim if no Notice of Allowance or Notice of Revision or Disallowance (in each case as defined in the Amended Claims Procedure Order) has been issued; (ii) the amount set out in the Notice of Revision or Disallowance in respect of such Claim if no Notice of Dispute (as defined in the Amended Claims Procedure Order) has been filed and the time for doing so has not expired; (iii) the amount set out in the Notice of Dispute in respect of such Claim if a Notice of Dispute has been timely filed, in all respects without prejudice to the determination of the dollar value of such Affected Unsecured Claim for distribution purposes in accordance with the Amended Claims Procedure Order; or (iv) the amount as may be agreed to between the Monitor and the Affected Unsecured Creditor, or between the Monitor and the Salaried Members Representative Counsel or the Monitor and the USW Counsel, as applicable.

25. **DECLARES** that in respect of the Eligible Voting Claims of the Salaried Members and the USW Members:

For greater certainty, however, only the Pension Plan Administrator or its designated Proxy may vote the Pension claims.

26. **ORDERS** that a Voting Claim or Unresolved Voting Claim shall not include fractional numbers and shall be rounded down to the nearest whole Canadian dollar amount.

27. **ORDERS** that the Monitor shall keep a separate record of the votes cast by Affected Unsecured Creditors holding Unresolved Voting Claims and shall report to the Court with respect thereto at the Sanction Motion.

28. **ORDERS** that the results of any and all votes conducted at the Meetings shall be binding on all Affected Unsecured Creditors, whether or not any such Affected Unsecured Creditor is present or voting at the Meetings.

29. **ORDERS** that a representative of the Monitor shall preside as the chair of each Meeting (the "**Chair**") and, subject to any further order of this Court, shall decide all matters relating to the conduct of such Meeting. The Participating CCAA Party and any Eligible Voting Creditor may appeal from any decision of the Chair to the Court, within three (3) Business Days of any such decision.

30. **DECLARES** that, at each Meeting, the Chair is authorized to direct a vote on the Resolution to approve the Plan, and any amendments thereto made in accordance with Paragraph 5 of this Order.

31. **ORDERS** that the Monitor may appoint scrutineers for the supervision and tabulation of the attendance at, quorum at and votes cast at each Meeting. Person(s) designated by the Monitor shall act as secretary at each Meeting.

32. **ORDERS** that the Monitor shall be directed to calculate the votes cast at each Meeting called to consider the Plan and report the results in accordance with Paragraph 42 of this Order.

33. **ORDERS** that an Affected Unsecured Creditor that is not an individual may only attend and vote at a Meeting if it has appointed a Proxy holder to attend and act on its behalf at such Meeting.

Notice of Transfers

34. **ORDERS** that, for purposes of voting at a Meeting, if an Affected Unsecured Creditor transfers or assigns all of its Affected Unsecured Claim, then the transferee or assignee shall only be entitled to vote and attend the applicable Meeting if the transferee or assignee delivers evidence satisfactory to the Monitor of its ownership of all of such Affected Unsecured Claim and a written request to the Monitor, not later than 5:00 pm on the date that is seven (7) days prior to the date of the Meeting, or such later time that the Monitor may agree to, that such transferee's or assignee's name be included on the list of Eligible Voting Creditors entitled to vote, either in person or by proxy, the transferor's or assignor's Voting Claim or Unresolved Voting Claim, as applicable, at the applicable Meeting in lieu of the transferor or assignor.

35. **ORDERS** that if the holder of an Affected Unsecured Claim or any subsequent holder of the whole of an Affected Unsecured Claim who has been acknowledged by the Monitor as the Affected Unsecured Creditor in respect of such Affected Unsecured Claim, transfers or assigns the whole of such Claim to more than one Person or part of such Claim to another Person or Persons, such transfer or assignment shall not create a separate Affected Unsecured Claim or Affected Unsecured Claims and such Affected Unsecured Claim shall continue to constitute and be dealt with as a single Claim as if such Claim (or portion of such Claim) had not been transferred or assigned, notwithstanding such transfer or assignment, and the Monitor and the Participating CCAA Parties shall in each such case not be bound to recognize or acknowledge any such transfer or assignment and shall be entitled to give notices to and to otherwise deal with such Affected Unsecured Claim only as a whole and then only to and with the Person last holding such Affected Unsecured Claim in whole as the Affected Unsecured Creditor in respect of such Affected Unsecured Claim, provided such Affected Unsecured Creditor may by notice in writing to the Monitor delivered so that it is received by the Monitor on or before the tenth day prior to any Meeting or distribution in respect of such Affected Unsecured Claim, direct that subsequent dealings in respect of such Affected Unsecured Claim, but only as a whole, shall be with a specified transferee or assignee and in such event, such Affected Unsecured Creditor and such transferee or assignee of the Affected Unsecured Claim shall be bound by any notices given to the transferor or assignor and prior steps taken in respect of such Claim.

Notices and Communications

36. **ORDERS** that any notice or other communication to be given under this Order by an Affected Unsecured Creditor to the Monitor or the Participating CCAA Parties shall be in writing and will be sufficiently given only if given by pre-paid mail, registered mail, e- mail, courier addressed to:

37. **ORDERS** that any document sent by the Monitor or the Participating CCAA Parties pursuant to this Order may be sent by e-mail, ordinary mail, registered mail or courier. A Creditor shall be deemed to have received any document sent pursuant to this Order two (2) Business Days after the document is sent by mail and one (1) Business Day after the document is sent by courier or e-mail. Documents shall not be sent by ordinary or registered mail during a postal strike or work stoppage of general application. For greater certainty, the Monitor shall not be deemed to have received any document unless and until such document is actually received by the Monitor at the address noted above.

38. **ORDERS** that, in the event that the day on which any notice or communication required to be delivered pursuant to this Order is not a Business Day, then such notice or communication shall be required to be delivered on the next Business Day.

39. **ORDERS** that if, during any period during which notices or other communications are being given pursuant to this Order, a postal strike or postal work stoppage of general application should occur, such notices or other communications sent by ordinary or registered mail and then not received shall not, absent further Order of this Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery or e-mail in accordance with this Order.

40. **ORDERS** that all references to time in this Order shall mean prevailing local time in Montréal, Québec and any references to an event occurring on a Business Day shall mean prior to 5:00 p.m. on the Business Day unless otherwise indicated.

41. **ORDERS** that references to the singular shall include the plural, references to the plural shall include the singular and to any gender shall include the other gender.

Sanction Hearing

42. **ORDERS** that the Monitor shall provide a report to the Court as soon as practicable after the Meetings by no later than June 21, 2018 (the "**Monitor's Report Regarding the Meetings**") with respect to:

43. **ORDERS** that an electronic copy of the Monitor's Report Regarding the Meetings, the Plan, including any Plan Modification, and a copy of the materials filed in respect of the Sanction Motion shall be posted on the Website prior to the Sanction Motion.

44. **ORDERS** that in the event the Plan has been approved by the Required Majority of each Unsecured Creditor Class, the Participating CCAA Parties may seek the sanction of the Plan before this Court on June 29, 2018 (the "**Sanction Motion**"), or such later date as the Monitor may advise the Service List in these proceedings, provided that such later date shall be acceptable to the Participating CCAA Parties, the Parent and the Monitor.

45. **ORDERS** that service of this Order by the CCAA Parties to the parties on the Service List, the delivery of the Meeting Materials in accordance with Paragraph 8 hereof and the posting of the Meeting Materials on the Website in accordance with Paragraph 9 hereof shall constitute good and sufficient service and notice of the Sanction Motion.

46. **ORDERS** that in the event that the Sanction Motion is adjourned, only those Persons appearing on the Service List as of the date of service shall be served with notice of the adjourned date.

47. **ORDERS** that, subject to any further Order of the Court, in the event of any conflict, inconsistency, ambiguity or difference between the provisions of the Plan and this Order, the terms, conditions and provisions of the Plan, as sanctioned, shall govern and be paramount, and any such provision of this Order shall be deemed to be amended to the extent necessary to eliminate any such conflict, inconsistency, ambiguity or difference.

48. **ORDERS** that any person who wishes to oppose the Sanction Motion shall serve upon the parties on the Service List, and file with the Court a copy of the materials to be used to oppose the Sanction Motion by no later than 5:00 p.m. (Eastern time) on June 26, 2018 or, if applicable, four days' prior to any adjourned or rescheduled Sanction Motion.

Monitor's Role

49. **ORDERS** that the Monitor, in addition to its prescribed rights and obligations under (i) the CCAA; (ii) the Initial Orders; and (iii) the Amended Claims Procedure Order, is hereby directed and empowered to take such other actions and fulfill such other roles as are authorized by this Order.

50. **ORDERS** that: (i) in carrying out the terms of this Order, the Monitor shall have all the protections given to it by the CCAA, the Initial Orders, the Amended Claims Procedure Order, and any other Order granted in these CCAA Proceedings and as an officer of the Court, including the stay of proceedings in its favour; (ii) the Monitor shall incur no liability or obligation as a result of carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part; (iii) the Monitor shall be entitled to rely on the books and records of the Participating CCAA Parties and any information provided by the Participating CCAA Parties, and any information acquired by the Monitor as a result of carrying out its duties under this Order without independent investigation; and (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

Aid and Assistance of Other Courts

51. **REQUESTS** the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province or any court or any judicial, regulatory or administrative body of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

General Provisions

52. **ORDERS** that the Monitor shall use reasonable discretion as to the adequacy of completion and execution of any document completed and executed pursuant to this Order and, where the Monitor is satisfied that any matter to be proven under this Order has been adequately proven, the Monitor may waive strict compliance with the requirements of this Order as to the completion and execution of documents.

53. **DECLARES** that the Monitor may apply to this Court for advice and direction in connection with the discharge or variation of its powers and duties under this Order.

54. **ORDERS** the provisional execution of this Order notwithstanding appeal.

55. **THE WHOLE** without costs.

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STEPHEN W. HAMILTON J.S.C.

Schedule — "A" to the Plan Filing and Meetings Order Definitions

"**8568391**" means 8568391 Canada Limited;

"**Administration Charges**" means, collectively, the BL Administration Charge and the Wabush Administration Charge in the aggregate amount of the BL Administration Charge and the Wabush Administration Charge, as such amount may be reduced from time to time by further Court Order;

"**Affected Claim**" means any Claim other than an Unaffected Claim;

"**Affected Creditor**" means any Creditor holding an Affected Claim, including a Non-Filed Affiliate holding an Affected Claim and a CCAA Party holding an Affected Claim;

"**Affected Unsecured Claim**" means an Affected Claim that is an Unsecured Claim, including without limitation, any Deficiency Claims;

"**Affected Unsecured Creditor**" means any Affected Creditor holding an Affected Unsecured Claim, including a Non-Filed Affiliate and a CCAA Party holding an Affected Unsecured Claim;

"**Affiliate**" means, with respect to any Person, any other Person who directly or indirectly controls, is controlled by, or is under direct control or indirect common control with, such Person, and includes any Person in like relation to an Affiliate. A Person shall be deemed to "**control**" another Person if such Person possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of such other Person, whether through ownership of voting securities, by contract or otherwise, and the term "**controlled**" shall have a similar meaning;

"**Allocation Methodology**" means the methodology for the allocation of proceeds of realizations of the CCAA Parties' assets and the costs of the CCAA Proceedings amongst the CCAA Parties and, to the extent necessary, amongst assets or asset categories, which was approved by an Order of the Court on July 25, 2017 as may be amended upon Final Determination of the Fermont Allocation Appeal;

"**Allocated Value**" means, in respect of any particular asset of a Participating CCAA Party, the amount of the sale proceeds realized from such asset, net of costs allocated to such asset all pursuant to the Allocation Methodology and, in respect of any Secured Claim, the amount of such sale proceeds receivable on account of such Secured Claim after taking into account the priority of such Secured Claims relative to other creditors holding a Lien in such asset;

"**Allowed Claim**" shall have the meaning given to it in the Amended Claims Procedure Order;

"**Amended Claims Procedure Order**" means the Amended Claims Procedure Order dated November 16, 2015, approving and implementing the claims procedure in respect of the CCAA Parties and the Directors and Officers (including all schedules and appendices thereof);

"**Applicable Law**" means any law (including any principle of civil law, common law or equity), statute, order, decree, judgment, rule, regulation, ordinance, or other pronouncement having the effect of law, whether in Canada or any other country or any domestic or foreign province, state, city, county or other political subdivision;

"**Arnaud**" means Arnaud Railway Company;

"**BIA**" means the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended;

"**BL Administration Charge**" means the charge over the BL Property created by paragraph 45 of the Bloom Lake Initial Order and having the priority provided in paragraphs 46 and 47 of such Court Order in the amount of Cdn.$2.5 million, as such amount may be reduced from time to time by further Court Order;

"**BL Directors' Charge**" means the charge over the BL Property of the BL Parties created by paragraph 31 of the Bloom Lake Initial Order, and having the priority provided in paragraphs 46 and 47 of such Order in the amount of Cdn.$2.5 million, as such amount may be reduced from time to time by further Court Order;

"**BLGP**" means Bloom Lake General Partner Limited;

"**BLLP**" means The Bloom Lake Iron Ore Mine Limited Partnership;

"**Bloom Lake CCAA Parties**" means, collectively, BLGP, Quinto, 8568391, CQIM, BLLP, and BLRC;

"**BL Parties**" means BLGP and BLLP;

"**BL Property**" means all current and future assets, rights, undertakings and properties of the Bloom Lake CCAA Parties, of every nature and kind whatsoever, and wherever situate, including all Cash or other proceeds thereof;

"**BLRC**" means Bloom Lake Railway Company Limited;

"**Business**" means the direct and indirect operations and activities formerly carried on by the Participating CCAA Parties;

"**Business Day**" means a day, other than a Saturday, a Sunday, or a non-juridical day (as defined in article 6 of the Code of Civil Procedure, R.S.Q., c. C-25, as amended);

"**Cash**" means cash, certificates of deposit, bank deposits, commercial paper, treasury bills and other cash equivalents;

"**CCAA**" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

"**CCAA Charges**" means the Administration Charge and the Directors' Charge;

"**CCAA Parties**" means the Wabush CCAA Parties, together with the Bloom Lake CCAA Parties, and **"CCAA Party**" means any one of the CCAA Parties;

"**CCAA Party Pre-Filing Interco Claims**" means Claims of the Participating CCAA Parties against other Participating CCAA Parties as set out in Schedule "H" hereto; "**CCAA Proceedings**" means the proceedings commenced pursuant to the CCAA by a Court Order issued on January 27, 2015, bearing Court File No. 500-11-048114-157;

"**Claim**" means:

provided, however, that Excluded Claims are not Claims, but for greater certainty, a Claim includes any claim arising through subrogation or assignment against any Participating CCAA Party or Director or Officer;

"**Claims Bar Date**" means as provided for in the Amended Claims Procedure Order: (a) in respect of a Claim or D&O Claim, 5:00 p.m. on December 18, 2015, or such other date as may be ordered by the Court; and (b) in respect of a Restructuring Claim, the later of (i) 5:00 p.m. on December 18, 2015 (ii) 5:00 p.m. on the day that is 21 days after either (A) the date that the applicable Notice of Disclaimer or Resiliation becomes effective, (B) the Court Order settling a contestation against such Notice of Disclaimer or Resiliation brought pursuant to Section 32(5)(b) CCAA, or (C) the date of the event giving rise to the Restructuring Claim; or (iii) such other date as may be ordered by the Court;

"**Claims Officer**" means the individual or individuals appointed by the Monitor pursuant to the Amended Claims Procedure Order;

"**CMC Secured Claims**" has the meaning ascribed thereto in the Thirty-Ninth Report dated September 11, 2017 of the Monitor;

"**CNR Key Bank Claims**" has the meaning ascribed thereto in the Thirty-Ninth Report dated September 11, 2017 of the Monitor;

"**Conditions Certificates**" means written notice confirming, as applicable, the fulfilment or waiver, to the extent available, of the conditions precedent to implementation of the Plan as set out in Section 11.3 of the Plan;

"**Construction Lien Claim**" means a Claim asserting a Lien over real property of a Participating CCAA Party in respect of goods or services provided to such Participating CCAA Party that improved such real property;

"**Court**" means the Québec Superior Court of Justice (Commercial Division) or any appellate court seized with jurisdiction in the CCAA Proceedings, as the case may be;

"**Court Order**" means any order of the Court;

"**CQIM**" means Cliffs Québec Iron Mining ULC;

"**CQIM/Quinto Parties**" means CQIM and Quinto together;

"**Creditor**" means any Person having a Claim, but only with respect to and to the extent of such Claim, including the transferee or assignee of a transferred Claim that is recognized as a Creditor in accordance with the Amended Claims Procedure Order,

the Plan and the Meetings Order, or a trustee, executor, liquidator, receiver, receiver and manager, or other Person acting on behalf of or through such Person;

"**D&O Bar Date**" means 5:00 p.m. (prevailing Eastern Time) on December 18, 2015, or such other date as may be ordered by the Court;

"**D&O Claim**" means any right or claim of any Person against one or more of the Directors and/or Officers howsoever arising on or before the D&O Bar Date, for which the Directors and/or Officers, or any of them, are by statute liable to pay in their capacity as Directors and/or Officers or which are secured by way of any one of the Directors' Charges;

"**Deficiency Claim**" means, in respect of a Secured Creditor holding a Proven Secured Claim, the amount by which such Secured Claim exceeds the Allocated Value of the Property secured by its Lien, and for greater certainty, includes, as applicable, the deficiency Claim, if any, of (a) the Pension Plan Administrator arising from any of the Pension Claims being Finally Determined to be a Priority Pension Claim, and (b) the Non- Filed Affiliate Secured Interco Claims;

"**Director**" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director or *de facto* director of any of the Participating CCAA Parties, in such capacity;

"**Directors' Charges**" means, collectively, the BL Directors' Charge and the Wabush Directors' Charge;

"**Eligible Voting Claims**" means a Voting Claim or an Unresolved Voting Claim;

"**Eligible Voting Creditors**" means, subject to Section 4.2(b) of the Plan, Affected Unsecured Creditors holding Voting Claims or Unresolved Voting Claims;

"**Employee**" means a former employee of a Participating CCAA Party other than a Director or Officer;

"**Employee Priority Claims**" means, in respect of a Participating CCAA Party, the following claims of Employees of such Participating CCAA Party:

"**Excluded Claim**" means, subject to further Court Order, any right or claim of any Person that may be asserted or made in whole or in part against the Participating CCAA Parties (or any one of them) in connection with any indebtedness, liability or obligation of any kind which arose in respect of obligations first incurred on or after the applicable Filing Date (other than Restructuring Claims and D&O Claims), and any interest thereon, including any obligation of the Participating CCAA Parties toward creditors who have supplied or shall supply services, utilities, goods or materials, or who have or shall have advanced funds to the Participating CCAA Parties on or after the applicable Filing Date, but only to the extent of their claims in respect of the supply or advance of such services, utilities, goods, materials or funds on or after the applicable Filing Date, and:

"**Fermont Allocation Appeal**" means the appeal by Ville de Fermont of the judgment of the Court in the CCAA Proceedings approving the Allocation Methodology dated July 25, 2017 under Court File Number 500-09-027026-178;

"**Filing Date**" means January 27, 2015 for the Bloom Lake CCAA Parties, and May 20, 2015 for the Wabush CCAA Parties;

"**Final Determination**" and "**Finally Determined**" as pertains to a Claim, matter or issue, means either:

"**Final Order**" means a Court Order, which has not been reversed, modified or vacated, and is not subject to any stay or appeal, and for which any and all applicable appeal periods have expired;

"**Governmental Authority**" means any government, including any federal, provincial, territorial or municipal government, and any government department, body, ministry, agency, tribunal, commission, board, court, bureau or other authority exercising or purporting to exercise executive, legislative, judicial, regulatory or administrative functions of, or pertaining to, government including without limitation any Taxing Authority;

"**Government Priority Claims**" means all claims of Governmental Authorities that are described in section 6(3) of the CCAA;

"**Initial Order**" means, collectively, in respect of the Bloom Lake CCAA Parties, the Bloom Lake Initial Order, and in respect of the Wabush CCAA Parties, the Wabush Initial Order;

"**Liability**" means any indebtedness, obligations and other liabilities of a Person whether absolute, accrued, contingent, fixed or otherwise, or whether due or to become due;

"**Lien**" means any lien, mortgage, charge, security interest, hypothec or deemed trust, arising pursuant to contract, statute or Applicable Law;

"**Meetings**" means the meetings of Affected Unsecured Creditors in the Unsecured Creditor Classes in respect of each Participating CCAA Party called for the purposes of considering and voting in respect of the Plan, which has been set by the Meetings Order to take place at the times, dates and locations as set out in the Meetings Order;

"**Meetings Order**" means this Plan Filing and Meetings Order, including the Schedules hereto, as may be amended or varied from time to time by subsequent Court Order;

"**Monitor**" means FTI Consulting Canada Inc., in its capacity as Monitor of the CCAA Parties and not in its personal or corporate capacity;

"**Newfoundland Reference Proceedings**" means the reference proceeding commenced in the Newfoundland Court of Appeal in respect of the Pension Claims as Docket No. 201701H0029, as appealed to the Supreme Court of Canada;

"**Non-Filed Affiliates**" means the Parent, its former and current direct and indirect subsidiaries and its current and former Affiliates who are not petitioners or mises-en- cause in the CCAA Proceedings, and for greater certainty does not include any CCAA Party but does include any subsidiary of a CCAA Party;

"**Non-Filed Affiliate Interco Claims**" means, collectively, the Non-Filed Affiliate Unsecured Interco Claims and the Non-Filed Affiliate Secured Interco Claims;

"**Non-Filed Affiliate Secured Interco Claims**" means, collectively, (a) the CNR Key Bank Claims and (b) the CMC Secured Claims, in each case only to the extent of the Allocated Value of the Property securing such Claims as set out in the Schedule "G" to this Order and to the extent not a Deficiency Claim;

"**Non-Filed Affiliate Unsecured Interco Claims**" means all Claims filed in the CCAA Proceedings by a Non-Filed Affiliate determined in accordance with the Plan (other than Non-Filed Affiliate Secured Claims) as set out in the Schedule "F" to this Order, and for greater certainty, includes any Deficiency Claims held by a Non-Filed Affiliate;

"**Notice of Disclaimer or Resiliation**" means a written notice issued, either pursuant to the provisions of an agreement, under Section 32 of the CCAA or otherwise, on or after the applicable Filing Date of the Participating CCAA Parties, and copied to the Monitor, advising a Person of the restructuring, disclaimer, resiliation, suspension or termination of any contract, employment agreement, lease or other agreement or arrangement of any nature whatsoever, whether written or oral, and whether such restructuring, disclaimer, resiliation, suspension or termination took place or takes place before or after the date of the Amended Claims Procedure Order;

"**Officer**" means any Person who is or was, or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer or *de facto* officer of any of the Participating CCAA Parties;

"**Parent**" means Cleveland-Cliffs Inc.;

"**Participating CCAA Parties**" means the CCAA Parties, other than 8568391 and BLRC, and

"**Participating CCAA Party**" means any of the Participating CCAA Parties;

"**Pension Plan Administrator**" means Morneau Shepell Ltd., the Plan Administrator of the Wabush Pension Plans, or any replacement thereof;

"**Pension Claims**" means Claims with respect to the administration, funding or termination of the Wabush Pension Plans, including any Claim for unpaid normal cost payments, or special/amortization payments or any wind up deficiency and "**Pension Claim**" means any one of them;

"**Pension Priority Proceedings**" means (a) the motion for advice and directions of the Monitor dated September 20, 2016 in respect of priority arguments asserted pursuant to the *Pension Benefits Act* (Newfoundland and Labrador), the *Pension Benefits Standards Act* (Canada) and the *Supplemental Pension Plans Act* (Québec) in connection with the claims arising from any failure of the Wabush CCAA Parties to make certain normal course payments or special payments under the Wabush Pension Plans and for the wind- up deficit under the Wabush Pension Plans currently subject to an appeal of Mr. Justice Hamilton's decision dated September 11, 2017, as may be further appealed, and (b) the Newfoundland Reference Proceedings with regards to the interpretation of the *Pension Benefits Act* (Newfoundland and Labrador) and the applicable pension legislation to members and beneficiaries of the Wabush Pension Plans;

"**Person**" means any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust (including a real estate investment trust), unincorporated organization, joint venture, government or any agency or instrumentality thereof or any other entity;

"**Plan**" has the meaning given to such term in Paragraph 4;

"**Plan Implementation Date**" means the Business Day on which all of the conditions precedent to the implementation of the Plan have been fulfilled, or, to the extent permitted pursuant to the terms and conditions of the Plan, waived, as evidenced by the Monitor's Plan Implementation Date Certificate to be filed with the Court;

"**Plan Implementation Date Certificate**" means the certificate substantially in the form to be attached to the Sanction Order to be filed by the Monitor with the Court, declaring that all of the conditions precedent to implementation of the Plan have been satisfied or waived;

"**Plan Modification**" shall have the meaning ascribed thereto in the Meetings Order;

"**Plan Sanction Date**" means the date that the Sanction Order issued by the Court;

"**Plan Sponsors**" means the Parent and all other Non-Filed Affiliates;

"**Post-Filing Claims Procedure Order**" means the Post-Filing Claims Procedures Order to be sought by the CCAA Parties, which, *inter alia*, seeks to establish a post-filing claims procedure with respect to post-filing claims, if any, against the CCAA Parties and their Officers and Directors, as such may be amended, restated or supplemented from time to time;

"**Priority Claims**" means, collectively, the (a) Employee Priority Claim; and (b) Government Priority Claims;

"**Priority Pension Claim**" means a Pension Claim that is Finally Determined to have priority over Secured Claims or Unsecured Claims;

"**Proof of Claim**" means the proof of claim form that was required to be completed by a Creditor setting forth its applicable Claim and filed by the Claims Bar Date, pursuant to the Amended Claims Procedure Order;

"**Property**" means, collectively, the BL Property and the Wabush Property;

"**Proven Affected Unsecured Claim**" means an Affected Unsecured Claim that is a Proven Claim;

"**Proven Claim**" means (a) a Claim of a Creditor, Finally Determined as an Allowed Claim for voting, distribution and payment purposes under the Plan, (b) in the case of the Participating CCAA Parties in respect of their CCAA Party Pre-Filing Interco Claims, and in the case of the Non-Filed Affiliates in respect of their Non-Filed Affiliate Unsecured Interco Claims and Non-Filed Affiliate Secured Interco Claims, as such Claims are declared, solely for the purposes of the Plan, to be Proven Claims pursuant to and in the amounts set out in this Order, and (c) in the case of Employee Priority Claims and Government Priority Claims, as Finally Determined to be a valid post-Filing Date claim against a Participating CCAA Party;

"**Proven Secured Claim**" means a Secured Claim that is a Proven Claim;

"**Quinto**" means Quinto Mining Corporation;

"**Representative Court Order**" means the Court Order dated June 22, 2015, as such order may be amended, supplemented, restated or rectified from time to time;

"**Required Majority**" means, with respect to each Unsecured Creditor Class, a majority in number of Affected Unsecured Creditors who represent at least two-thirds in value of the Claims of Affected Unsecured Creditors who actually vote approving the Plan (in person, by proxy or by ballot) at the Meeting;

"**Restructuring Claim**" means any right or claim of any Person against the Participating CCAA Parties (or any one of them) in connection with any indebtedness, liability or obligation of any kind whatsoever owed by the Participating CCAA Parties (or any one of them) to such Person, arising out of the restructuring, disclaimer, resiliation, termination or breach or suspension, on or after the applicable Filing Date, of any contract, employment agreement, lease or other agreement or arrangement, whether written or oral, and whether such restructuring, disclaimer, resiliation, termination or breach took place or takes place before or after the date of the Amended Claims Procedure Order, and, for greater certainty, includes any right or claim of an Employee of any of the Participating CCAA Parties arising from a termination of its employment after the applicable Filing Date, *provided, however*, that "**Restructuring Claim**" shall not include an Excluded Claim;

"**Salaried Members**" means, collectively, all salaried/non-Union Employees and retirees of the Wabush CCAA Parties or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses, or group or class of them (excluding any individual who opted out of representation by the Salaried Members Representatives and Salaried Representative Counsel in accordance with the Representative Court Order, if any);

"**Salaried Members Representatives**" means Michael Keeper, Terrence Watt, Damien Lebel and Neil Johnson, in their capacity as Court-appointed representatives of all the Salaried Members of the Wabush CCAA Parties, the whole pursuant to and subject to the terms of the Representative Court Order;

"**Salaried Members Representative Counsel**" means Koskie Minsky LLP and Fishman Flanz Meland Paquin LLP, in their capacity as legal counsel to the Salaried Members Representatives, or any replacement thereof;

"**Salaried Pension Plan**" means the defined benefit plan known as the Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent (Canada Revenue Agency registration number 0343558);

"**Sanction Hearing**" means the hearing of the Sanction Motion;

"**Sanction Motion**" means the motion by the Participating CCAA Parties seeking the Sanction Order;

"**Sanction Order**" means the Court Order to be sought by the Participating CCAA Parties from the Court as contemplated under the Plan which, *inter alia*, approves and sanctions the Plan and the transactions contemplated thereunder, pursuant to Section 6(1) of the CCAA, substantially in the form of Schedule "E" to the Plan or otherwise in form and content acceptable to the Participating CCAA Parties, the Monitor and the Parent, in each case, acting reasonably;;

"Secured Claims" means Claims held by "secured creditors" as defined in the CCAA, including Construction Lien Claims, to the extent of the Allocated Value of the Property securing such Claim, with the balance of the Claim being a Deficiency Claim, and amounts subject to section 6(6) of the CCAA;

"**Service List**" means the service list in the CCAA Proceedings;

"**Secured Creditors**" means Creditors holding Secured Claims;

"**Stay of Proceedings**" means the stay of proceedings created by the Initial Order as amended and extended by further Court Order from time to time;

"**Tax**" or "**Taxes**" means any and all taxes including all income, sales, use, goods and services, harmonized sales, value added, capital gains, alternative, net worth, transfer, profits, withholding, payroll, employer health, excise, franchise, real property, and personal property taxes and other taxes, customs, duties, fees, levies, imposts and other assessments or similar charges in the nature of a tax, including Canada Pension Plan and provincial pension plan contributions, employment insurance and unemployment insurance payments and workers' compensation premiums, together with any instalments with respect thereto, and any interest, penalties, fines, fees, other charges and additions with respect thereto;

"**Tax Claims**" means any Claim against the Participating CCAA Parties (or any one of them) for any Taxes in respect of any taxation year or period ending on or prior to the applicable Filing Date, and in any case where a taxation year or period commences on or prior to the applicable Filing Date, for any Taxes in respect of or attributable to the portion of the taxation period commencing prior to the applicable Filing Date and up to and including the applicable Filing Date. For greater certainty, a Tax Claim shall include, without limitation, (a) any and all Claims of any Taxing Authority in respect of transfer pricing adjustments and any Canadian or non-resident Tax related thereto, and (b) any Claims against any BL/Wabush Released Party in respect of such Taxes;

"**Taxing Authorities**" means Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of any province or territory of Canada, any municipality of Canada, the Canada Revenue Agency, the Canada Border Services Agency, any similar revenue or taxing authority of Canada and each and every province or territory of Canada (including Revenu Québec) and any political subdivision thereof and any Canadian or foreign government, regulatory authority, government department, agency, commission, bureau, minister, court, tribunal or body or regulation making entity exercising taxing authority or power, and "**Taxing Authority**" means any one of the Taxing Authorities;

"**Unaffected Claims**" means:

"**Union Pension Plan**" means the defined benefit plan known as the Pension Plan Bargaining Unit Employees of Wabush Mines, Cliffs Mining Company, Managing Agent (Canada Revenue Agency registration number 0555201);

"**Unresolved Affected Unsecured Claim**" means an Affected Unsecured Claim that is an Unresolved Claim;

"**Unresolved Claim**" means a Claim, which at the relevant time, in whole or in part: (a) has not been Finally Determined to be a Proven Claim in accordance with the Amended Claims Procedure Order and this Plan; (b) is validly disputed in accordance with the Amended Claims Procedure Order; and/or (c) remains subject to review and for which a Notice of Allowance or Notice of Revision or Disallowance (each as defined in the Amended Claims Procedure Order) has not been issued to the Creditor in accordance with the Amended Claims Procedure Order as at the date of this Plan, in each of the foregoing clauses, including both as to proof and/or quantum, and for greater certainty includes a Non-Filed Affiliate Interco Claim or CCAA Party Pre-Filing Interco Claim in respect of the Wabush CCAA Parties prior to the Final Determination of the Pension Priority Proceedings;

"**Unresolved Voting Claim**" means the amount of the Unresolved Affected Unsecured Claim of an Affected Unsecured Creditor as determined in accordance with the terms of the Amended Claims Procedure Order entitling such Affected Unsecured Creditor to vote at the applicable Meeting in accordance with the provisions of the Meetings Order, the Plan and the CCAA;

"**Unsecured Claims**" means Claims that are not secured by any Lien;

"**Unsecured Creditor Class**" means each of the CQIM/Quinto Unsecured Creditor Class, BL Parties Unsecured Creditor Class, Wabush Mines Unsecured Creditor Class, Arnaud Unsecured Creditor Class and Wabush Railway Unsecured Creditor Class;

"**USW Counsel**" means Philion Leblanc Beaudry avocats, in their capacity as legal counsel to the United Steelworkers, Locals 6254, 6285 and 9996;

"**USW Members**" means any Employee or retiree who is or was a member of the United Steelworkers, locals 6254, 6285 or 9996, including any successor of such Employees or retirees;

"**Voting Claim**" means the amount of the Affected Unsecured Claim of an Affected Unsecured Creditor as Finally Determined in the manner set out in the Amended Claims Procedure Order entitling such Affected Unsecured Creditor to vote at the applicable Meeting in accordance with the provisions of the Meetings Order, the Plan and the CCAA;

"**Wabush Administration Charge**" means the charge over the Wabush Property created by paragraph 45 of the Wabush Initial Order and having the priority provided in paragraphs 46 and 47 of such Order in the amount of Cdn$1.75 million, as such amount may be reduced from time to time by further Court Order;

"**Wabush CCAA Parties**" means, collectively, Wabush Iron, Wabush Resources, Wabush Mines, Arnaud and Wabush Railway;

"**Wabush Directors' Charge**" means the charge over the Wabush Property created by paragraph 31 of the Wabush Initial Order, and having the priority provided in paragraphs 46 and 47 of such Court Order in the amount of Cdn$2 million, as such amount may be reduced from time to time by further Court Order;

"**Wabush Iron**" means Wabush Iron Co. Limited;

"**Wabush Mines Parties**" means collectively, Wabush Iron, Wabush Resources and Wabush Mines;

"**Wabush Pension Plans**" means, collectively, the Salaried Pension Plan and the Union Pension Plan;

"**Wabush Property**" means all current and future assets, rights, undertakings and properties of the Wabush CCAA Parties, of every nature and kind whatsoever, and wherever situate, including all Cash or other proceeds thereof;

"**Wabush Railway**" means Wabush Lake Railway Company Limited;

"**Wabush Resources**" means Wabush Resources Inc.;

"**Website**" means www.cfcanada.fticonsulting.com/bloomlake.

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[LETTERHEAD OF MONITOR]

May _____, 2018

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Dear Sirs/Mesdames:

Proposed Joint Plan of Compromise and Arrangement of the Participating CCAA Parties

Please find attached a Joint Plan of Compromise and Arrangement (as amended, restated or supplemented from time to time in accordance with the provisions thereof, the "**Plan**") under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") as filed by the Participating CCAA Parties (as defined above) with the Quebec Superior Court on April 16, 2018. Capitalized terms used in this letter not otherwise defined are as defined in Schedule "A" to the Plan.

The Plan seeks to implement the principal terms of a proposed settlement (the "**Settlement**") between the Participating CCAA Parties and Cleveland-Cliffs Inc. (the "**Parent**") and its former and current direct and indirect subsidiaries and affiliates (collectively with the Parent, the "**Non-Filed Affiliates**") as negotiated by FTI Consulting Canada Inc., in its capacity as the independent court-appointed Monitor in the CCAA proceedings (the "**Monitor**") and to distribute remaining assets of the Participating CCAA Parties to their creditors.

If the Plan is approved by the required majorities of creditors and sanctioned by the Court, the Plan will:

Pursuant to the Settlement, the Non-Filed Affiliates have agreed to sponsor the Plan by contributing the following to the Participating CCAA Parties' estates for the benefit of Third Party Affected Unsecured Creditors with Proven Claims:

While the value of the distributions to be contributed by the Designated Non-Filed Affiliates cannot be calculated with certainty at this time because of various outstanding issues in the CCAA Proceedings, the Monitor estimates that the total incremental amount available to third-party creditors in the event that the Plan is implemented would be in the range of approximately CDN $62 million to CDN$100 million.

The Plan is a single joint Plan that will be subject to approval by each of the Unsecured Creditor Classes, which are:

Third Party Affected Unsecured Creditors in each as class will be entitled to vote the amount of their Claim proven in accordance with the Claims Procedure Order. To the extent that a Claim or any part of a Claim remains unresolved, the Affected Unsecured Creditor will also be able to vote its Unresolved Claim and such vote shall be tabulated separately from the votes of Affected Unsecured Creditors with Proven Claims.

Distributions on account of Proven Claims of Affected Unsecured Creditors in each Unsecured Creditor Class will be based on the pro-rata share of the net amounts available in each estate from realizations as determined pursuant to the Allocation Methodology approved by the Court by an Order granted July 25, 2017, as supplemented by the amounts being contributed by the Designated Non-Filed Affiliates. The methodology for calculating the distribution entitlement of individual Affected Unsecured Creditors is the same for each Unsecured Creditor Class.

The Plan provides for customary releases for the Participating CCAA Parties and their respective Directors, Officers, Employees, advisors, legal counsel and agents, the Monitor, FTI and their respective current and former affiliates, directors, officers and employees and all of their respective advisors, legal counsel and agents, and the Non-Filed Affiliates and their respective current and former members, shareholders, directors, officers and employees, advisors, legal counsel and agents. The defendants named in class action proceedings filed in the Supreme Court of Newfoundland and Labrador on behalf of former salaried and union employees are not released from the claims asserted in those class action proceedings. Accordingly, those class action proceedings are not impacted by the Plan.

The Plan does not affect the determination of the Pension Priority Proceedings, which matters are the subject of dispute and must be resolved prior to any distributions to Affected Unsecured Creditors of the Wabush CCAA Parties.

The information provided in this letter is intended to give a high-level overview to help you understand the Plan. You should note, however, that the governing document is the Plan. Accompanying this letter are the following important documents:

You should read each of these documents carefully and in their entirety. You may wish to consult financial, tax or other professional advisors regarding the Plan and should not construe the contents of this letter as investment, legal or tax advice.

The Creditors' Meetings will be held on June 18, 2018 in Montreal, Quebec. Details of the Creditors' Meetings and the Sanction Hearing are contained in the Notice of Creditors' Meetings and Sanction Hearing.

Creditors that are corporations, partnerships or trusts wishing to vote on the Plan must submit a properly completed Proxy by no later than **5:00 p.m. (Eastern time) June 14, 2018** (the "**Proxy Deadline**") appointing a proxy holder to attend and vote at the Creditors' Meeting.

Creditors that are individuals wishing to vote on the Plan may (i) appoint a proxy holder to attend and vote at the Creditor's Meeting by submitting a properly completed Proxy by no later than the Proxy Deadline; or (ii) vote in person at the Creditors' Meeting.

As stated in the Monitor's Report on the Plan, and for the reasons set out therein, the Monitor recommends that creditors vote **FOR** the Plan.

The Salaried Members Representative Counsel (the lawyers representing the salaried/non- Union Employees and retirees of the Wabush CCAA Parties in these proceedings, the "Salaried Members") and the USW Counsel (the lawyers representing the Employees and retirees of the Wabush CCAA Parties that are or were members of United Steelworkers locals 6254, 6285 or 9996, including any successor of such Employees and retirees, the "USW Members") recommend that you vote **FOR/ AGAINST** the Plan. You will find enclosed letters from the Salaried Members Representative Counsel and the USW Counsel explaining their reasons.

If you are a Salaried Member and you **AGREE** with the recommendation of the Salaried Members Representative Counsel, you do NOT have to fill out, sign or return any Proxy or any other form to the Monitor since the Salaried Members Representative Counsel have been authorized by the CCAA Court to attend at the Creditors' Meeting and to vote your employee claims on your behalf according to that recommendation (the "Salaried Members Deemed Proxy"). If however, you **DISAGREE** with the recommendation, you have the right to opt out of the Salaried Members Deemed Proxy by advising the Monitor in writing of your desire to do so and you may vote in person at the Creditors' Meeting in Montreal or you may appoint a different Proxy holder by using the Proxy form.

If you are a USW Member and you **AGREE** with the recommendation of the USW Counsel, you do NOT have to fill out, sign or return any Proxy or any other form to the Monitor since the USW Counsel have been authorized by the CCAA Court to attend at the Creditors' Meeting and to vote your employee claims on your behalf according to that recommendation (the "USW Deemed Proxy"). If however, you **DISAGREE** with the recommendation, you have the right to opt out of the USW Deemed Proxy by advising the Monitor in writing of your desire to do so and you may vote in person at the Creditors' Meeting in Montreal or you may appoint a different Proxy holder by using the Proxy form.

If you have any questions regarding the Plan, the vote, or matters with respect to the Creditors' Meetings or Sanction Hearing, please contact the Monitor by email at bloomlake@fticonsulting.com or by telephone at 1-844-669-6338 or 416-649-8126.

Yours sincerely,

FTI Consulting Canada Inc., solely in its capacity as Court-Appointed

Monitor of the CCAA Parties

—

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

—

AND IN THE MATTER OF A JOINT PLAN OF COMPROMISE OR ARRANGEMENT OF BLOOM LAKE GENERAL PARTNER LIMITED, THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, QUINTO MINING CORPORATION, CLIFFS QUÉBEC IRON

MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC., WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED
(collectively, the "Participating CCAA Parties")

—

NOTICE OF MEETINGS AND SANCTION HEARING

—

TO: The Affected Unsecured Creditors of the Participating CCAA Parties

Capitalized terms used and not otherwise defined in this Notice are as defined in the Joint Plan of Compromise and Arrangement of the Participating CCAA Parties dated April 16, 2018 (as amended, restated and/or supplemented from time to time in accordance with the terms thereof, the "**Plan**").

NOTICE IS HEREBY GIVEN that Meetings of each of the following Unsecured Creditor Classes of the Participating CCAA Parties will be held at the following dates, times and locations:

Unsecured Creditor Class	Meeting Information
Cliffs Québec Iron Mining ULC and Quinto Mining Corporation, voting together as one Unsecured Creditor Class	**June 18, 2018 at 9:30 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
Bloom Lake General Partner Limited and The Bloom Lake Iron Ore Mine Limited Partnership, voting together as one Unsecured Creditor Class	**June 18, 2018 at 9:30 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
Wabush Iron Co. Limited, Wabush Resources Inc., and Wabush Mines, voting together as one Unsecured Creditor Class	**June 18, 2018 at 11:00 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
Arnaud Railway Company	**June 18, 2018 at 11:00 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
Wabush Lake Railway Company Limited	**June 18, 2018 at 11:00 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

The purpose of the Meetings is to:

The Meetings are being held pursuant to an order (the "**Plan Filing and Meetings Order**") of the Québec Superior Court ("**CCAA Court**") made on April 20, 2018, which establishes the procedures for FTI Consulting Canada Inc. (in such capacity and not in its personal or corporate capacity, the "**Monitor**") to call, hold and conduct the Meetings.

The Plan provides for the compromise of the Affected Claims. The quorum for each Meeting will be one Affected Unsecured Creditor holding a Voting Claim or an Unresolved Voting Claim (each such creditor, an "**Eligible Voting Creditor**") present in person or by proxy.

In order for the Plan to be approved and binding in accordance with the CCAA, the Resolution must be approved by a majority in number of Affected Unsecured Creditors in each Unsecured Creditor Class representing at least two-thirds in value of the Claims of Affected Unsecured Creditors who actually vote (in person or by proxy) on the Resolution at the applicable Meeting (the "**Required Majority**").

All Eligible Voting Creditors will be eligible to attend the applicable Meeting and vote on the Plan. The votes of Eligible Voting Creditors holding Unresolved Voting Claims will be separately tabulated by the Monitor, and Unresolved Claims will be resolved in accordance with the Amended Claims Procedure Order prior to any distribution on account of such Unresolved Claims. Holders of an Unaffected Claim will not be entitled to attend and vote at any Meeting.

Forms and Proxies for Affected Unsecured Creditors

Any Eligible Voting Creditor who is unable to attend the applicable Meeting may vote by proxy. Further, any Eligible Voting Creditor who is not an individual may only attend and vote at the applicable Meeting if a proxyholder has been appointed to act on its behalf at such Meeting. A form of Proxy is included as part of the Meeting Materials being distributed by the Monitor to each Affected Unsecured Creditor.

Proxies, once duly completed, dated and signed, must be sent by email to the Monitor, or if cannot be sent by email, delivered to the Monitor at the address of the Monitor as set out on the Proxy form. Proxies must be received by the Monitor by no later than **5:00 p.m. (Eastern time) June 14, 2018** (the "**Proxy Deadline**").

Notice of Sanction Hearing

NOTICE IS ALSO HEREBY GIVEN that if the Plan is approved by the Required Majority of each Unsecured Creditor Class at the Meetings, the Participating CCAA Parties intend to bring a motion before the CCAA Court on **June 29, 2018 at 9:00 am** (Eastern Time) (the "**Sanction Hearing**"). The motion will be seeking the granting of the Sanction Order sanctioning the Plan under the CCAA and for ancillary relief consequent upon such sanction. Any person wishing to oppose the motion for the Sanction Order must serve upon the parties on the Service List as posted on the Monitor's Website and file with the CCAA Court, a copy of the materials to be used to oppose the Sanction Order by no later than 5:00 pm (Eastern Time) on June 26, 2018.

This Notice is given by the Participating CCAA Parties pursuant to the Plan Filin-g and Meetings Order. Additional copies of the Meeting Materials, including the Plan, may be obtained from the Monitor's Website (http://cfcanada.fticonsulting.com/bloomlake), or by requesting one from the Monitor by email at bloomlake@fticonsulting.com.

DATED this _____ day of_____, 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 JOINT PLAN OF COMPROMISE OR ARRANGEMENT OF BLOOM LAKE GENERAL PARTNER LIMITED, THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, QUINTO MINING CORPORATION, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC., WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED (collectively, the "Participating CCAA Parties")

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PROXY

Before completing this Proxy, please read carefully the accompanying instructions for the proper completion and return of the form.

Capitalized terms used and not otherwise defined herein have the meanings ascribed to them in the Joint Plan of Compromise and Arrangement of the Participating CCAA Parties dated April 16, 2018 (as may be amended, supplemented and/or restated from time to time, the "Plan") filed pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA") with the Quebec Superior Court (the "CCAA Court") on April 16, 2018.

In accordance with the Plan, Proxies may only be filed by Affected Unsecured Creditors having a Voting Claim or an Unresolved Voting Claim ("Eligible Voting Creditors").

PROXIES, ONCE DULY COMPLETED, DATED AND SIGNED, MUST BE SENT BY EMAIL TO THE MONITOR, OR IF CANNOT BE SENT BY EMAIL, DELIVERED TO THE MONITOR BY NO LATER THAN 5:00 P.M. (EASTERN TIME) ON JUNE 14, 2018 (THE "PROXY DEADLINE").

THE UNDERSIGNED ELIGIBLE VOTING CREDITOR hereby revokes all Proxies previously given, if any, and nominates, constitutes, and appoints **Mr. Nigel Meakin** of FTI Consulting Canada Inc., in its capacity as Monitor, or such Person as he, in his sole discretion, may designate or, instead of the foregoing, appoints:

—

to attend on behalf of and act for the Eligible Voting Creditor at the applicable Meeting(s) to be held in connection with the Plan and at any and all adjournments, postponements or other rescheduling of the Meeting(s), and to vote the dollar value of the Eligible Voting Creditor's Eligible Voting Claim(s) as determined by and accepted for voting purposes in accordance with the Meetings Order and as set out in the Plan as follows:

—

Dated this _____ day of_____, 2018.

—

_____ Print Name of Eligible Voting Creditor	_____ Title of the authorized signing officer of the corporation, partnership or trust, if applicable
— _____ Signature of Eligible Voting Creditor or, if the Eligible Voting Creditor is a corporation, partnership or trust, signature of an authorized signing officer of the corporation, partnership or trust	_____ Telephone number of the Eligible Voting Creditor or authorized signing officer
— _____ Mailing Address of Eligible Voting Creditor	_____ Email address of Eligible Voting Creditor
— _____ Print Name of Witness, if Eligible Voting Creditor is an individual	
— _____ Signature of Witness	

INSTRUCTIONS FOR COMPLETION OF PROXY

1. This Proxy should be read in conjunction with the Joint Plan of Compromise and Arrangement of the Applicant dated April 16, 2018 (as it may be amended, restated or supplemented from time to time, the "Plan") filed pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA") with the Quebec Superior Court (the "CCAA Court") on April 16, 2018 and the Meetings Order. Capitalized terms used herein not otherwise defined shall have the meanings ascribed to them in the Plan.

2. Each Eligible Voting Creditor has the right to appoint a person (who need not be a Creditor) (a "Proxy holder") to attend, act and vote for and on behalf of such Eligible Voting Creditor and such right may be exercised by inserting the name of the Proxy holder in the blank space provided on the Proxy.

3. If no name has been inserted in the space provided to designate the Proxy holder on the Proxy, the Eligible Voting Creditor will be deemed to have appointed Mr. Nigel Meakin of FTI Consulting Canada Inc., in its capacity as Monitor (or such other Person as he, in his sole discretion, may designate), as the Eligible Voting Creditor's Proxy holder.

4. An Eligible Voting Creditor who has given a Proxy may revoke it by an instrument in writing executed by such Eligible Voting Creditor or by its attorney, duly authorized in writing or, if an Eligible Voting Creditor is not an individual, by an officer or attorney thereof duly authorized, and deposited with the Monitor in each case before the Proxy Deadline.

5. If this Proxy is not dated in the space provided, it shall be deemed to be dated as of the date on which it is received by the Monitor.

6. A valid Proxy from the same Eligible Voting Creditor bearing or deemed to bear a later date than this Proxy will be deemed to revoke this Proxy. If more than one valid Proxy from the same Eligible Voting Creditor and bearing or deemed to bear the same date are received by the Monitor with conflicting instructions, such Proxies shall not be counted for the purposes of the vote.

7. This Proxy confers discretionary authority upon the Proxy holder with respect to amendments or variations to the matters identified in the notice of the Meeting and in the Plan, and with respect to other matters that may properly come before the Meeting.

8. The Proxy holder shall vote the Eligible Voting Claim of the Eligible Voting Creditor in accordance with the direction of the Eligible Voting Creditor appointing him/her on any ballot that may be called for at the applicable Meeting. **IF AN ELIGIBLE VOTING CREDITOR FAILS TO INDICATE ON THIS PROXY A VOTE FOR OR AGAINST APPROVAL OF THE RESOLUTION TO ACCEPT THE PLAN, AND MR. NIGEL MEAKIN OR HIS DESIGNATE IS APPOINTED AS PROXY HOLDER, THIS PROXY WILL BE VOTED FOR THE RESOLUTION TO APPROVE THE PLAN, INCLUDING ANY AMENDMENTS, VARIATIONS OR SUPPLEMENTS THERETO. IF AN ELIGIBLE VOTING CREDITOR FAILS TO INDICATE ON THIS PROXY A VOTE FOR OR AGAINST APPROVAL OF THE RESOLUTION TO ACCEPT THE PLAN AND APPOINTS A PROXY HOLDER OTHER THAN MR. NIGEL MEAKIN OR HIS DESIGNATE, THE PROXY HOLDER MAY VOTE ON THE RESOLUTION AS HE OR SHE DETERMINES AT THE APPLICABLE MEETING.**

9. If the Eligible Voting Creditor is an individual, this Proxy must be signed by the Eligible Voting Creditor or by a person duly authorized (by power of attorney) to sign on the Eligible Voting Creditor's behalf. If the Eligible Voting Creditor is a corporation, partnership or trust, this proxy must be signed by a duly authorized officer or attorney of the corporation, partnership or trust. If you are voting on behalf of a corporation, partnership or trust or on behalf of another individual at a Meeting, you must have been appointed as a proxy holder by a duly completed proxy submitted to the Monitor by the Proxy Deadline. You may be required to provide documentation evidencing your power and authority to sign this Proxy.

10. **PROXIES, ONCE DULY COMPLETED, DATED AND SIGNED, MUST BE SENT BY EMAIL TO THE MONITOR, OR IF CANNOT BE SENT BY EMAIL, DELIVERED TO THE MONITOR BY NO LATER THAN 5:00 P.M. (EASTERN TIME) ON JUNE 14, 2018 (THE "PROXY DEADLINE").**

By email:	bloomlake@fticonsulting.com
By mail or courier:	FTI Consulting Canada Inc. Monitor of Bloom Lake General Partners Limited, et al. TD Waterhouse Tower 79 Wellington Street West Suite 2010, P.O. Box 104 Toronto, Ontario M5K 1G8

11. The Applicant and the Monitor are authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which any Proxy is completed and executed, and may waive strict compliance with the requirements in connection with the deadlines imposed by the Meetings Order.

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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 JOINT PLAN OF COMPROMISE OR ARRANGEMENT OF BLOOM LAKE GENERAL PARTNER LIMITED, THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, QUINTO MINING CORPORATION, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC., WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED (collectively, the "Participating CCAA Parties") and each a "Participating CCAA Party")

—

RESOLUTION OF UNSECURED CREDITOR CLASS

BE IT RESOLVED THAT:

Motion granted.

Appendix

SUPERIOR COURT

CANADA

PROVINCE OF QUÉBEC

DISTRICT OF MONTRÉAL

N^{O}: **500-11-048114-157**

DATE: **April 20, 2018**

_____

PRESIDING: THE HONOURABLE STEPHEN W. HAMILTON J.S.C.

_____

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED

QUINTO MINING CORPORATION

8568391 CANADA LIMITED CLIFFS QUÉBEC IRON MINING ULC

WABUSH IRON CO. LIMITED

WABUSH RESOURCES INC.

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP

BLOOM LAKE RAILWAY COMPANY LIMITED

WABUSH MINES

ARNAUD RAILWAY COMPANY

WABUSH LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

(Petitioners and Mises-en-cause hereinafter the "**CCAA Parties**")

-and-

FTI CONSULTING CANADA INC.

Monitor

—

PLAN FILING AND MEETINGS ORDER

HAVING READ the CCAA Parties' (the "**Petitioners**") *Amended Motion for the Issuance of a Plan Filing and Meetings Order*, and the attached exhibits thereof, and the affidavit in support thereof (the "**Motion**"), the Monitor's Forty-Fourth Report and the submissions of counsels for the Petitioners, the Monitor and other interested parties;

GIVEN the provisions of the Initial Orders granted on January 27, 2015 and May 20, 2015, as subsequently amended, rectified or restated (together, the "**Initial Orders**");

GIVEN the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c-36 (the "**CCAA**").

3.1 "**Chair**" shall have the meaning ascribed to such term in Paragraph 29;

3.2 "**Creditor Letter**" means the letter (in English and French) sent to Affected Unsecured Creditors in substantially the form of **Schedule "B"** hereto;

3.3 "**Meeting Materials**" shall have the meaning ascribed to such term in Paragraph 8;

3.4 "**Notice of Creditors' Meetings and Sanction Hearing**" means the notice which shall be given to the Affected Unsecured Creditors of the Meetings to be held for the approval of the Plan, and of the Sanction Hearing of the Plan, being substantially in the form of **Schedule "C"** hereto;

3.5 "**Proxy**" means a proxy and instructions to Affected Unsecured Creditors for explaining how to complete same, substantially in the form of **Schedule "D"** hereto;

3.6 "**Resolution**" means the resolution substantially in the form attached as **Schedule "E**"; and

3.7 "**Website**" means http://cfcanada.fticonsulting.com/bloomlake.

14.1 CQIM and Quinto (together, the "**CQIM/Quinto Parties**");

14.2 BLGP and BLLP (together, the "**BL Parties**"); and

14.3 Wabush Iron, Wabush Resources and the Wabush Mines (together, the "**Wabush Mines Parties**").

15.1 **CQIM/Quinto Unsecured Creditor Class**: being Affected Unsecured Creditors of any of the CQIM/Quinto Parties;

15.2 **BL Parties Unsecured Creditor Class**: being Affected Unsecured Creditors of any of the BL Parties;

15.3 **Wabush Mines Unsecured Creditor Class**: being Affected Unsecured Creditors of any of the Wabush Mines Parties;

15.4 **Arnaud Unsecured Creditor Class**: being Affected Unsecured Creditors of Arnaud; and

15.5 **Wabush Railway Unsecured Creditor Class**: being Affected Unsecured Creditors of Wabush Railway.

1. **Meeting of CQIM/Quinto Unsecured Creditor Class:** June 18, 2018 at 9:30 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

2. **Meeting of BL Parties Unsecured Creditor Class**: June 18, 2018 at 9:30 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

3. **Meeting of Wabush Mines Unsecured Creditor Class**: June 18, 2018 at 11:00 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

4. **Meeting of Arnaud Unsecured Creditor Class**: June 18, 2018 at 11:00 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

5. **Meeting of Wabush Railway Unsecured Creditor Class**: June 18, 2018 at 11:00 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

22.1 announce the adjournment, postponement or rescheduling of the applicable Meeting(s) or adjourned Meeting(s) to the participants at the applicable Meeting(s) if the commencement of the Meeting(s) has occurred prior to the adjournment, postponement or rescheduling;

22.2 post notice of the adjournment, postponement or rescheduling at the originally designated time and location of each of the Meeting(s) or adjourned Meeting(s), as applicable;

22.3 forthwith post notice of the adjournment, postponement or rescheduling on the Website; and

22.4 provide notice of the adjournment, postponement or rescheduling to the Service List forthwith. Any Proxies validly delivered in connection with the Meeting(s) shall be accepted as Proxies in respect of any adjourned, postponed or rescheduled Meeting(s).

25.1 The Salaried Members Representative Counsel shall be deemed to be a Proxy holder in respect of each Eligible Voting Claim related to or arising from the employment of the Salaried Members and shall be entitled to vote them at a Meeting on their behalf, without the requirement for any Salaried Member to submit a Proxy to the Monitor,

save in respect of any Salaried Member who, prior to a Meeting, notifies the Monitor by an instrument in writing that he revokes this deemed Proxy;

25.2 The USW Counsel shall be deemed to be a Proxy holder in respect of each Eligible Voting Claim related to or arising from the employment of the USW Members and shall be entitled to vote them at a Meeting on their behalf, without the requirement for any USW Member to submit a Proxy to the Monitor, save in respect of any USW Member who, prior to a Meeting, notifies the Monitor by an instrument in writing that he revokes this deemed Proxy; and

25.3 The Salaried Members Representative Counsel and the USW Counsel shall vote each Eligible Voting Claim in accordance with the recommendation made by the Salaried Members Representative Counsel to the Salaried Members and by USW Counsel to the USW Members in the Meeting Materials.

Monitor:

FTI Consulting Canada Inc.
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, ON M5K 1G8
Attention: Nigel Meakin
E-mail: bloomlake@fticonsulting.com

With a Copy to:

Norton, Rose, Fulbright LLP
Suite 2500, 1 Place Ville Marie
Montréal, QC H3B 1R1
Attention: Sylvain Rigaud
E-mail: sylvain.rigaud@nortonrosefulbright.com

Participating CCAA Parties:

Bloom Lake General Partner Limited *et al*
c/o Blake, Cassels & Graydon LLP
199 Bay Street Suite 4000,
Commerce Court West
Toronto Ontario M5L 1A9
Attention: Clifford T. Smith, Officer
E-mail: clifford.smith@CliffsNR.com

With a Copy to:

Blake, Cassels & Graydon LLP
199 Bay Street Suite 4000,
Commerce Court West
Toronto Ontario M5L 1A9
Attention: Milly Chow
E-mail: milly.chow@blakes.com

42.1 the results of voting at the Meetings;

42.2 whether the Required Majority of each Unsecured Creditor Class has approved the Plan;

42.3 the separate tabulation of the Unresolved Voting Claims as required by Paragraph 27; and

42.4 in its discretion, any other matter relating to the Participating CCAA Parties' motion(s) seeking sanction of the Plan.

Mtre Bernard Boucher

Mtre Emily Hazlett

(Blake, Cassels & Graydon LLP)

Attorneys for the CCAA Parties

Date of hearing: April 16, 2018

Schedule A: Definitions

Schedule B: Creditor Letter

Schedule C: Notice of Creditor's Meetings and Sanction Hearing

Schedule D: Proxy

Schedule E: Form of Resolution

(a) any right or claim of any Person that may be asserted or made in whole or in part against the Participating CCAA Parties (or any of them), whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, in existence on, or which is based on, an event, fact, act or omission which occurred in whole or in part prior to the applicable Filing Date, at law or in equity, by reason of the commission of a tort (intentional or unintentional), any breach of contract, lease or other agreement (oral or written), any breach of duty (including, without limitation, any legal, statutory, equitable or fiduciary duty), any breach of extra-contractual obligation, any right of ownership of or title to property, employment, contract or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise) or for any reason whatsoever against any of the Participating CCAA Parties or any of their property or assets, and whether or not any such indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmetered, disputed, legal, equitable, secured (by guarantee, surety or otherwise), unsecured, present, future, known or unknown, and whether or not any such right or claim is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, together with any other rights or claims not referred to above that are or would be claims provable under the BIA had the Participating CCAA Parties (or any one of them) become bankrupt on the applicable Filing Date, including, for greater certainty, any Tax Claim and any monetary claim in connection with any indebtedness, liability or obligation by reason of a breach of a collective bargaining agreement, including grievances in relation thereto, or by reason of a breach of a legal or statutory duty under any employment legislation or pay equity legislation;

(b) a D&O Claim; and

(c) a Restructuring Claim,

> (a) claims equal to the amounts that such Employees would have been qualified to receive under paragraph 136(1)(d) of the BIA if the Participating CCAA Party had become bankrupt on the Plan Sanction Date, which for greater certainty, excludes any OPEB, pension contribution, and termination and severance entitlements;
>
> (b) claims for wages, salaries, commissions or compensation for services rendered by such Employees after the applicable Filing Date and on or before the Plan Implementation Date together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the Business during the same period, which for greater certainty, excludes any OPEB, pension contribution, and termination and severance entitlements; and

(c) any amounts in excess of (a) and (b), that the Employees may have been entitled to receive pursuant to the *Wage Earner Protection Program Act* (Canada) if such Participating CCAA Party had become a bankrupt on the Plan Sanction Date, which for greater certainty, excludes OPEB and pension contributions;

(a) any claim secured by any CCAA Charge;

(b) any claim with respect to fees and disbursements incurred by counsel for any CCAA Party, Director, the Monitor, Claims Officer, any financial advisor retained by any of the foregoing, or Representatives' Counsel as approved by the Court to the extent required;

(a) in respect of a Claim, such Claim has been finally determined as provided for in the Amended Claims Procedure Order;

(b) there has been a Final Order in respect of the matter or issue; or

(c) there has been an agreed settlement of the issue or matter by the relevant parties, which settlement has been approved by a Final Order, as may be required, or as determined by the Monitor, in consultation with the Participating CCAA Parties, to be approved by the Court;

(a) Excluded Claims;

(b) Secured Claims;

(c) amounts payable under Section 6(3), 6(5) and 6(6) of the CCAA;

(d) Priority Claims; and

(e) D&O Claims that are not permitted to be compromised under section 5.1(2) of the CCAA;

TO: Creditors of Cliffs Québec Iron Mining ULC ("**CQIM**"), Bloom Lake General Partner Limited ("**BLGP**"), The Bloom Lake Iron Ore Mine Limited Partnership ("**BLLP**") and Quinto Mining Corporation ("**Quinto**" and, together with CQIM, BLGP and BLLP, the "**Participating BL CCAA Parties**") and Wabush Iron Co. Limited ("**WICL**"), Wabush Resources Inc. ("**WRI**"), Wabush Mines ("**Wabush Mines**"), Arnaud Railway Company ("**Arnaud**") and Wabush Lake Railway Company Limited ("**Wabush Railway**" and, together with WICL, WRI, Wabush Mines and Arnaud, the "**Wabush CCAA Parties**" and, together with the Participating BL CCAA Parties, as certain of them may be consolidated under the Plan (as defined below), the "**Participating CCAA Parties**").

• resolve potential claims (collectively, the "**Potential Recovery Claims**") against certain of the Non-Filed Affiliates, without the significant time and expense of litigation and of obtaining payment from defendants in multiple foreign jurisdictions, the whole with an uncertain outcome;

• resolve significant intercompany claims between the CCAA Parties and between the CCAA Parties and certain Non-Filed Affiliates without the significant time and expense that would otherwise be incurred;

• provide significant additional monetary recoveries to third-party creditors which would not be available absent successful litigation in respect of the Potential Recovery Claims; and

• accelerate the payment of interim distributions to third-party creditors.

(a) a cash contribution of CDN$5 million, of which CDN$4 million will be allocated to the CQIM/Quinto Unsecured Creditor Class and CDN$1 million will be allocated amongst unsecured creditors of the other Participating CCAA Parties pro- rata based upon the amount of third party Proven Claims against such other CCAA Parties; and

(b) all of the secured and unsecured distributions to which certain Non-Filed Affiliates would otherwise be entitled, which will be contributed to the CQIM/Quinto Parties (such Non-Filed Affiliates, being the "**Designated Non-Filed Affiliates**").

(a) CQIM/Quinto Unsecured Creditor Class: Affected Unsecured Creditors of CQIM or Quinto;

(b) BL Parties Unsecured Creditor Class: Affected Unsecured Creditors of BLGP or BLLP;

(c) Wabush Mines Parties Unsecured Creditor Class: Affected Unsecured Creditors of WICL, WRI or Wabush Mines;

(d) Arnaud Unsecured Creditor Class: Affected Unsecured Creditors of Arnaud; and

(e) Wabush Railway Unsecured Creditor Class: Affected Unsecured Creditors of Wabush Railway.

• The Plan;

• The Meetings Order, granted April 20, 2018;

• A Notice of Creditors' Meetings and Sanction Hearing;

• A form of Proxy and instructions for its completion;

• The Monitor's Report on the Plan;

• A Letter from Salaried Members Representative Counsel; and

• A Letter from USW Counsel.

a) consider, and if deemed advisable, to pass, with or without variation, a resolution (the "**Resolution**") approving the Plan; and

b) transact such other business as may properly come before the Meetings or any adjournment or postponement thereof.

_____

Print Name of Proxy holder if wishing to appoint

someone other than Mr. Nigel Meakin

A. (mark one only):

[ ] Vote FOR approval of the resolution to accept the Plan; or

[ ] Vote AGAINST approval of the resolution to accept the Plan.

B. If a box is not marked as a vote FOR or AGAINST approval of the Plan:

a) if Mr. Nigel Meakin or his designate is appointed as proxy holder, this Proxy shall be voted FOR approval of the Plan; or

b) if someone other than Mr. Nigel Meakin or his designate is appointed as proxy holder, the nominee shall vote at his or her discretion and otherwise act for and on behalf of the undersigned Eligible Voting Creditor with respect to any amendments or variations to the matters identified in the notice of the Meeting and in this Plan, and with respect to other matters that may properly presented at Meeting.

1. the Joint Plan of Compromise and Arrangement dated April 16, 2018 filed by the Participating CCAA Parties under the *Companies' Creditors Arrangement Act*, as may be amended, restated or supplemented from time to time in accordance with its terms (the "Plan"), which Plan has been presented to this Meeting, be and is hereby accepted, approved, and authorized;

2. any director or officer of the applicable Participating CCAA Party be and is hereby authorized, empowered and instructed, acting for, and in the name of and on behalf of such Participating CCAA Party, to execute and deliver, or cause to be executed and delivered, all such documents, agreements and instruments and to do or cause to be done all such other acts and things as such director or officer determines to be necessary or desirable in order to carry out the Plan, such determination to be conclusively evidenced by the execution and delivery by such directors or officers of such documents, agreements or instruments or the doing of any such act or thing.

3. notwithstanding that this Resolution has been passed and the Plan has been approved by the Affected Unsecured Creditors and the Court, the directors of the Participating CCAA Parties be and are hereby authorized and empowered to amend the Plan or not proceed to implement the Plan subject to and in accordance with the terms of the Plan.

Footnotes

1 The Petitioners and the Mis-en-cause.

2 R.S.C. 1985, c. C-36 (the "CCAA").

3 The NFA filed secured and unsecured claims in excess of $1 billion against the CCAA Parties.

4 Forty-Third Report to the Court submitted by FTI Consulting Canada Inc., in its Capacity as Monitor, dated March 19, 2018.

5 8568391 Canada Limited and Bloom Lake Railway Company Limited ("BLRC"), have no pre-filing creditors and will be dissolved.

6 Forty-Fourth Report to the Court submitted by FTI Consulting Canada Inc., in its Capacity as Monitor, dated March 22, 2018, par. 68.

7 Wabush Iron, Wabush Resources, Wabush Mines, Arnaud Railway and Wabush Lake Railway.

8 The claims against Arnaud Railway and Wabush Lake Railway overlap with the claims against Wabush Mines.

9 *Unique Broadband Systems Inc., Re*, 2013 ONSC 676 (Ont. S.C.J.), par. 52 and 95; *Kerr Interior Systems Ltd., Re*, 2011 ABQB 214 (Alta. Q.B.), par. 29; *ScoZinc Ltd., Re*, 2009 NSSC 163 (N.S. S.C.), par. 7-9; *Fracmaster Ltd., Re*, 1999 ABQB 379 (Alta. Q.B.), par. 24; *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* [1998 CarswellOnt 3346 (Ont. Gen. Div. [Commercial List])], 1998 CanLII 14907, par. 37.

10 44th Report, *supra* note 6, par. 60-68.

11 CQLR, chapter C-27.

12 *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39 (S.C.C.), par. 41.

13 RSNL 1990, chapter L-1.

14 *Désir c. Québec (Procureur général)*, 2008 QCCA 1755 (C.A. Que.), par. 8.

15 See the meeting orders issued with respect to U.S. Steel Canada Inc., Collins & Aikman Canada Inc., Nortel Networks Corporation, Hollinger Canadian Publishing Holdings Co., Co-op Atlantic and NewPage Port Hawkesbury Corp., and the Frequently Asked Questions with respect to Fraser Papers inc.

16 *Ibid*.

17 See the Nortel, Hollinger and U.S. Steel meeting orders.

18 *U.S. Steel Canada Inc., Re*, 2017 ONSC 1967 (Ont. S.C.J.), par. 15.

TAB 10

2011 ABQB 214
Alberta Court of Queen's Bench

Kerr Interior Systems Ltd., Re

2011 CarswellAlta 508, 2011 ABQB 214, [2011] 10 W.W.R. 159, [2011] A.W.L.D. 2318, 200 A.C.W.S. (3d) 930, 43 Alta. L.R. (5th) 386, 517 A.R. 186, 79 C.B.R. (5th) 1

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

And In the Matter of the Plan of Compromise or Arrangement of
Kerr Interior Systems Ltd. and Composite Building Systems Inc.

J.E. Topolniski J.

Judgment: March 30, 2011
Docket: Edmonton 0703-14357

Counsel: Darren Bieganek for Applicant
James Hanley for Respondent

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.e Miscellaneous

Headnote

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

Debtors obtained initial Companies' Creditors Arrangement Act order granting them usual stay of proceedings and protections — Plan of arrangement ("Plan") made pursuant to Act called for payment of $2,600,000.00 — There was favourable creditor vote, and order was made sanctioning Plan — Debtors defaulted after making first of four instalment payments due under Plan — Debtors brought application for further meeting of creditors to reconsider Plan — Application dismissed — Claiming that downturn in economy, weight of secured debt and obligations of related party precluded them from living up to their obligations under Plan, debtors wanted another chance to escape bankruptcy by presenting creditors with proposed amendment to Plan — Proposed amendment was to reduce debtors' obligation under Plan by 80 per cent, and, in essence, it was new deal — Purposive and contextual interpretation of s. 11 of Act vested court with discretion to grant relief sought — However, threshold for summoning further meeting of creditors after court sanction was high and to succeed debtor had to establish truly extraordinary circumstances — In making its determination, court should consider whether debtor's application was made in good faith and in timely fashion and whether granting relief would advance policy objectives of Act, serve and enhance public's confidence in process or otherwise serve ends of justice — Court should also consider degree of creditor support for application — Debtors did not meet high threshold required for court to exercise its discretion to order further meeting of creditors to be called at this late juncture.

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Algoma Steel Corp. v. Royal Bank (1992), 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303, 11 C.B.R. (3d) 11, 1992 CarswellOnt 163 (Ont. C.A.) — referred to

Algoma Steel Corp. v. Royal Bank (1992), 94 D.L.R. (4th) vii (note), 10 O.R. (3d) xv (note), (sub nom. *Royal Insurance Co. of Canada v. Kelsey-Hayes Canada Ltd.)* 145 N.R. 391 (note), (sub nom. *Royal Insurance Co. of Canada v. Kelsey-Hayes Canada Ltd.)* 59 O.A.C. 326 (note) (S.C.C.) — referred to

Avery Construction Co., Re (1942), 24 C.B.R. 17, 1942 CarswellOnt 86, [1942] 4 D.L.R. 558 (Ont. S.C.) — considered

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

Cable Satisfaction International Inc. v. Richter & Associés inc. (2004), 2004 CarswellQue 810, 48 C.B.R. (4th) 205 (C.S. Que.) — considered

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Daon Development Corp., Re (1984), 26 B.L.R. 38, B.C. Corps. L.G. 78,261, 10 D.L.R. (4th) 216, 1984 CarswellBC 175, 54 B.C.L.R. 235 (B.C. S.C.) — referred to

First Treasury Financial Inc. v. Cango Petroleums Inc. (1991), 1991 CarswellOnt 170, 3 C.B.R. (3d) 232, 78 D.L.R. (4th) 585 (Ont. Gen. Div.) — considered

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Generally — referred to

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

Generally — referred to

s. 4 — considered

ss. 4-7 — referred to

s. 5 — considered

s. 6 — considered

s. 6(1)(a) — considered

s. 7 — considered

s. 10(2) — considered

s. 11 — considered

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

s. 23(1)(b) — considered

s. 23(1)(i) — considered

APPLICATION by debtors for further meeting of creditors to reconsider plan of arrangement made pursuant to *Companies' Creditors Arrangement Act* after court sanction and part performance.

***J.E. Topolniski J.*:**

I. Introduction

1 This case concerns the court's jurisdiction to authorize debtors to call a further meeting of creditors to reconsider a plan of arrangement (the "Plan") made pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") after court sanction and part performance. The Plan called for payment of $2,600,000.00, including a first installment of $260,000.00 (the "Payment").

2 Kerr Interior Systems Ltd. ("Kerr") and Composite Building Systems Inc. ("Composite") (collectively the "Debtors") obtained an initial *CCAA* order granting them the usual stay of proceedings and protections on November 7, 2007 ("Initial

Order"). Kerr's primary business is the supply and installation of commercial steel stud and drywall load bearing frames. Composite was in the business of fabricating the steel panels installed by Kerr, but ceased operating and transferred its assets to Kerr sometime between the fall of 2009 and the spring of 2010. It is unclear whether Composite is back in business today.

3 The restructuring followed a fairly typical course of proceedings under the *CCAA*. There was a period of time dedicated to reorganization and formulating the Plan, followed by a favourable creditor vote and an order sanctioning the Plan (the "Sanction Order"). The restructuring went sideways when the Debtors defaulted after making the first of four instalment payments due under the Plan.

4 Claiming that an unexpected downturn in the economy, difficulty collecting accounts receivable, the strain of servicing secured debt, and the obligations of a related entity (that is not part of the *CCAA* proceeding) have created insurmountable impediments to their ability to carry on in business and to satisfy their obligations under the Plan, the Debtors want to present another offer to their creditors. If successful in their bid for another creditors' meeting, they propose to ask their creditors to accept a global payment of $520,000.00 (comprised of the Payment and an additional $260,000.00 to be paid at a later unspecified date). The Debtors are cognizant that they can pursue restructuring under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 or by making a further *CCAA* filing, but they consider those avenues too expensive and unnecessary.

5 In a rather cursory report to the court, BDO Canada Limited (the "Monitor") expressed the view that the Debtors appear to be acting in good faith and their application "does not seem to be unreasonable" in light of economic conditions.

6 Two creditors oppose the application, Winroc, a division of Superior Plus LP ("Winroc"), and Descon Mechanical Protostatix Engineering. A third creditor, Kenroc Building Materials Ltd. ("Kenroc"), voiced support for Winroc's position (collectively the "Opposing Creditors"). The Opposing Creditors argue that the court does not have jurisdiction to call a further meeting of creditors at the post-sanction stage of the proceedings and, in any event, the relief sought is a collateral attack on the Sanction Order. They submit that to authorize a further meeting of the creditors would open the floodgates to such applications and result in uncertainty in *CCAA* proceedings.

7 There are no reported cases directly on point. The outcome of this application hinges on statutory interpretation and the analysis of reported cases involving analogous situations.

II. The Issues

8 The following two issues arise on this application:

1. Does the court have jurisdiction to call a further meeting of creditors following the court's sanctioning of the Plan?

2. If yes, should the court direct a further meeting of creditors on the facts of this case?

III. Factual Context

9 On January 31, 2008, the Debtors' unsecured creditors voted in favour of the Plan, which provided for a global payment of $2,600,000.00 to be paid in four instalments of varying amounts. On the application for court approval of the Plan, Kenroc and Winroc were unsuccessful in arguing that they should not be listed under the Plan as unsecured creditors but rather as secured creditors with builders' lien claims in Saskatchewan or, alternatively that they should be put in a separate voting class and, in any event, were entitled to the $150,000.00 paid into court by a third party to discharge their builders' liens. On April 4, 2008, Bielby J. (as she then was) granted the Sanction Order (2008 ABQB 286, 449 A.R. 185 (Alta. Q.B.)).

10 Kenroc and Winroc appealed the Sanction Order to the Alberta Court of Appeal, which ruled (2009 ABCA 240, 457 A.R. 274 (Alta. C.A.)) that they met the test for classification as secured creditors (by way of lien or trust) and that they were entitled to the $150,000.00 that had been paid into court. The Sanction Order and Plan otherwise remained unaffected.

11 The Debtors made the first instalment payment under the Plan, the $260,000.00 Payment, but failed to make the second instalment of $720,000.00. They have since unsuccessfully sought informal creditor approval to alter the Plan. One year later and despite the Debtors' default, no creditor has sought to vacate the stay of proceedings.

12 In November 2007, when the Debtors crafted their proposal to the creditors, their combined value was $2,700,000.00, comprised of accounts receivable ($1,900,000.00) and other assets ($800,000.00). They considered that an offer of $2,400,000.00 (or 50 cents on the dollar) was reasonable for all concerned. At the creditors' meeting, they topped up the offer by $200,000.00, offering a global payment of $2,600,000.00. The creditors agreed to that deal.

13 What is known of the Debtors' affairs since the Sanction Order includes the following:

(a) Kerr had 13 to 15 salaried employees in 2008-2009. That number increased to 50 by the fall of 2010.

(b) The Debtors' combined 2008 revenue was $14,000,000. Profits were two to three percent.

(c) Kerr's asset value in 2009 was $4,800,000.00. The Debtors' combined revenue in 2009 was $8,000,000.00. Kerr enjoyed a $167,055.00 profit, while Composite lost $571,307.00 that year.

(d) By May 31, 2010:

(i) Composite was out of business;

(ii) Kerr had revenue of $6,500,000.00, with a profit of $79,809.00;

(ii) Kerr's accounts receivable stood at $1,790,000.00, $600,000.00 to $700,000.00 of which likely was stale dated. Kerr considers all but $100,000.00 of its three major accounts receivable (totalling $585,000.00) to be potentially collectible; and

(iv) $2,200,000.00 of Kerr's accounts payables are owed to related parties, either to Composite or numbered companies owned or controlled by Kerr's shareholders.

(e) At present, Kerr has work in progress and is cautiously optimistic about future revenues. It is unclear whether Composite is operating again.

14 The Debtors point to the obligations of 1005559 Alberta Ltd. ("1005559"), a related company, as another impediment to their ability to fulfill the terms of the Plan. They submit that the following transactions are germane to the present application:

(a) 1005559 borrowed $3,900,000.00 to buy and renovate a building for the Debtors' use (the "Building"). Of that amount, $3,000,000.00 was still owing at the date of the Initial Order. 1005559 sold the Building for an unknown sum. It also created a $100,000.00 builders' lien fund for persons claiming for work done on renovations to the Building.

(b) 1005559 pledged its assets in favour of the Royal Bank of Canada under a general security agreement to secure a $1,800,000.00 loan to the Debtors (the general security agreement subsequently was assigned to a takeout financier).

(c) 1005559 granted a $2,000,000.00 mortgage to an investor group that had threatened litigation. The court was not advised as to the composition of this investor group or the party threatened by litigation.

15 Darryl Wiebe, a shareholder, director and officer of Kerr, was questioned about why Kerr wanted to reduce the Debtors' obligations under the Plan when it had saleable assets to fund the Plan and the economy was improving. His response was: "[w]ell, frankly we'd like to get it out of our hair."

IV. Legislative Context

16 Sections 4 to 7 and 11 of the *CCAA* are relevant to this application.

17 Section 4, which concerns the court ordering a meeting of creditors to consider compromises with unsecured creditors, reads:

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

18 Section 5 is identical except that it concerns a compromise or an arrangement between the debtor company and its secured creditors.

19 Section 6 deals with court sanction of compromises. It outlines a number of restrictions on when a plan of arrangement can be sanctioned, none of which are relevant to this inquiry. However, ss. 6(1)(a) is of relevance. It refers to modification of a proposed compromise or arrangement at a meeting of creditors, stating:

> 6(1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be - other than, unless the court orders otherwise, a class of creditors having equity claims, - present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding
>
> > (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and ...

20 Section 7 concerns the adjournment of creditors' meetings when amendments to a compromise or plan of arrangement are proposed. It reads:

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

21 Section 11, which describes the court's plenary jurisdiction, provides that:

> 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.

V. Analysis

22 Statutes are to be interpreted purposively and contextually. The words used are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the legislation, its object and with Parliament's intention (*Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, (1998), 221 N.R. 241 (S.C.C.); *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42 (S.C.C.) at para. 26, [2002] 2 S.C.R. 559 (S.C.C.)). Every word is presumed to make sense and to have a specific role to play in advancing the *CCAA*'s purpose (*Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*,

2006 SCC 20 (S.C.C.) at para 45, [2006] 1 S.C.R. 715 (S.C.C.), citing R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at p. 159).

23 The *CCAA* is remedial legislation. Its goals include the following:

> (i) permitting debtors to continue in business and, where possible, avoid the social and economic costs of liquidation (*Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para. 15 [hereinafter Century Services Inc.]);
>
> (ii) balancing stakeholder interests (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (Ont. C.A.); *Air Canada, Re* (2004), 47 C.B.R. (4th) 189 (Ont. S.C.J. [Commercial List]); and
>
> (iii) protecting creditors' interests and permitting an orderly administration of the debtor's affairs (*Meridian Development Inc. v. Toronto Dominion Bank* (1984), 53 A.R. 39, 52 C.B.R. (N.S.) 109 (Alta. Q.B.)).
>
> (iv) rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation (*Century Services Inc.* at para. 18).

24 In this vein, Parliament is said to have understood in adopting the *CCAA* that liquidation of an insolvent company is harmful for most of those it affects, notably creditors and employees. Corporate reorganization under the *CCAA* serves the public interest by facilitating corporate survival (*Century Services Inc.* at paras. 17 and 18).

25 Proceedings under the *CCAA* are designed to be flexible and responsive, with a view to providing fairness, certainty and stability for the stakeholders. The *CCAA* is to be liberally interpreted to achieve those ends.

26 *CCAA* jurisdiction is conferred on superior courts vested with inherent and equitable jurisdiction. The present jurisprudential trend is for courts to employ their inherent and equitable jurisdiction only as a tool of last resort when the language of the *CCAA* cannot be interpreted to anchor an intended measure to be taken in the *CCAA* proceedings (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* (Toronto: Thomson Carswell, 2008) 41 at 42, cited in *Century Services Inc.* at para. 65).

27 Extensive amendments to the *CCAA* in 2008 (2007, c. 36) codified various measures previously undertaken by the court through the exercise of what was referred to in *Century Services Inc.*. at paras. 62 and 63 as "creative use of authority" and "judicial innovation;" for example, imposing priority charges for critical suppliers or debtor in possession ("DIP") financing (now termed "interim financing") and releasing claims against third parties.

28 With these contextual considerations and directives in mind, I now turn to an analysis of ss. 4 to 7 and 11 of the *CCAA* and the relevant authorities in order to assess whether this court has the discretion to call a further meeting of the Debtors' creditors and, if it does, whether the court should exercise that discretion in the circumstances of this case.

29 Calling a meeting of creditors pursuant to s. 4 or 5 is discretionary. A refusal to summon a creditors' meeting often is attributable to the court's determination that the compromise or plan of arrangement is contrary to the creditors' interests (*Avery Construction Co., Re*, [1942] 4 D.L.R. 558, 24 C.B.R. 17 (Ont. S.C.)), it is doomed to failure due to a lack of creditor support (*Fracmaster Ltd., Re*, 1999 ABQB 379, 11 C.B.R. (4th) 204 (Alta. Q.B.), aff'd 1999 ABCA 178, 11 C.B.R. (4th) 230 (Alta. C.A.)), or there is no reasonable chance the debtor will be able to continue in business (*First Treasury Financial Inc. v. Cango Petroleums Inc.* (1991), 78 D.L.R. (4th) 585, 3 C.B.R. (3d) 232 (Ont. Gen. Div.)).

30 The court's sanction of a compromise or plan of arrangement under s. 6 also is discretionary. A compromise or plan of arrangement is enforceable only if and when sanctioned by the court (*Cable Satisfaction International Inc. v. Richter & Associés inc.* (2004), 48 C.B.R. (4th) 205 (C.S. Que.)), although court sanction is not necessary to bind the parties to an inter-creditor agreement in a compromise or plan of arrangement (*Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6).

31 Section 6 expressly permits court sanction of a compromise or plan of arrangement amended at the creditors' meeting, so long as the required majority of those voting in person or by proxy at the creditors' meeting agreed to the amended plan. It is clear from this section that amendments to the plan may be proposed at the meeting and the plan as amended may be put to a vote.

32 Pursuant to s. 7, where an amendment to the plan is proposed after the creditors' meeting has been scheduled, the meeting may be adjourned on such term as to notice or otherwise as directed by the court, presumably to allow the creditors more time to consider the proposed amendment. Use of the term "adjourned" implies that the creditors' meeting has not yet been held or that the vote has not yet been taken as otherwise there would be nothing to adjourn.

33 If the court is of the opinion that the proposed amendment does not adversely affect a particular class of creditors, the court has the discretion under s. 7 to direct that the meeting of that class need not be adjourned or a further meeting of that class need not be convened. Again, the reference to adjournment implies that the meeting of and voting by the creditors or class of creditors have not yet occurred, whereas use of the phrase "convene any further meeting" suggests that the meeting and vote of the creditors or particular class of creditors have taken place. It is not clear whether the provisions of s. 7 relating to proposed non-prejudicial amendments apply once the court has sanctioned the plan.

34 Section 7 does not address whether the court can convene a further meeting of creditors to consider a proposed substantive amendment once the creditors' meeting and vote have taken place. Further, the section is silent as to whether the court can convene a further meeting of the creditors to consider such a proposal once the plan has received court sanction - the issue which arises on this application.

35 A review of case law relating to amendments made under s. 7 is instructive as to the nature and timing of permissible court intervention after the creditors' vote has taken place.

36 Section 7 has been interpreted as allowing substantive (i.e prejudicial) amendments only at the pre-vote stage. In *Central Guaranty Trustco Ltd., Re* (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List])), Farley J. commented (at para. 11):

> ... In ***Algoma Steel Corp. v. Royal Bank of Canada*** (1992), 8 O.R. (3d) 449, the Court of Appeal determined that there were exceptional circumstances (unrelated to the Plan) which allowed it to adjust a Plan where no interest was adversely affected. The same cannot be said here. FSTQ aside from s. 11(c) of the *CCAA* also raised s. 7. I am of the view that s. 7 allows an amendment after an adjournment — but not after a vote has been taken.

37 Section 7 also has been interpreted as permitting judicial amendments of a technical non-prejudicial nature at the sanction stage (*Wandlyn Inns Ltd., Re* (1992), 15 C.B.R. (3d) 316 (N.B. Q.B.)). Even then, the court's jurisdiction to allow a judicial amendment must be exercised sparingly, in exceptional circumstances, and only if permitted by the *CCAA* (*Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11 (Ont. C.A.), at 15; *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) at para. 6). The court's jurisdiction does not extend to modifying plans of arrangement simply because a person is dissatisfied with the existing plan (*Daon Development Corp., Re* (1984), 10 D.L.R. (4th) 216 (B.C. S.C.) at para. 9.

38 In Houlden and Morawetz's *Bankruptcy and Insolvency Law of Canada*, 4th ed., vol. 4 (Toronto: Carswell, 2009) at p. 11-69, N§48, the authors observe that: "[a]lthough it would seem that once the plan has been sanctioned by the court, the court has no power to make any alterations or modifications in it, there are cases where orders have been made altering or modifying a plan after it has been sanctioned." They then cite a number of authorities, including those discussed below.

39 In *Northland Properties Ltd., Re* (1989), 74 C.B.R. (N.S.) 231 (B.C. S.C. [In Chambers]), a *CCAA* debtor successfully applied five months after the sanction order to rectify a unilateral mistake made by it in electing a mortgage rate under the plan of arrangement. The court focussed its analysis on whether this type of unilateral mistake was subject to rectification. In any event, the circumstances in that case are distinguishable from the situation here of a default at the implementation stage of *CCAA* proceedings.

40 *Royal Heaters Ltd., Re* (1947), 30 C.B.R. 199 (C.S. Que.) concerned a series of post-sanction applications by a *CCAA* debtor for orders extending the time to make payments and temporarily suspending payments under the plan of arrangement. The debtor in that case, like the Debtors here, claimed that economic conditions had impaired its ability to honour its obligations under the plan. While the amendments clearly were prejudicial, the majority of the creditors in number and value consented to at least one of the extensions. Without discussing its jurisdiction to approve the amendments, the court granted the extensions, observing that it was in the interest of the creditors to do so.

41 In *Keddy Motor Inns Ltd., Re* (1992), 13 C.B.R. (3d) 262, 113 N.S.R. (2d) 431 (N.S. T.D. [In Chambers]), a sanctioned plan of arrangement specified certain payment dates that could not be complied with because of an extant appeal. Without reference to ss. 7 or 11, the court approved a change in those dates.

42 In *Algoma Steel Corp. v. Royal Bank* (1992), 8 O.R. (3d) 449 (Ont. C.A.), leave to appeal to S.C.C. refused (1992), 10 O.R. (3d) xv (note) (S.C.C.), the Ontario Court of Appeal considered whether the existence of a sanctioned plan of arrangement under the *CCAA* prevented the court from permitting the applicant to sue the debtor to the limited extent of certain insurance proceeds. The court determined that the power to amend the plan in the manner sought could be found, by inference, in what is now s. 11.02 (the stay provision) of the *CCAA*. It was argued in that case that having regard to the commercial realities reflected by the *CCAA*, the power to allow an action to proceed could only be exercised before the creditors' vote. The court held that, as a matter of principle, there was no reason to suggest the court's power was limited in that way, although given "the primacy accorded by the Act to agreement among the affected actors, the jurisdiction of the court is to be exercised sparingly and in exceptional circumstances only, if the result of the exercise is to amend the plan, even in merely a technical way." It commented that it would be an unacceptable exercise of jurisdiction if the effect of granting the applicant leave to sue the debtor would be to make any assets other than the insurance proceeds vulnerable to possible execution. It noted that the proposed amendment to the plan was insignificant and technical only as far as the other creditors were concerned.

43 The applicant creditor in *Ontario v. Canadian Airlines Corp.*, 2001 ABQB 983, 306 A.R. 124 (Alta. Q.B.) sought a declaration that the portion of the debt owed to it which was secured by letters of credit was not compromised by the plan of arrangement which had received court sanction. In the alternative, it asked for an order varying the plan to permit the liability secured by the letters of credit to be considered a secured claim and directing that the debtor was liable for the full amount of that liability up to the value of the letters of credit. The court dealt with the issue as one of interpretation and application of the plan, rather than its amendment.

44 However, in *obiter dicta*, Madam Justice Romaine expressed the view (at para. 61) that the court retains jurisdiction at the post-sanction stage to direct amendment to the plan, reasoning that:

> The *CCAA* authorizes the court to amend a plan in appropriate circumstances, where there are compelling reasons to do so. Although the Act does not expressly state that such amendment could take place after the Plan is sanctioned, as pointed out in ***Algoma***, *supra* there is no reason to suggest that the *CCAA* "contemplates a role for the court as a mere rubber stamp or one that is simply administrative rather than judicial" (p.103). While the circumstances justifying an amendment after a sanction hearing ought to be truly exceptional, in recognition of the potential violence done to the laudable goal of commercial certainty, there is no reason why subsequent amendments should be conclusively foreclosed in every case, without examination of the particular circumstances.

45 Romaine J. commented at para. 56 that ss. 6 and 7 offer no guidance on whether a court-sanctioned plan may subsequently be amended. However, at para. 57, she noted:

> As mentioned, the *CCAA* confers broad discretion on the court and is to be afforded a large and liberal interpretation: ***Re Canadian Airlines Corp.***, *supra* at para 95 (Q.B); ***Chef Ready Foods Ltd. v. Hongkong Bank of Canada*** (1990), 51 B.C.L.R. (2d) 84 (C.A.). It is silent, however, on many procedural issues. Given the lack of legislative guidance, the courts have used the basic purpose of the *CCAA* as a guide to its application and the exercise of its discretion in disposing of applications under the Act: ***Re Canadian Airlines Corp.***, *supra* at para. 95. The keynote concepts of fairness and

> reasonableness have been recognized as the driving force behind the *CCAA* and the court's interpretation and application of the Act: ***Re Canadian Airlines Corp.*** at para. 95, ***Re Canadian Airlines Corp.***, *supra* at p. 9.

46 In concluding that amendment of the plan would recognize the concepts of fairness and reasonableness to a greater extent than would interpreting the plan in the manner advocated by the debtor, Romaine J. took into consideration that the claims procedure in that case had been unique in that it allowed the debtor to unilaterally categorize its creditors and required that any creditor which did not agree with the classification file a dispute note. She also considered that the applicant creditor had not become aware that the debtor was rejecting its claim as being out of time until the last day and that no evidence of the creditor's position was presented to the court at the sanction hearing. In addition, she noted that no creditor or debtor prejudice would result from the sought after amendment.

47 As the proposed amendment in *Ontario* was non-prejudicial to the debtor and creditors, the court's jurisdiction to make the amendment might have been based on s. 7 or the court's plenary jurisdiction as set out in s. 11.

48 Madam Justice Romaine again was asked to consider amending a plan of arrangement at the post-sanction stage in *Teragol Investments Ltd. v. Hurricane Hydrocarbons Ltd.*, 2005 ABQB 324, 382 A.R. 383 (Alta. Q.B.). In refusing the application, she commented (at para. 21) that a post-sanction amendment should be limited to truly exceptional circumstances as such an amendment has the potential to do violence to the goal of commercial certainty.

49 In *Century Services Inc.*, the first case in which the Supreme Court of Canada was asked to directly interpret the provisions of the *CCAA*, Deschamps J., for the majority, discussed the source of the court's authority during *CCAA* proceedings and the boundary between the court's statutory authority under the Act and the residual authority under its inherent and equitable jurisdiction when supervising a reorganization. She noted that appellate courts were of the view that while lower courts might be purporting to rely on their inherent jurisdiction, in fact they were simply construing the authority supplied by the *CCAA* itself, citing *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.) at paras. 45-47 and *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at paras. 31-33. She affirmed that the appropriate approach for a court to take is to rely first on a purposive and liberal interpretation of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding. She accepted (at para. 66) that in most cases the issuance of an order in a *CCAA* proceeding should be considered to be an exercise in statutory interpretation, given the expansive interpretation the language of the statute is capable of supporting. The example she referred to was s. 11 of the *CCAA*, which was amended to make explicit the discretionary authority of the court under the *CCAA* and to endorse the broad reading of *CCAA* authority developed by the jurisprudence.

50 Deschamps J. instructed (at paras. 69 and 70) that while the *CCAA* explicitly provides for certain orders, the general language of the Act should not be read as being restricted by the availability of more specific orders. She indicated that the court should take into consideration appropriateness, good faith, and due diligence when exercising *CCAA* authority, explaining that:

> 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.

51 Given a plain and contextual reading of the *CCAA*, augmented by guidance provided by the case law, I conclude that:

> (a) The courts' supervisory function ends only when the plan has been fully implemented or has failed. Parliament must have intended that the court retain jurisdiction to address issues that could arise during implementation of the plan, including whether to summon a further creditors' meeting after the creditors' vote or court sanction. Section 7 does not grant that jurisdiction. However, the court's discretionary authority under s. 11 is broad enough to encompass such a direction.

(b) In accordance with *Century Services Inc.*, the court's general discretionary authority under s. 11 should not be interpreted as being restricted by the more specific authority set out in s. 7.

(c) When exercising its authority under s. 11, the court must consider the good faith of the applicant, whether due diligence has been exercised and the appropriateness of making the order sought. In regard to the latter, the court should consider whether the relief sought advances the objectives of the *CCAA* and all relevant policy concerns.

(d) Parliament's intention could not have been to introduce uncertainty and instability to the process. On the contrary, stability, certainty and fairness for all are the recognized goals of the *CCAA*. The effect of the sanction order is relevant as it binds the parties and cements commercial certainty. Once sanctioned, creditors can take their contract with the debtor "to the bank" (for all that may be worth where, as in the present case, plan implementation is staged). In balancing the policy objectives of the *CCAA*, Parliament must have intended that while calling a further meeting of the creditors should remain an option, under certain circumstances, at any stage of the proceedings, once the creditors have voted and the plan has been sanctioned, the court should do so only in exceptional circumstances - circumstances well beyond foreseeable risks such as ordinary business risks.

(e) While each case must be determined on its unique facts, at a minimum, the court should consider the following non-exhaustive list of considerations (many of which overlap and all of which rest on the applicant to establish) before summoning a further meeting of the creditors at the post-sanction stage to vote on a proposed amendment to the plan:

(i) Is the plea for relief made in good faith?

(ii) Has it been made in a timely fashion?

(iii) Would granting the relief advance the policy objectives underlying the *CCAA*?

(iv) Would granting the relief enhance the public's confidence in the *CCAA* process?

(v) Would granting the relief otherwise serve the ends of justice?

(vi) What is the level of creditor support?

VI. Application to the Present Case

A. Is the Plea for Relief Made in Good Faith?

52 There was a lack of cogent evidence establishing that the Debtors have no hope of meeting their obligations under the Plan unless the creditors' meeting is allowed and the proposed amendment is passed.

53 It appears that the Debtors banked on a steady flow of work and the payment of certain receivables to fund the second installment due under the Plan. Neither transpired. However, since the fall of 2010, Kerr has experienced an increase in its work. It is unclear whether Composite is back in business today.

54 Mr. Weibe indicated that he is "cautiously optimistic" about the Debtors' future and, as evidenced by his answers given during cross-examination on his affidavit, the Debtors want matters with their pre-*CCAA* creditors to end; they want to get it "out of [their] hair." Doubtless, this is a common sentiment for any company in the process of restructuring.

55 While I accept that the Debtors have suffered some negative effects from a downturn in the economy, nevertheless I find it curious, and indeed troubling, that:

(i) since formulating the Plan their workforce has more than quadrupled;

(ii) they chose to rely (at least in part) on the impact of 1005559's debts to support their plea for relief;

(iii) the evidence fails to show that they have taken all reasonable steps to fund the Plan, including downsizing and selling non-essential assets.

56 In the result, despite the Monitor's comment (as stated in its fifth report to the court) that it is "... unaware of any facts to suggest that the Management of the Companies are not acting in good faith with respect to their creditors...", I am not so certain. In this regard, I am mindful that the Monitor's comment preceded the cross-examination on affidavit of Mr. Weibe that fleshed out much of the evidence that I have referred to in relation to this factor.

B. Is the Application Timely?

57 There is no suggestion that the Debtors delayed in bringing this application. The real concern is whether it is premature.

C. Would Granting the Relief Advance the Policy Objectives Underlying the CCAA?

58 The facts of this case reveal a tension between the objectives of facilitating restructuring and providing stability, certainty and fairness for all of the stakeholders. Avoiding a second, costly insolvency proceeding by allowing the Debtors to present a revised compromise, proposal, or plan of arrangement is a laudable goal. However, this would involve a tradeoff. The creditors voted on the Plan. Their agreement was cemented by the Sanction Order. They were entitled to rely on the deal and may have altered their own circumstances as a result of it. The Plan amendment proposed by the Debtors would see an eighty percent reduction in the amount the creditors originally accepted. So radical is this proposed change that it is more reasonably viewed as a completely new deal rather than an amendment.

59 While granting the relief would permit the creditors the opportunity to say whether the Debtors' proposed new deal is acceptable, other considerations also must be weighed. A non-exhaustive list of those considerations includes:

(i) the creditors' right to receive current financial information prepared in accordance with the requirements of s. 10(2);

(ii) meaningful compliance with the Monitor's duty to review the Debtors' s. 10(2) financial information as to its reasonableness (s.23(1)(b));

(iii) meaningful compliance with the Monitor's duty to report to the court about the fairness and reasonableness of the proposal (s. 23(1)(i));

(vi) the court's consideration of whether the proposal is workable (see *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93 (Alta. C.A.), confirming *Royal Bank v. Fracmaster Ltd.*, 1999 ABQB 425, 245 A.R. 138 (Alta. Q.B.) in relation to a ss. 4 or 5 application).

These deficiencies might well be addressed by imposing conditions, but the benefit of that approach should be assessed contextually.

60 The demise of the Debtors is not a certainty if the relief is not granted. They can attempt to make another deal with their creditors in alternate insolvency proceedings, whether under the *BIA* or possibly another filing under the *CCAA*. As noted in L.W. Houlden and G.B. Morawetz's *Bankruptcy and Insolvency Law of Canada* (Toronto: Carswell, 2009), 4th ed. (rev'd), vol. 4, p. 11-28, there is nothing in the statute barring a second application. While the court in *Norseman Products Ltd., Re* (1949), 30 C.B.R. 71, [1950] O.W.N. 81 (Ont. S.C.) commented that a debtor company cannot claim the benefit of the *CCAA* more than once as this would lead to abuse, relying on *Comptoir coopératif du combustible Ltée, Re* (1935), 17 C.B.R. 124 (C.S. Que.), restructuring cases such as *Algoma Steel* suggest that a subsequent filing is appropriate where the statute affords an opportunity for a company to attempt to devise a revised business plan to address its financial distress. Such proceedings come at a price, but given the Debtors' work on its propose revised deal to date and the cost of complying with conditions to address informational concerns, that price is likely less than might otherwise be incurred.

61 In the result, the Debtors have not shown that the policy objectives underlying the *CCAA* would be advanced or that the process would be served by granting them the opportunity to present their proposal to their creditors.

D. Would Granting the Relief Enhance the Public's Confidence in the CCAA Process?

62 The Debtors have experienced economic trouble which has been caused, at least in part, by a downturn in the condominium development industry. However, downturns in the condominium market, especially in the boom and bust economy of Alberta, are a foreseeable and ordinary business risk. There has been insufficient evidence presented establishing that this downturn is truly exceptional or was unforeseeable.

63 Similarly, the impact of the Debtors' secured obligations is not a basis for finding exceptional circumstances. These obligations were known long ago when the Plan was formulated. Although 1005559 is not a part of the group which sought *CCAA* protection, it is a related entity and its performance influences that of the Debtors. Alone or in combination with the Debtors' secured obligations, the obligations of 1005559 do not constitute an extraordinary circumstance.

64 The public's confidence in the *CCAA* process is necessarily grounded in fairness and stability for all of the stakeholders. Allowing the Debtors an opportunity for what, essentially, would be a second kick at the *CCAA* can after defaulting on their obligations would not, in all of the circumstances, further this objective.

E. Would Granting the Relief Serve the Ends of Justice?

65 Assessing whether the relief sought would serve the ends of justice entails many of the same considerations as determining whether it would advance the policy objectives underlying the *CCAA*. In addition, factors such as whether a unilateral mistake has been made may be taken into account, as in *Northland Properties Ltd., Re*

66 In the present case, directing a further meeting of the creditors is not necessary to meet the ends of justice.

F. What is the Level of Creditor Support?

67 The Opposing Creditors oppose granting of the application. There is no evidence of the level of creditor support to the proposed amendment. However, I understand that the creditors were canvassed informally, an approach which presumably failed.

68 After weighing the various factors, I find that the Debtors have failed to meet the high threshold required of them on this application.

VII. Conclusion

69 The Debtors are in default of their obligations under the Plan. Claiming that a downturn in the economy, the weight of secured debt and the obligations of a related party preclude them from living up to their obligations, they want another chance to escape bankruptcy by presenting their creditors with a proposed amendment to the Plan. The proposed amendment is to reduce the Debtors' obligation under the Plan by eighty percent. In essence, it is a new deal.

70 A purposive and contextual interpretation of s. 11 of the *CCAA* vests the court with discretion to grant the relief sought. However, the threshold for summoning a further meeting of creditors after court sanction is high and to succeed the debtor must establish truly extraordinary circumstances.

71 In making its determination, the court should consider whether the debtor's application is made in good faith and whether granting the relief would advance the policy objectives of the *CCAA*, serve and enhance the public's confidence in the process or otherwise serve the ends of justice. The court should also consider the degree of creditor support for the application.

72 The Debtors in the present case have not met the high threshold required for the court to exercise its discretion to order a further meeting of the creditors to be called at this late juncture. Accordingly, the application is dismissed and the creditors

are at liberty to apply to lift the stay and pursue their remedies. The parties may speak to me within 30 days if they are unable to agree on costs.

Application dismissed.

TAB 11

Most Negative Treatment: Distinguished
Most Recent Distinguished: AbitibiBowater inc., Re | 2009 QCCS 5482, 2009 CarswellQue 11821, 64 C.B.R. (5th) 189, EYB 2009-166332, 186 A.C.W.S. (3d) 324 | (C.S. Qué., Nov 9, 2009)

1999 ABQB 379
Alberta Court of Queen's Bench

Fracmaster Ltd., Re

1999 CarswellAlta 461, 1999 ABQB 379, [1999] A.J. No. 566, 11 C.B.R. (4th) 204, 245 A.R. 102

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

In the Matter of Fracmaster Ltd.

Paperny J.

Judgment: May 17, 1999 *
Docket: Calgary 9901-05042

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Donald B. Higa, for Canawill Ltd.
Robert T. Anderson, for TrizecHahn Office Properties Ltd.
Mark G. Damm, for Employees.
J. Patrick Peacock, Q.C., for 812124 Alberta Ltd.
Anita Walker, for Tuboscope Inc.
Richard Dudelzak, Q.C., for Shareholders / Investors.
Allan G.P. Shewchuk.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
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.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iii Creditor approval

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

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Corporation and syndicate of creditor banks entered into asset purchase agreement with third party — Price significantly less than total of secured debt owing to syndicate — Major shareholder and other party proposed alternative plans of arrangement — Corporation applied for approval of sale — Syndicate supported sale but applied in alternative for appointment of receiver — Receiver appointed — Companies' Creditors Arrangement Act contemplates restructuring for general benefit of all stakeholders — Proposed sale provided nothing for unsecured creditors or shareholders — Proposed sale ought not to be approved under CCAA — No evidence alternative proposals had economic reality — Syndicate would be at further risk and would not agree to proposals — Ordering meeting of creditors and shareholders pointless in view of syndicate's position — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Paperny J.*:

Associated Investors of Canada Ltd., Re (1987), 56 Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, 67 C.B.R. (N.S.) 237, *(*sub nom. *First Investors Corp., Re)* 46 D.L.R. (4th) 669 (Alta. Q.B.) — considered

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) — considered

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

Olympia & York Developments Ltd., Re (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

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

Generally — pursuant to

s. 4 — referred to

s. 5 — referred to

APPLICATION by debtor corporation for approval of sale of assets; CROSS-APPLICATION by creditors for appointment of receiver.

***Paperny J.*:**

I. Introduction

1 Fracmaster Ltd. ("Fracmaster") is an Alberta corporation. On March 18, 1999, LoVecchio J. granted an order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (*CCAA*), appointing Arthur Anderson Inc. as the monitor (the "Monitor"). At the same time, he imposed a stay of proceedings, effectively preventing any creditors from realizing on their assets. I later extended that stay to April 30, 1999. Various parties returned before me on April 30, 1999 with several applications. Fracmaster asked me to approve the sale of substantially all of its assets to UTI Energy Corp. ("UTI"). A syndicate of creditors (the "Syndicate") supported that application, but presented an alternate application of lifting the stay and appointing the Monitor as receiver and manager of Fracmaster. The Syndicate is represented by counsel for the Royal Bank of Canada ("Royal Bank") and represents the Royal Bank, Canadian Imperial Bank of Commerce, Bank of Nova Scotia, Hongkong Bank of Canada, Banque Nationale de Paris (Canada) and Credit Suisse First Boston Canada. While the Royal Bank has a separate interest as well, I will, for simplicity, refer to these secured creditors, including the Royal Bank in its capacity

as operating lender, as the Syndicate. Alfred Balm ("Mr. Balm"), a large shareholder of Fracmaster, requested an adjournment to allow him to develop an alternative to the UTI sale.

2 I granted an adjournment until May 14, 1999, and also extended the stay. In the interim, Mr. Balm was to be given access by Fracmaster to financial information that he might need to prepare his alternative. I also requested the Monitor to prepare a further report, including a report on the valuation of Fracmaster and its subsidiaries, to help me determine if this matter was appropriately under the *CCAA*. Finally, I asked Fracmaster to consider certain matters, including the existence of a "plan" within the meaning of the *CCAA* and any provisions for notice to creditors and other interested parties. On May 7, 1999, I granted an application by Harvard International Resources Ltd. ("Harvard") for access to financial information, so that Harvard could consider its interest in presenting an alternative to the UTI sale. I did not agree, however, to entertain the proposal or to allow it to be submitted for consideration by the stakeholders.

3 I now have six applications before me. First, Fracmaster applies to have the UTI sale approved. Second, the Syndicate (although supporting Fracmaster's application) applies, as an alternative to Fracmaster's application, to lift the stay, appoint a receiver, direct the receiver to approve the UTI sale, and allow the Syndicate to begin steps to realize on its security. Third, Mr. Balm and the Janus Corporation ("Janus") apply to continue the stay, adjourn the other applications, appoint an interim receiver, and have the court direct the calling of meetings for consideration of its proposal by the secured creditors, the unsecured creditors and the shareholders. Fourth, the previously unheard-from party Calfrac Ltd., formerly 812124 Alberta Ltd. ("Calfrac") applies for approval and acceptance of the proposal which it purports to put forward. Fifth, Cananwill Canada Limited ("Cananwill") applies for a declaration that it has a valid assignment of certain sums in priority to all security interests granted by Fracmaster, including those granted to the Syndicate. Sixth, TD Asset Finance Corp. seeks an order lifting the stay. Harvard has indicated it does not intend to seek the court's leave to put forward a proposal.

II. Facts

A. Background

4 Fracmaster applied for protection under the *CCAA*, proposing to file a compromise or arrangement with its creditors and, if appropriate, an arrangement with its shareholders.

5 In his affidavit sworn in support of the initial application, Gary Sherkey, Fracmaster's chief financial officer, deposed that for the year ending December 31, 1998 Fracmaster had a net loss of approximately $11 million before charges of $126 million were taken to reduce the carrying value of the company's Russian related assets. At March 15, 1999 Fracmaster had claims owing to trade creditors in excess of $17 million. At March 15, 1999 Fracmaster's indebtedness included a revolving demand operating facility in the amount of $32,672,000, advances under a credit facility of a subsidiary company in the amount of $12 million U.S. and a revolving demand loan of another subsidiary in the amount of $2,045,000 U.S. In addition, at March 15, 1999 Fracmaster had a term loan facility with the syndicate of banks in the amount of $63,200,000. The loan was repayable in three annual payments of approximately $21,100,000, with the initial payment due on April 30, 1999. On March 15, 1999 Fracmaster's operating facility was almost fully drawn and a payment of $7.5 million was due on March 18, 1999. Fracmaster was unable to make that payment. Fracmaster at the time had been unable to arrange for additional operating funds from its banks or elsewhere. Justice LoVecchio granted the application, including the stay requested.

6 The Monitor's April 12, 1999 report shows that Fracmaster's liabilities were:

-operating line of credit	$32,972,000.00
-term loan, long term debt	$63,590,000.00
-BNPI (contingent) (approximate)	$18,000,000.00
-accounts payable, pre-CCAA	$19,703,000.00
TOTAL:	$134,265,000.00 Cdn

The total owed to the Syndicate at that time was approximately $96,562,000.

7 According to the April 30 affidavit of Douglas Paul, a Senior Account Manager at the Royal Bank, Fracmaster and the Syndicate agreed to continue earlier efforts to sell Fracmaster. In consideration for the Syndicate allowing this *CCAA* process to be undertaken, Fracmaster provided the Syndicate with a consent order to lift the stay and a consent order to appoint a receiver.

8 On April 27, 1999, Fracmaster and the Syndicate entered into an asset purchase agreement with UTI. The purchase price is $60.7 million for the assets, plus an equity participation for the Syndicate. UTI wishes to close the transaction. Counsel for UTI states that UTI would prefer to complete the sale under the *CCAA*, but that it would still be possible under receivership. If court approval is not received for its offer, or the offer is not extended beyond May 17, 1999, UTI may terminate the offer. As is evident from the figures set out above, the UTI purchase price is significantly less than the total of the secured debt owing to the Syndicate.

9 The Syndicate supports the sale to UTI under the *CCAA*. The Syndicate is contractually obliged to support the sale. However, as mentioned, if the court declines to approve the UTI sale under the *CCAA*, the Syndicate wishes the stay lifted and a receiver appointed, so that the Syndicate can proceed to enforce its security. Notwithstanding its earlier notice of motion, the Syndicate submitted at the hearing it would seek the court to direct the receiver to complete the UTI sale.

10 Mr. Balm has been involved with Fracmaster in some capacity since its inception. Mr. Balm sold all of his Fracmaster shares (approximately 67 per cent of the outstanding shares) on September 9, 1997. The shares were sold through an instalment receipt structure. When the second instalment was due on September 9, 1998, buyers representing approximately 43 per cent of the Fracmaster shares defaulted on the payment because the share price had substantially decreased. Mr. Balm announced his intention to re-sell those shares; Fracmaster announced it was willing to cooperate with that sale. Apparently, Mr. Balm still holds approximately 43 per cent of Fracmaster's shares, giving him a substantial stake in Fracmaster.

11 In a May 11 affidavit, Mr. Margetak, President and CEO of Fracmaster, deposes that Fracmaster conducted a sales process from September 1998 to April 27, 1999. He opines that this was a full and effective canvassing of the market for parties interested in investing in or buying the assets of Fracmaster. Fracmaster's brief describes the sales process in two stages. First, there was the attempt from September 16, 1998 to March 9, 1999 to sell the shares of Fracmaster in conjunction with Mr. Balm. Second, there was the attempt from March 18, 1999 to April 27, 1999 during which certain steps were taken: (i) Fracmaster solicited and received expressions of interest from various parties; (ii) the parties were requested to file proposals by April 19 - five were received; and (iii) proposals were reviewed and negotiations occurred - the UTI sale was considered the best proposal.

12 There is a dispute over Mr. Balm's commitment to reinvesting in Fracmaster. Mr. Blam deposes that he never foreclosed the possibility of coming up with an alternative arrangement to any sale; Fracmaster's representatives depose that he indicated he was no longer interested. However, on April 30, 1999, I granted Mr. Balm access to the financial information to decide if he wished to put forward a proposal. I did not at the time agree to entertain such a proposal, or allow it to be submitted to the various stakeholders, reserving that issue for consideration today.

B. UTI's Offer

13 UTI's offer is for all, or substantially all, of Fracmaster's assets. The purchase price is $60.7 million cash, plus warrants for up to five per cent of the outstanding shares of Newco, the purchaser, a "single-purpose corporation". Through a scheme of puts and calls, the value of the warrants is effectively capped at $20 million. The result is there is no provision for unsecured creditors or shareholders. The Syndicate supports the UTI proposal and is contractually obliged to do so. The offer does not come before the court in the form of a plan, nor does it contemplate a plan being put forward post-closing.

C. Balm/Janus Plan of Arrangement

14 This is the only true plan put forward as contemplated by the terms and spirit of the *CCAA*. This proposal offers the secured creditors $66 million, plus 720,000 warrants at an exercise price of $5 per consolidated share. The unsecured creditors would have a choice of (i) the lesser of their claim amount and $500; or (ii) an unsecured note for a maximum of 20 per cent of their claim, which appears to be payable in instalments over several years, presumably if Fracmaster is solvent at the time

the payments come due. Some unsecured creditors are excluded from the plan, and will be paid in full. There would be a consolidation of the shares on a 25 for 1 basis. Shareholders would be able to purchase some of the new shares at $5 per share, although the mechanics in the proposal are unclear. The plan contemplates approval by the secured creditors as a class, the unsecured creditors as a class and the shareholders as a class. It anticipates meetings being held and a hearing to obtain court approval on July 19, 1999.

D. Calfrac Offer

15 Calfrac's purported proposal, which emerged almost literally at the last minute, is very similar to the UTI sale. Calfrac would pay a maximum of $65 million total. The Syndicate would receive $61 million, plus equity participation similar to that in the UTI sale. The unsecured creditors would receive ten cents on the dollar, to a maximum of $3 million among all the unsecured creditors. The shareholders would receive two cents per common share, to a maximum of $1 million.

E. Value of Fracmaster

16 It would have been of assistance to the Court to have an independent opinion as to the fairness of the sale process and the consideration to all stakeholders. Instead, I have Fracmaster's submission that the UTI offer represents the best available value for Fracmaster, based on the extensive sales process that was undertaken over several months.

17 I also have the valuation which the Monitor prepared at my request. However, the Monitor has requested, and I have agreed, that it be kept sealed and confidential, first, because of the expressions of interest by other parties, and, second, because releasing the valuation may prejudice Fracmaster's ability to negotiate sales of the subsidiaries and their assets. This report is limited due to time constraints, and the court recognizes that, because the valuation is sealed, it is not capable of being challenged.

18 The Monitor states in its second report (May 12, 1999) that: "The valuation evidence provided to the Court by the Monitor...indicates that the liquidation value of Fracmaster and its subsidiaries will not generate sufficient funds to satisfy the Lending Syndicate's claim." (at para. 44). The valuation clearly supports that conclusion. That valuation underscores that in a best-case scenario, the Syndicate will not be paid in full and will be left with a loss. The Monitor has not put forward a valuation scenario that would result in any recovery by the unsecured creditors, let alone the shareholders.

III. Analysis

A. Structure and Purpose of the CCAA

19 The formal title of the *CCAA* states that it is an "Act to facilitate compromises and arrangements between companies and their creditors". A wealth of case law has developed from this broad wording. As stated by L.W. Houlden and G.B. Morawetz in *Bankruptcy and Insolvency Law of Canada*, 3d ed. (Carswell, looseleaf), volume 3 at 10A-2:

> The C.C.A.A. has a broad remedial purpose giving a debtor an opportunity to find a way out of financial difficulties short of bankruptcy, foreclosure or the seizure of assets through receivership proceedings. It allows the debtor to find a plan that will enable him to meet the demands of his creditors through refinancing with new lending, equity financing or the sale of the business as a going concern....

20 Therefore, the objective of the *CCAA* is to help businesses restructure or reach some other kind of arrangement with their creditors. It is generally accepted that the *CCAA* is not to be used to wind-up or liquidate a company, although there are some circumstances in which the *CCAA* can be used in such a way (Houlden and Morawetz at 10A-3).

21 For example, the court in *Associated Investors of Canada Ltd., Re* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) (reversed on different grounds) dealt with plans of arrangement that contemplated liquidation of the companies rather than their survival (at 240-41). The trial court held that the *CCAA* "is not restricted in its application to companies which are to be kept in business.... (at 245).

22 Similarly, Farley J. has held that the *CCAA* "need not be employed to revitalize a corporation but can also involve a liquidation scenario" (*Olympia & York Developments Ltd., Re* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]) at 104), and that an orderly distribution of the company's affairs "may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally." (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at 32).

23 I accept those statements. However, I note that the court in *Olympia & York* was dealing with an arrangement which had been approved in accordance with the *CCAA* provisions (*i.e.*, it had been approved by the creditors and sanctioned by the court). In *Lehndorff*, the court explicitly required that the action (*e.g.*, liquidation) be "in the best interests of the creditors generally". The court went on to conclude that each of the applicants, who wished *CCAA* protection in order to present a plan, had a "realistic possibility of being able to continue operating" (at 32).

24 I also note the principle that even where a plan is proposed, the court need not order a meeting of the creditors or class of creditors. That is because ss.4 and 5 of the *CCAA*, which provide for such meetings, are permissive, not mandatory. As Houlden and Morawetz state at 10A-11: "If the court believes that the proposed plan or arrangement is not in the best interests of creditors, it may refuse to make the order...[I]f the plan lacks economic reality, the court will also refuse to make the order".

25 The latter point of "economic reality" is well illustrated in the recent decision of Blair J. in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]). In that case, the Canadian Red Cross Society (the "Red Cross") sought *CCAA* protection with a view to putting forth a plan. The purpose of the plan was both to deal with its creditors and as part of the government-mandated process for transferring responsibility for the Canadian blood supply to two new agencies. The Red Cross was faced with approximately $8 billion of tort claims arising from contaminated blood products. The Red Cross asked the court to approve the sale of its principal assets to the two new agencies. One group of tort claimants asked the court to direct a meeting of creditors to consider a counter-proposal.

26 Even though the proceeds of sale would be far too low to satisfy the tort claims, the Red Cross and the governments involved thought the amount was the best that could be obtained, considering the urgency of transferring the blood supply services system. The central question was whether the proposed price for the asset purchase was "fair and reasonable in the circumstances, and a price that is as close to the maximum as is reasonably likely to be obtained for such assets." (at4). The price was supported by many tort claimants. After payment of the secured line of credit and certain other unspecified creditors, there would be a $70 million to $100 million pool of funds for the tort claimants.

27 The price in *Red Cross* was reached by the governments' and the Red Cross' financial advisers. The two financial advisers had retained independent appraisal experts. Another adviser reviewed the price and the process. This independent due diligence gave the court "some comfort as to the adequacy of the purchase price" (at 5).

28 The court was also faced with the "Lavigne Proposal", which would see the assets stay with the Red Cross. However, the court held that national policy decisions precluded the Lavigne Proposal from having any "realistic likelihood" of success (at 7). The court concluded that the Lavigne Proposal:

> ...does not offer a workable or practical alternative solution in the context of these CCAA proceedings. I question whether it can even be said to constitute a 'Plan of Compromise and Arrangement' within the meaning of the CCAA, because it is not something which either the debtor (the Red Cross) or the creditors (the Transfusion Claimants amongst them) have control over to make happen.

Because it was not a realistic plan in the circumstances, the court refused to order a meeting under ss.4 and 5 of the *CCAA*.

29 I accept and support the broad statement made by Blair J. in *Red Cross* (at 10):

> I cannot accept the submission that the Court has no jurisdiction to make the order sought. The source of the authority is twofold: it is to be found in the power of the Court to impose terms and conditions on the granting of a stay under section11;

> and it may be grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to 'fill in the gaps in the legislation so as to give effect to the objects of the CCAA, including the survival program of a debtor until it can present a plan.'

This statement must be read in light of the following wording (at 10):

> It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan is formally tendered and voted upon.

30 Apart from the sale of assets or the Lavigne Proposal, the only alternative was liquidation. The experts opined that the value on liquidation basis would be $95-139 million less than the value of the proposed sale. Therefore, the court determined that the proposed sale price was fair and reasonable, and as close as possible to a maximum price under the circumstances (at 9). While commenting that it is not uncommon for courts to approve sales before a plan is filed or voted on (supra), the Court said the circumstances must be "appropriate" and the orders must be able to be made "within the framework and in the spirit of the *CCAA* legislation." (at 11).

B. Appropriate Remedy in this Situation

31 I do not have the benefit of an independent full appraisal of Fracmaster. I wish to emphasize that this is not the Monitor's fault. In the circumstances of this case, including time pressures and other factors, I believe that the Monitor has performed to the best of its ability.

32 However, I do have enough valuation information to determine that there is no value in Fracmaster greater than the amount owed to the secured creditors. In otherwords, there is insufficient value in Fracmaster to provide anything for the unsecured creditors or shareholders. While I appreciate that the Balm/Janus and the Calfrac proposals attempt to make a provision for the unsecured creditors and shareholders, even the total value of those proposals appears to be considerably less than the amount owed to the Syndicate of secured creditors. Both those proposals on their face offer only an incremental increase to the secured creditors but are marginally better for the unsecured creditors and, possibly, for the shareholders. While the Balm/Janus proposal has potential "upside" for all classes, I have no way of determining the economic reality of such an upside.

33 I commend Mr. Balm for the effort he has gone to in formulating his proposal and seeking financial backing. As noted earlier, it is the only option before me that fits conventionally within the *CCAA* structure. He has also gone to great lengths to address concerns that could arise, such as the BNPI secured interest and his offer to provide unsecured DIP financing. Mr. Balm's proposal theoretically leaves a life for Fracmaster and for the shareholders.

34 However, I cannot ignore the commercial and practical realities of Fracmaster's situation. The valuation evidence before me clearly indicates that there is no equity in Fracmaster. Notwithstanding the court's broad powers under the *CCAA*, the Balm/Janus proposal, and the *CCAA* itself, specifically require the approval of the secured lenders - here, the Syndicate. Regardless of whether the court could compel the Syndicate to consider and vote on the Balm/Janus proposal, I recognize and accept that the Syndicate has commercial concerns with the proposal.

35 The delay until July 19 contemplated by the Balm/Janus proposal is significant in the circumstances. The Syndicate is currently faced with a loss of approximately $35 million under the UTI sale. The Balm/Janus proposal puts the Syndicate, in the Syndicate's view, at risk to lose even more. The unsecured creditors and the shareholders face no such risk if there is delay - they have only the possibility of recovering some amount greater than zero.

36 This fundamental concept - that the Syndicate would be further risking its recovery after already accepting the reality of a $35 million loss - speaks to why these proposals do not fit within the *CCAA*. The spirit of the *CCAA* contemplates a restructuring, or at least an attempt at restructuring, for the general benefit of all stakeholders. Fracmaster's current financial situation precludes that, absent the secured creditors' agreement to accept a substantial commercial risk.

37 The Calfrac proposal is no more a plan than is the UTI proposal. Although it slightly betters UTI's pricing structure, it fails to contemplate practical procedures, including a provision for consultations with the stakeholders or a method of determining claims.

38 As with the Balm/Janus proposal, the Calfrac proposal ignores the fundamental reality that the Syndicate is not agreeable to it. Again, this is a business decision of the Syndicate, notwithstanding its contractual obligation to support the UTI sale.

39 Accordingly, neither the Balm/Janus nor the Calfrac proposals are "workable or practical", to use the language from *Red Cross*. The Syndicate has indicated it will not approve either proposal in the circumstances, and that it is contractually bound to support the UTI sale. However, more persuasive than its contractual obligation is the fact that it has valid commercial reasons for refusing to take the risk those offers present. It has been submitted, that under the broad power conferred by the *CCAA* I can require the Syndicate to consider the proposals and direct the calling of meetings for that purpose. However, to exercise my discretion in that fashion would substitute the Court's commercial view and ignore the Syndicate's business concerns, hoping it will have a change of heart, where it has the only realistic remaining financial interest in Fracmaster. I decline to do so. Given the Syndicate's refusal to consent, it would be pointless to order meetings of the creditors and shareholders to consider either proposal.

40 It may well be that the UTI proposal is a commercially provident deal. The fact that it is not in the form of a plan is not in and of itself fatal in *CCAA* proceedings. However, the proposed transaction does not create a pool of cash in which unsecured creditors or shareholders can ultimately participate for their general benefit. It does not provide for the opportunity to consult with those stakeholders because it does not contemplate their receipt of any benefit. The court does not have the comfort of an independent opinion as to the fairness of the transaction or the process leading up to it. It has only a limited opportunity to evaluate the proposal. However reasonable the proposal may be, its purpose is to facilitate a sale for the benefit of the Syndicate. That can be accomplished in a different fashion without distorting the spirit of the *CCAA*. These concerns, cumulatively, lead me to no other conclusion than this proposed sale ought not to be approved under the *CCAA*.

41 I reach this conclusion with great reluctance, as I respect the purpose of the *CCAA* and recognize the losses that are being suffered by the unsecured creditors and the shareholders. However, inappropriate use of the Act can only weaken such a valuable piece of legislation.

42 The Syndicate has applied to this Court for the lifting of the stay to allow them to enforce their security. Fracmaster has acknowledged it is indebted to the Syndicate pursuant to the terms of two general security agreements dated April 28, 1998 as supplemented and amended, that it is in default under each part of the security, that all sums owing under the security have become due and payable and that the security has become enforceable.

43 I am prepared to lift the stay for that purpose and to grant the requested order appointing Arthur Andersen Inc. ("Arthur Andersen") as receiver and manager (the "Receiver") of the present and future undertaking, property and assets of Fracmaster on certain terms and conditions. I find it just and convenient to do so. Arthur Andersen has been the Monitor since the commencement of these proceedings and has fulfilled its role independently. It is well informed and alert to the precarious financial situation of Fracmaster.

44 The Syndicate and UTI wish me to direct that the Receiver proceed to close the UTI sale. In my view the purpose of the appointment of the Receiver would be largely defeated were I to fetter his discretion in that regard. The Monitor in his submissions made it abundantly clear that he is conscious of "the absolute need to resolve this". As such, I am confident, given his prior involvement in this matter, that he will be able to take whatever immediate action he deems necessary and to report to the Court as required.

45 The Court is very much alive to the concern regarding delay in the process and the need for finality. To that end I seek advice from the Receiver as to how quickly he can report as to its recommendations with respect to a sale of assets or such other immediate action he deems appropriate for the benefit of all claimants, including the secured creditors.

46 The terms of the appointment are to include, but are not limited to, the following:

> The Receiver shall be authorized and empowered to take all steps it deems necessary to preserve and protect the undertaking, property and assets of Fracmaster for the benefit of all claimants, including the secured creditors.
>
> The Receiver shall report to this Court at the earliest opportunity, and in any event no later than May 21, 1999, as to its recommendation with respect to a sale of Fracmaster's assets, or such other immediate action as it may deem appropriate for the benefit of all claimants, including the secured creditors.
>
> The Receiver may from time to time apply to this Court for advice and direction in the discharge of its powers and duties upon notice to all parties who made submissions to the Court with respect to this order, and such other parties as the Court may direct.

47 I request the assistance of counsel in preparing a proposed form of order for my review, incorporating the above and including the necessary powers anticipated. The order is also to reflect the Court's request for aid and recognition of any court or judicial body within and outside Canada.

48 I ask counsel to re-attend before me today with the proposed form of order.

IV. Disposition

49 The Syndicate's application is granted on the terms set out above. The applications of Fracmaster, Mr. Balm/Janus and Calfrac are dismissed. The applications of Cananwill, TD Asset Finance Corp. and TrizecHahn Office Properties Ltd. are all adjourned sine die, to be dealt with by the Receiver or further Court order.

Application dismissed; cross-application granted.

Footnotes

* Affirmed (1999), (sub nom. *Royal Bank v. Fracmaster Ltd.* 11 C.B.R. (3d) 230, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 209 W.A.C. 93 (Alta. C.A.).

TAB 12

Most Negative Treatment: Not followed
Most Recent Not followed: Norm's Hauling Ltd., Re | 1991 CarswellSask 38, 6 C.B.R. (3d) 16, 91 Sask. R. 210, [1991] 3 W.W.R. 23, [1991] S.J. No. 53, 25 A.C.W.S. (3d) 57 | (Sask. Q.B., Jan 28, 1991)

1990 CarswellOnt 139
Ontario Court of Appeal

Nova Metal Products Inc. v. Comiskey (Trustee of)

1990 CarswellOnt 139, 1 C.B.R. (3d) 101, 1 O.R. (3d) 289, 23 A.C.W.S. (3d) 1192, 41 O.A.C. 282

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

Finlayson, Krever and Doherty JJ.A.

Heard: October 30 and 31, 1990
Judgment: November 2, 1990
Docket: Doc. Nos. CA 684/90 and CA 685/90

Counsel: *F.J.C. Newbould*, Q.C., and *G.B. Morawetz*, for appellant The Bank of Nova Scotia.
John Little, for respondents Elan Corporation and Nova Metal Products Inc.
Michael B. Rotsztain, for RoyNat Inc.
Kim Twohig and *Mel Olanow*, for Ontario Development Corp.
K.P. McElcheran, for monitor Ernst & Young.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act
Corporations — Arrangements and compromises — Court having discretion when ordering creditors' meeting under s. 5 of Companies' Creditors Arrangement Act to consider equities between debtor company and secured creditors and to consider possible success of plan of arrangement — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.
Corporations — Arrangements and compromises — Opposing commercial and legal interests requiring secured creditors to be in separate classes — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.
Corporations — Arrangements and compromises — Where receiver-manager having been appointed, corporation not entitled to issue debentures and trust deeds or to bring application for relief under Companies' Creditors Arrangement Act — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 3.
The applicants were two related companies. The bank was the lender to the companies and was owed over $2,300,000. R Inc. was also a secured creditor of the companies, and was owed approximately $12 million. By agreement, the bank had a first registered charge on the companies' accounts receivable and inventory and a second registered charge on land, buildings and equipment, while R Inc. had a second registered charge on the accounts receivable and inventory and a first registered charge on the land, buildings and equipment. The security agreements with the bank prohibited the companies from encumbering their assets without the bank's consent. The bank also had s. 178 *Bank Act* security. The Ontario Development Corporation ("ODC") guaranteed part of the companies' debt to R. Inc. and held as security a debenture from one of the companies ranking third to the bank and R Inc. Two municipalities had first priority liens on the companies' lands for unpaid municipal taxes.

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

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

Held:

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

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

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

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

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

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

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

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

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

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

Table of Authorities

Cases considered:

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

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Per Doherty J.A. (dissenting in part)

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Statutes considered:

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

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s. 3

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s. 5

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s. 6(a)

s. 11

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s. 144(1)

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

s. 12

Municipal Act, R.S.O. 1980, c. 302 —

s. 369

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

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

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

2 The orders appealed from are:

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

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

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

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

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

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

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

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

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

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

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

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

> 3. This Act does not apply in respect of a debtor company unless
>
> (a) the debtor company has outstanding an issue of secured or unsecured bonds of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee; and
>
> (b) the compromise or arrangement that is proposed under section 4 or 5 in respect of the debtor company includes a compromise or an arrangement between the debtor company and the holders of an issue referred to in paragraph (a).

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

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

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

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

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

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

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

> (i) that the companies could spend the accounts receivable assigned to the bank that would be collected in accordance with a cash flow forecast filed with the Court providing for $1,387,000 to be spent by September 30, 1990; and
>
> (ii) a stay of proceedings against the bank acting on any of its security or paying down any of its loans from accounts receivable collected by Elan and Nova.

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

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

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

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

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

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

21 There are five issues in this appeal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> In *In re Alabama, New Orleans, Texas and Pacific Junction Ry. Co.*, [1891] 1 Ch. 213, a scheme and arrangement under the Joint Stock Companies Arrangement Act (1870), was submitted to the Court for approval. Lord Justice Bowen, at p. 243, says:
>
> > Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation ... Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such.

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

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

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

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

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

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

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

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

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

DOHERTY J.A. **(dissenting in part):**

I Background

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

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

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

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

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

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

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

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

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

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

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

II The Issues

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

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

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

(i) Did Hoolihan J. err in holding that the companies were entitled to invoke the Act?

(ii) Did Hoolihan J. err in exercising his discretion in directing that a meeting of creditors should be held under the Act?

(iii) Did Hoolihan J. err in directing that the bank and RoyNat Inc. should be placed in the same class of creditors for the purposes of the Act?

(iv) Did Hoolihan J. err in the terms of the interim orders he made pending the meeting of creditors and the submission to the court of a plan of reorganization?

III The Purpose and Scheme of the Act

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

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

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

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

59 In an earlier passage, His Lordship had said:

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

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

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

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

> 3. This Act does not apply in respect of a debtor company unless
>
> (a) the debtor company has outstanding an issue of secured or unsecured bonds of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee; and
>
> (b) the compromise or arrangement that is proposed under section 4 or 5 in respect of the debtor company includes a compromise or an arrangement between the debtor company and the holders of an issue referred to in paragraph (a).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Section 3 and "Instant" Trust Deeds

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

— Class 2 — The Bank of Nova Scotia

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

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

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

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

100 These orders imposed the following conditions pending the meeting:

(a) all proceedings with respect to the debtor companies should be stayed, including any action by the bank to realize on its security;

(b) the bank could not reduce its loan by applying incoming receipts to those debts;

(c) the bank was to be the sole banker for the companies;

(d) the companies could carry on business in the normal course, subject to certain very specific restrictions;

(e) a licensed trustee was to be appointed to monitor the business operations of the companies and to report to the creditors on a regular basis; and

(f) any party could apply to terminate the interim orders, and the orders would be terminated automatically if the companies defaulted on any of the obligations imposed on them by the interim orders.

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

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

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

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

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

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

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

VIII Conclusion

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

Appeal allowed.

TAB 13

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous
Civil practice and procedure
XII Discovery
XII.4 Examination for discovery
XII.4.h Range of examination
XII.4.h.ix Privilege
XII.4.h.ix.F Miscellaneous
Evidence
XIV Privilege
XIV.8 Public interest immunity
XIV.8.a Crown privilege

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges

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Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

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Generally — referred to

s. 1 — referred to

s. 2(b) — referred to

s. 11(d) — referred to

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Generally — considered

s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 151 — considered

R. 312 — referred to

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

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two

CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

> 151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.
>
> (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

> A publication ban should only be ordered when:

(a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

(b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

(a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;

(b) the judge must consider whether the order is limited as much as possible; and

(c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

A publication ban should only be ordered when:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right*. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial

generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, *supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck*, *supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the

parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits" may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan*, *supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck*, *supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, *supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, *per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination.

In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

> Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive

information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.

Pourvoi accueilli.