COURT FILE NUMBER:	1501-00955
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
APPLICANTS:	LUTHERAN CHURCH – CANDA, THE ALBERTA – BRITISH COLUMBIA DISTRICT, ENCHARIS COMMUNITY HOUSING AND SERVICES, ENCHARIS MANAGEMENT AND SUPPORT SERVICES, AND LUTHERAN CHURCH – CANADA, THE ALBERTA – BRITISH COLUMBIA DISTRICT INVESTMENTS LTD. ("DIL")
DOCUMENT:	**BRIEF OF THE RESPONDENTS ELVIRA KROEGER AND RANDALL KELLEN REGARDING THE SANCTION HEARING FOR THE DIL PLAN OF COMPROMISE AND ARRANGEMENT**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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SCHEDULED TO BE HEARD BEFORE THE HONOURABLE MADAM JUSTICE ROMAINE AT 2:00 PM ON MONDAY, FEBRUARY 29, 2016

I. INTRODUCTION AND BACKGROUND

1. DIL Creditors Elvira Kroeger and Randy Kellen oppose the judicial sanction of the Amended Amended Plan of Compromise and Arrangement of Lutheran Church – Canada, the Alberta – British Columbia District Investments Ltd. ("DIL"), filed on January 11, 2016 (the "Amended Amended DIL Plan") on the grounds that:

   (a) it improperly compromises the Depositors' procedural rights to pursue legal claims against parties other than the Applicant;
   (b) it is inappropriate and not advanced in good faith; and
   (c) it is not fair or reasonable to the DIL Depositors.

2. Mrs. Kroeger and Mr. Kellen are depositors to both the CEF and the DIL.

Affidavit of Elvira Kroeger sworn Feruary 23, 2016
Affidavit of Randy Kellen filed May 21, 2015, para. 13

3. The Amended Amended DIL Plan was approved by the requisite majority of DIL Depositors present at the DIL Creditors' Meeting held on the premises of the Prince of Peace ("POP") School in Calgary, Alberta on January 23, 2016.

4. Pursuant to the Amended Amended DIL Plan, the remaining assets of DIL are currently being liquidated and transferred from Concentra to a Replacement Fund Manager for the benefit of the DIL Depositors. Once all of DIL's assets have been liquidated, DIL will cease to operate.

Applicant's Brief, para. 19

(a) Article 5 The Representative Action

5. The Amended Amended DIL Plan contains Article 5 ("Representative Action"), which purports to require, as a term of the Plan, that the DIL Creditors assign all of their procedural rights to pursue any and all legal causes of action for that part of their claims not paid by the Plan (whether in their individual capacity, as part of a class under provincial class proceedings legislation, or in a derivative capacity in the name of DIL) against any person to a Subcommittee appointed by the DIL Creditors' Committee.

6. The Amended Amended Plan provides as follows:

Art. 5.1 Representative Action

Pursuant to the Plan and Santion Order, the Subcommittee shall be authorized and enabled to take any and all steps as they deem necessary and desirable to commence and prosecute the Representative Action on behalf of the Representative Class.....

7. Art. 1 of the Amended Amended Plan defines the term "Representative Action" as follows:

> **"Representative Action"**: means that legal action or actions undertaken in respect of the Representative Action Claims, which action may be advanced as a class proceeding for the benefit of the Representative Action Class pursuant to the terms of the Plan....

8. The definition of the term "Representative Action Claim(s)" in Art. 1 of the Plan is broad enough to encompass any and every claim that a DIL Depositor may bring against any defendant, whether in an individual, representative or derivative capacity. It even encompasses those claims which a DIL Depositor may wish to advance, but the Subcommittee chooses not to pursue:

> **"Representative Action Claims"**: means Any and all potential claims of DIL Depositors, whether such claims are pursued as part of the Representative Action or not, that seek or could seek, directly or indirectly, to recover the amounts of their Claims under this Plan and are not released by this Plan under Articles 8.1 and 8.3. For greater certainty, such potential claims include those claims or potential claims specifically mentioned in Articles 8.2 and 8.4, and also includes the following claims:

(a) Claim(s) related to a contractual right of one or more of the DIL Depositors entered into personally by a Representative Action Defendant;

(b) Claim(s) based on allegations of misrepresentations made by a Representative Action Defendant to DIL Depositors or of wrongful or oppressive conduct by a Representative Action Defendant;

(c) Claim(s) of DIL against a Representative Action Defendant, including but not limited to claims for breach of any legal, equitable, contractual or other duty;

(d) Claims that are a D & O Claim, including a D & O Insured Claim; and

(e) Any claim(s) which one or more of the DIL Depositors could have pursued in the name of DIL, including without limitation, any derivative action (whether statutory or otherwise) or any Claim(s) which could be assigned to a creditor pursuant to s. 38 of the BIA, if such legislation were available.

[underlining added]

9. Given that the definition of "Representative Action Claim" includes claims against "Representative Action Defendants", it is essential to understand who a "Representative Action Defendant" is in order to understand what claims are included in the definition of "Representative Action Claims".

10. Under Art. 1 of the Plan, the definition of "Representative Action Defendant" against whom a Representative Claim may only be brought within the confines of a Representative Action is broad enough to encompass (with certain exclusions and limitations) any person whatsoever:

> **"Representative Action Defendant**:: means the Partially Released Parties and any other parties against whom Representative Action Claim(s) may be brought, but excludes the Released Representatives except to the extent permitted pursuant to Art. 8.2. [underlining added]

11. However, the definition is circular. A Representative Action Claim is a claim brought against a Representative Action Defendant; a Representative Action Defendant is a person against whom a Representative Action Claim is brought. The definitions offer no useful guidance to the reader as to what or whom a Representative Action Claim or a Representative Action Defendant is.

12. The "Partially Released Parties" included in the definition of "Representative Action Defendant" are the Applicant and those closely enough connected with the Applicant that they might reasonably expect to receive the substantive and procedural protections of the CCAA:

> **"Partially Released Parties"**: DIL, the D & O Party(ies), the directors and officers, volunteers and employees of the District, DIL, ECHS, and EMSS, any independent contractors of DIL who are individuals and who were employed three days or more a week on a regular basis.

13. Excluded from the definition of "Representative Action Defendants" are the "Released Representatives", who are the professionals involved in the CCAA proceedings:

"Released Representatives": The Monitor, the Monitor's Counsel, the Applicant's Counsel, the CRO, legal counsel for the DIL Committee, and the DIL Committee members. [underlining added]

14. The Applicants' Counsel, Mr. Francis Taman and his law firm Bishop & McKenzie LLP were the solicitors for both District and its borrowers (ECHS and Shepherd's Village Ministries Ltd.) in respect of the transactions which have given rise to these proceedings from at least 1999 to 2013.

Affidavit of Courtney Clark sworn February 23, 2016 ("Clark Affidavit"), Exs. "F" to "H", "V"

15. Art. 8.1 of the Plan provides a general release to the Released Representatives. However, Art. 8.2 of the Amended Amended DIL Plan sets out exceptions to those general releases, as follows:

> Notwithstanding Art. 8.1 of this Plan, the following matters are not released by this Plan as against the Released Representatives:
>
> (a) Any liability arising out of any fraud, gross negligence or willful misconduct on the part of the Released Representatives; and
>
> (b) Any actions or omissions of the Released Representatives which are not directly or indirectly related to the CCAA Proceedings or their commencement.
>
> For greater certainty, the release of Released Representatives pursuant to Article 8.1 of this Plan shall release the Released Representatives from any and all matters that may or could be alleged as against the Released Representatives in the Representative Action Claims advanced pursuant to the Representative Action, save and except for any matters referenced within Article 8.2.

16. Accordingly, Mr. Taman and Bishop & McKenzie LLP are not released for any fraud, gross negligence or willful misconduct arising in the course of the CCAA proceedings, or for any acts or omissions arising prior to the CCAA proceedings. However, under the terms of the Plan those claims against Mr. Taman and Bishop & McKenzie LLP can only be advanced on behalf of the DIL Depoitors in the Representative Action.

17. Art. 5.6 of the Amended Amended DIL Plan ("No Claims Other than Representative Action") states that the Representative Action shall be the sole recourse of the DIL Depositors with respect to the Representative Action Claims:

Art 5.6 No Claims Other than Representative Action

> The Representative Action shall represent the sole recourse of any DIL Depositor with respect to a Representative Action Claim except if such DIL Depositor is also a District Depositor, in which case he or she may participate in any representative action commenced pursuant to the District plan of compromise and arrangement. No legal proceedings shall be commenced by any DIL Depositor or any other Person for a claim that is an actual or potential Representative Action Claim except for any representative action commenced pursuant to the District plan or compromise or arrangement, if applicable. Without limiting the generality of the foregoing, but for greater clarity, those DIL Depositors who elect or who are deemed to have elected to participate in the Representative Action, or those DIL Depositors wh have elected to opt out of the Representative Action, either in the Representative Action Letter or pursuant to Article 5.7, are not eligible to be members of any "class" for purposes of the Class Proceedings Act, RSBC 1996, c. 50 (British Columbia) and Class Proceedings Act, S.A. 2010, c. 15 (Alberta) or any legislation of similar purpose or intent in any Canadian Province or Territory, or State of the United States in any other legal proceeding(s) other than the Representative Action except for any representative action commenced pursuant to the District plan of compromise and arrangement, if applicable.

18. Accordingly, unless a DIL Depositor agrees to participate in the Representative Action, he or she will have no recourse whatsoever to pursue the residual portion of his or her claim which is not paid by way of a distribution under the Plan.

19. Any DIL Depositor who wishes to participate in the Representative Action is required to fund it through the application of a Representative Action Holdback, which is also defined in Art. 1:

> **"Representative Action Holdback":** an amount withheld from the amounts payable to members of the Representative Action Class pursuant to the Plan to fund the out-of-pocket costs associated with the Representative Action, including any costs that may be incurred by the Monitor or the Monitor's Counsel in relation to the Representative Action, together with a reasonable reserve to cover the indemnity granted [to the Representative Plaintiff] in Article 5.8, the amount of which is to be determined by the Subcommittee once appointed.

20. The Plan makes no provision for replenishing the Holdback once it is expended, or for requisitioning additional funds from the participating DIL Depositors if needed. This is a

significant gap in the Plan, in that Depositors are not given full disclosure of the extent of the financial commitment that may be required of them to participate in the Representative Action..

21. Further, the provisions of Art. 5 render it impossible for a Depositor to know and understand exactly what legal actions that he or she is opting into or out of, against whom those actions are brought and in what capacity, and when those opt-in/opt-out elections must be made, before agreeing to the financial commitment of the Representative Action Holdback.

22. Pursuant to Art. 5.5 of the Amended Amended Plan ("Electing to Participate or Deemed Election to Participate in Representative Action in Representative Action Letter"), a DIL Depositor may elect to participate or not to participate in the Representative Action by delivering the Represenative Action Letter (Schedule 2 to the Plan) to the Monitor "on or before 5:00 pm (Calgary time) on the last Business Day preceding the date of commencement of the Representative Action". Depositors who fail to return the Letter are deemed to have opted in to the Representative Action.

23. However, the opt-out deadline is the same as the opt-in deadline. Under Art. 5.7 of the Amended Amended Plan ("Opting Out of Representative Action"), a DIL Depositor who has opted in to the Representative Action may opt out again by delivering the Notice of Opting Out Form (Schedule 5 to the Plan) to the Monitor or Representative Counsel "at any time prior to the commencement of the Representative Action."

24. Art. 5.5 contemplates that "following section of Representative Counsel by the Subcommitee, the Monitor will provide "an estimate of the Representative Action Holdback and information regarding opting out of the Representative Action" to all DIL Depositors who have opted in to the Representative Action.

25. However, given that the opt-in and opt-out deadlines are the same, Depositors who opt in close to the deadline or are deemed to have opted in at the deadline will not receive this information before the opt-out deadline. Further, the Plan does not contemplate that the Subcommittee, the Monitor or the Representative Counsel will advise the Depositors as to the nature of the claims to be commenced, or the defendants named, at any time prior to the commencement of the Representative Action.

26. Further, while Art. 5.5 of the Plan provides that after the Subcommittee has been appointed the Monitor will advise the participating DIL Depositors as to the amount of the Representative Holdback, the participating Depositors will not be advised of their own proportionate share of the Representative Action Holdback (the "Proportionate

Share of Costs", as defined in Art. 1) until the opt-out deadline has passed and the size of the Representative Action Class is known.

27. This leaves the DIL Depositors in the position of having to make an irrevocable decision as to whether or not to participate in the Representative Action prior to the opt-in/opt-out deadline without knowing what types of actions will be advanced, which defendants will be named, and what their total financial obligation to fund these actions will be. If the Depositor finds that he or she has insufficient information upon which to make an informed decision and therefore elects not to participate, he or she will have no recourse to pursue their claims independently of the Representative Action process.

28. Finally, pursuant to Arts. 5.2 and 5.3 of the Amended Amended Plan, the Representative Action is to be advanced by the Subcommittee, a group of three to five DIL Depositors appointed by the DIL Creditors' Committee. One of those persons shall be the named Representative Plaintiff in the Representative Action.

29. That Subcommittee will be responsible for, *inter alia*, instructing the Representative Counsel, establishing the amount of the Representative Action Holdback, and "serving in a fiduciary capacity to the Representative Action Class". However, the Subcommittee has no obligation to communicate with or seek the views of any member of the Representative Action Class (who are obligated to pay for the costs of advancing the Representative Action through the Representative Action Holdback), other than the Representative Plaintiff.

II. ISSUES

30. Ms. Kroeger and Mr. Kellen submit that there are three issues on this application:

    (a) Does the Amended Amended DIL Plan conform to the statutory requirements, objectives and purposes of the CCAA?

    (b) Is the Amended Amended DIL Plan appropriate and advanced with due diligence and in good faith?; and

    (c) Is the Amended Amended DIL Plan fair and reasonable to the DIL creditors?

III. ARGUMENT

A. Applicable Legislation

31. The *Companies Creditors' Arrangement Act*, RSC 1985, c-36 ("CCAA") provides:

> **5.1** (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> (2) A provision for the compromise of claims against directors may not include claims that
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> **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
>
> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Respondents' Tab H

B. Applicable Principles of Law re Judicial Sanction of a Plan of Compromise and Arrangement

32. The Court's power to sanction a plan or compromise or arrangement under s. 6 of the CCAA is discretionary, not mandatory. The Court does not have to sanction the compromise or arrangement even if it has been approved by the required double majority of creditors.

Respondents' Tab F -- *Re 229531 BC Ltd.* (1989),
73 CBR (N.S.) 310 at para. 21 (BCSC)

33. The debtor has the burden on an application for judicial sanction pursuant to s.6 of the CCAA. Before sanctioning the plan, the court must be satisfied that:

    (a) all statutory requirements and previous court order have been complied with;
    (b) nothing has been done or purported to be done which is not authorized by the CCAA; and
    (c) the plan is fair and reasonable.

Applicant's Tab E – *Re: Nortel Networks*,
2009 CanLii 31600 (Ont.S.C.) at para. 79

34. The Court does not have the jurisdiction or authority to sanction a Plan which contains terms that fall outside the purpose, objects and scheme of the CCAA.

Applicant's Tab B - *Re Metcalfe & Mansfield Alternative Investments II Corp.*,
2008 240 OAC 245, 2008 ONCA 587 (CanLii) ("Metcalfe & Mansfield") at para. 73

35. In *Re: Ted Leroy Trucking Ltd.* [2010] 3 SCR, 2010 SCC 60 ("*Century Services*"), the Supreme Court of Canada observed that the exercise of judicial discretion on an application for judicial sanction of a plan of compromise and arrangement must be guided by the "remedial purpose" of the CCAA (para. 59):

> Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
> >
> > (*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

Applicant's Tab A

Respondents' Tab A

36. The Court in *Century Services*, *supra*, articulated the purpose of the *CCAA* in several ways:

(i) To permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets (at para. 15)

(ii) To provide 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 (at para. 59);

(iii) To avoid the social and economic losses resulting from liquidation of an insolvent company (at para. 70) ; and

(iv) To create conditions for preserving the status quo while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. (at para. 77)

Applicant's Tab A

37. The Courts have recognized that, in addition to regulating the affairs of the debtor company and its creditors, the CCAA also serves the "wider public interest" by ameliorating the negative social and economic impacts of business failure. In *Metcalfe & Mansfield, supra* at para. 52, the Ontario Court of Appeal agreed with the following statement of Doherty J.A. (in dissent) in *Elan v. Comiskey*, (1990) 1 O.R. (3d) 289 p. 306-307:

> [T]he 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.

Applicant's Tab B

38. Accordingly, the Courts have interpreted the term "arrangement" in ss. 4 and 6 of the CCAA as broad enough to include the compromise of third party claims, but only where those compromises are necessary to accomplish the purpose of the Act. Blair J.A. stated in *Metcalfe v. Mansfield*, *supra* at paras. 68 – 70:

> [68] Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But

the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

[69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

[70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. *In short, there must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan.* [italics added]

Applicant's Tab B

39. The Court of Appeal went on to uphold the reasoning of the application judge, who approved the third party releases contained in the proposed plan of compromise and arrangement for the following reasons (at para. 71):

    (a) The parties released are necessary and essential to the restructuring of the debtor;
    (b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
    (c) The Plan cannot succeed without the releases;
    (d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and

    ....

Applicant's Tab B

40. In *Pacific Coastal Airlines Ltd. v. Air Canada*, 2001 BCSC 1721, Tysoe J. observed that the regulating disputes between creditors and third parties is not a proper use of CCAA proceedings (at para. 24):

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

Respondents' Tab E

41. The applicant also has the burden of satisfying the court that the order sought is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence. In *Century Services*, *supra*, the Court held (at para. 70):

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

42. Only if all of the statutory requirements in relation to a proposed plan of compromise and arrangement have been satisfied, the court must then determine if the plan is fair and reasonable.

Respondents' Tab D - *Northland Properties Ltd. et al v. Excelsior Life Assur. Co. of Can. And Guardian Ins. Co. of Can.* (1989) 73 CBR (NS) 195

43. The test that the court must apply in considering whether to sanction a plan or compromise or arrangement approved by creditors is:

> [Is the proposed plan of compromise or arrangement] such that an intelligent and honest man, a member of the class concerned and acting in respect of his interests, might reasonably approve?

Respondents' Tab G - *Re Dorman Long & Co.*,

[1934] 1 Ch. 635 (LexisNexis) at page 8

44. Given that CCAA proceedings provide an alternative to bankruptcy, the benefits offered by a proposed plan or compromise and arrangement must be measured against a forced liquidation. Accordingly, the Court in *Century Services*, *supra*, held (at para. 77):

> The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation.
>
> Applicant's Tab A

B. Application of the Law to the Application for Judicial Sanction of the DIL Plan

(a) Art. 5 ("Representative Action") of the Amended Amended DIL Plan Does Not Conform with the Purposes or Requirements of the CCAA

(a) The Representative Action is not Within the Purposes of the CCAA

45. As noted above, the purpose of the CCAA is to ameliorate the social and economic effects of a forced liquidation while efforts are made to reorganize the debtor's affairs so that it may carry on in business. The Representative Action provisions of the Amended Amended DIL Plan do not address that purpose, or any other legitimate purpose of the CCAA.

46. The Applicant has identified the "benefits" of the Representative Action as follows:

> (a) It provides a "streamlined process" for the establishment of the Representative Action Class and the funding of the Representative Action;
> (b) It allows for ongoing involvement of members of the DIL Creditors' Committee; and
> (c) "Selected depositors" have indicated that the view any involvement in litigation as inconsistent with their personal religious beliefs.
>
> Applicant's Brief, para. 26

47. None of these purported procedural "benefits" are among the express purposes of the CCAA, as identified by the Supreme Court of Canada in *Century Services, supra.* Accordingly, the Court has no jurisdiction or authority under the CCAA to sanction the imposition of those "benefits" upon the DIL Despoitors pursuant to the Amended Amended DIL Plan in exchange for a distribution of their own funds.

48. The Representative Action provisions of the Amended Amended Plan represent a significant compromise of the DIL Depositors' procedural rights to pursue claims against third party co-obligators and independent tortfeasors. Under the Plan the DIL Depositors must, as a condition of receiving a distribution of their own money (significantly, trust funds) from DIL, assign all of their procedural rights to pursue the unpaid balance of their claim to an appointed and unaccountable Subcommittee of the DIL Creditors' Committee, which will have absolute discretion as to the type of actions commenced, the defendants who are named, and the litigation budget to be shouldered by the Depositors. Those who decline to do so are without <u>any recourse whatsoever</u>.

49. However, those third parties have contributed nothing to the Amended Amended Plan, are not entitled to the protection of the Plan, and are not bound by its terms. There is no interrelationship between the distributive provisions of the Plan and the Representative Action. The Representative Action provisions of the Plan are not necessary to its success. Contrary to the principles in *Re Metcalfe & Mansfield, supra*, there is no "reasonable connection" between the compromise of the DIL Depositors' procedural rights and the objectives of the Plan, which are nothing more than the liquidation of DIL's remaining mortgage assets and the cessation of its business activities.

50. In support of the Representative Action provisions of the Plan, the Monitor refers to *Re: Stelco Inc.*, 2006 CarswellOnt 3050 (Ont CA) as an example of a post-sanction claims process approved by the Court. However, as noted by the Court in that case, the claims process was negotiated and approved by the creditors, and sanctioned by the Court, as a means of resolving inter-creditor claims to the debtor's assets, not claims between creditors and unrelated third parties. Further, the Court found that the process was rationally connected to the objectives of the plan. The Court held:

> In short, the parties negotiated as part of the Plan, and agreed to – and the Court sanctioned – a mechanism for resolving "entitlement to the Turnover Proceeds". That is what this dispute is about. The evidence before Farley J. indicated that a significant portion of the Turnover Proceeds consists of potentially volatile marketable securities that could not be traded until this dispute is resolved. The procedure created by Farley J. reflects this dynamic of the Stelco process <u>and responds to the particular exigencies of this restructuring.</u> [underlining added]
>
> Monitor's Brief, para. 65(a)

51. That is not the case here. The Representative Action provisions of the Amended Amended DIL Plan are not being advanced by DIL or by the Monitor as necessary to the

restructuring of DIL or the success of the Plan, but rather as a "benefit" to the DIL Depositors. Again, the CCAA does not contemplate the imposition of unasked-for "benefits" upon creditors in which they are required to forgo their legal rights to pursue third parties in exchange for distributions of their own funds from the debtor.

52. The Monitor also relies upon the decision in *Re: Mid-Bowline Group Corp.*, 2016 ONSC 699. In that case, the plan of arrangement contemplated that Shaw Communications Inc. would purchase all of the shares of the debtor, including the shares of West Face Capital Inc., free and clear of all claims The Catalyst Capital Group Inc. asserted a constructive trust claim over West Face's shares in Mid-Bowline. The Court approved the plan, releasing Shaw from any constructive claim by Catalyst, but preserving Catalyst's right to pursue its claim against West Face for any profit earned on the sale of those shares to Shaw (at paras. 1 – 5).

Monitor's Brief, para. 65(c)

53. Again, the terms of the plan of arrangement in *Re: Mid-Bowline* which regulated the dispute between a shareholder of the debtor and a third party were essential to the success of the plan. Had the release not been granted, Shaw would not have purchased the shares of Mid-Bowline and the plan would have failed.

54. Again, the Representative Action is not necessary to the success of the Amended Amended DIL Plan.

55. Finally, the Monitor relies upon the decision in *Re Sino-Forest Corporation*, 2012 ONSC 7041 for the proposition that the Court exercising jurisdiction in the CCAA proceedings has the jurisdiction to approve terms contained in a plan of arrangement which contemplate court approval of a settlement of a claim brought against third party (and the granting of releases) by way of a class proceeding.

Monitor's Brief, para. 65(b)

56. In that case, a third party had entered into a settlement with class counsel, and the plan of arrangement was amended to provide for a process whereby the CCAA Court could be asked to approve the settlement and grant a release to the third party. That is no different, in substance, from any other situation in which a third party who makes a financial contribution to a debtor's restructuring may be released from further claims. In this case, no third party has made a financial contribution to DIL's "restructuring" (a

"restructuring" in name only; in reality it is a liquidiation) and yet they continue to seek the benefit of the plan and the protection of the CCAA Court.

b. The Amended Amended Plan Contravenes Section 5.1(2) of the CCAA

57. The definition of those "Representative Action Claims" which may only be advanced against Representative Action Defendants (including DIL's directors) by the Subcommittee includes certain claims against directors which are subject to a prohibition against compromise by s.5.1(2) of the CCAA, including:

    (a) Claims related to a contractual right of one or more DIL Depositors entered into personally by a Representative Action Defendant (the definition of which includes DIL's directors); and

    (b) Claims based on allegations of misrepresentations made by a Representative Action Defendant (the definition of which includes DIL's directors) or of wrongful or oppressive conduct by a Representative Action Defendant.

Respondents' Brief, Tab H

58. Under the terms of the Plan, a DIL Depositor may not directly advance a claim against a DIL director in respect of any of the matters identified in s.5.1(2). Those claims may only be advanced by the Subcommittee.

59. The Representative Action constitutes a significant compromise of the DIL Depositors' procedural rights to pursue these statutorily-protected claims against DIL's directors outside of the Representative Action process. Accordingly, the Court has no authority to sanction the Plan.

(b) The Amended Amended Plan is not Appropriate or Advanced in Good Faith

60. The Representative Action provisions of the Plan are not appropriate, and have not been advanced in good faith. They have the purpose and effect of shielding from future liability the very parties who have been the architects of their terms.

61. Mr. Taman and Bishop & McKenzie LLP, the law firm in which he is a partner, are counsel for all four Applicants in this proceeding. Mr. Taman and Bishop & McKenzie LLP also provided legal advice and services to District, and to its borrowers ECHS and

Shepherd's Village Ministries Ltd., with respect to the matters giving rise to these insolvencies, including the POP Village transactions.

Clark Affidavit, Exs. "F" to "H", "V"

62. In their Notice of Civil Claim, the Respondents allege (*inter alia*) that Mr. Taman and Bishop & McKenzie LLP rendered knowing assistance to breaches of trust and breaches of fiduciary duty by the ABC District in relation to the POP Village and related transactions, and that they are jointly and severally liable with defendant Shepherd's Village Ministries Ltd. for knowing receipt of District CEF trust funds obtained through breach of trust.

Clark Affidavit, Ex. "K", paras. 148 - 156

Respondents' Tabs B and C -- *Locking v. McCowan*, 2015 ONSC 4435; varied 2016 ONCA 88

63. The Respondents further allege that by acting for the Applicants in this matter and by advancing the Amended Amended DIL Plan which contains the Representative Action provisions purporting to circumscribe the procedural rights of the DIL and District Depositors to advance third party claims (including claims against himself and Bishop & McKenzie LLP), Mr. Taman has intentionally sought to misuse the CCAA proceedings to shield himself and his law firm from liability. The Respondents have sought an order for punitive damages in relation to this conduct.

Clark Affidavit, Ex. "K", paras. 100 – 101, 175

64. Finally, the Respondents claim that Mr. Taman and Bishop McKenzie LLP have been unjustly enriched as a result of the legal fees that they have been paid at the cost of the DIL and District Depositors in these proceedings.

Clark Affidavit, Ex."K", para. 157

65. Against those allegations, Mr. Taman's defence of the Representative Action provisions of the Amended Amended Plan that he himself drafted are disingenuous. In a letter to Respondents' counsel dated December 21, 2015, Mr. Taman stated:

> We appreciate your comments [concerning the determination of the opt-in deadline], but they fail to take into account religious beliefs of the individuals involved in this particular CCAA Proceeding. There are a material number of

individuals who, based on their religious beliefs, including their understanding of 1 Corinthians 6, do not believe in pursuing law suits against the Church. It is a desire to be responsive to these people's desires to not in any way be involved in the organization or pursuit of such a law suit that we have set an early date for the initial election as to whether or not they wish to participate in the law suit. While from a purely secular perspective this would seem early, the initial opt out respects the individual's desire not to be in any way involved in the law suit. When combined with the ability to opt out later on, we believe that it provides an ability for people who have a differing interpretation of scripture to be able to pursue the action if they believe that it is in their best interests.

Clark Affidavit, Ex. "C"

66. Mr. Taman and Bishop & McKenzie LLP are not "the Church". However, by characterizing the Reprsentative Action as an action against "the Church", Mr. Taman has sought to take advantage of some Depositors' disinclination to sue "the Church" to ensure that claims are also not advanced against himself and his law firm.

67. Mr. Taman has not disclosed to the Court in these proceedings his prior personal and professional involvement in the affairs of District, ECHS and Shepherd's Village Ministries Ltd. Rather, he (with the knowledge and consent of the Applicants) has advanced the Representative Action provisions of the Amended Amended DIL Plan as if he had no personal stake whatsoever in the outcome of the Representative Action.

68. Indeed, at the DIL Creditors' Meeting on January 23, 2016, Mr. Taman intentionally sought to mislead the DIL Depositors as to his prior involvement in District affairs, and whether the Amended Amended DIL Plan shielded him or Bishop McKenzie LLP from liability. When confronted with his misleading statement, he did not provide an explanation for his conduct.

Clark Affidavit, Ex. "F" - "H"

69. As noted above, it is not among the legitimate purposes of the CCAA to impose upon creditors "benefits" which circumscribe their ability to advance third party claims. In seeking to characterize a benefit to himself and Bishop McKenzie LLP as a benefit to the DIL Depositors without disclosing his own and the law firm's potential liability in subsequent proceedings, Mr. Taman has acted in bad faith, misused the CCAA and these proceedings, and abused the processes of the Court. Further, he has done so with the knowledge and consent of his clients ABC District and DIL.

70. Monitor's vehement support of the Representative Action process bears scrutiny. The definition of "Representative Action Claims" includes derivative claims that could be brought in the name of the Applicant. Deloitte & Touche (a company related to the Monitor, Deloitte Restructuring Inc.) was the auditor of ABC District from at least 1990 to 1998 or 1999, during which time the POP Village development was commenced, financed and and brought to market by ABC District.

Clark Affidavit, Exs. "L" – "U"

71. As such, Deloitte & Touche are potential defendants to a derivative claim, if not in the name of DIL then in the name of ABC District. Accordingly, the Monitor also stands to benefit from the judicial sanction of the Amended Amended DIL Plan, if for no other reason than it would set a strong precedent for judicial sanction of the same Representative Action provisions in the ABC District Plan. Again, this is a misuse of the CCAA and the processes of this Court.

(c) The Amended Amended Plan is not Fair or Reasonable

72. The "benefits" which the Applicant purports to confer upon the DIL Depositors by way of the Representative Action provisions of the Plan are illusory, and are far outweighed by their detriments. They are not fair or reasonable to the DIL Depositors.

i. The Purported "Benefits" of the Representative Action Provisions of the Plan are Illusory

73. Firstly, applicable provincial class proceeding legislation provides for the "streamlining" of class claims. Upon certification, all persons meeting the class description are automatically members of the class unless they fill out an opt-out form which is provided to them along with the notice of certification. Any individual actions previously commenced by members of the class are stayed. Multiple class proceedings filed in the same jurisdiction are reduced to a single proceeding through the application of carriage provisions.

Respondents' Tab I -- *Class Proceedings Act*, RSBC 1996, c. 50 (the "BC CPA"), s. 8, 12, 13, 16

74. Accordingly, there is no need for these claims to be "streamlined" through the Representative Action process. Indeed, by bombarding these (mostly elderly) depositors with both a Representative Action Letter which requires them to make an election as to whether to participate in the Representative Action, and a Notice of Opting Out form which requires them to make a second election as to whether to opt out, both of which are

due upon the same date and both of which must be completed in the absence of any substantive information at all about the nature of the Representative Action or its cost, the strong potential exists for confusion, fear and ultimately, avoidance of the Representative Action process.

75. Secondly, there is no reason why the DIL Creditors' Committee could not consult with depositors' counsel outside the Representative Action framework on a voluntary basis. All of the members of the Creditors' Committee are DIL Depositors and presumably have an interest in assisting counsel.

76. Thirdly, it is disproportionate to cater to the desire of some Depositors' disinclination to engage in the litigation by circumscribing others Depositors' ability to participate, and by removing all options for those who wish to advance claims outside of the Representative Action process. As noted above, provincial class proceedings legislation provides a process whereby Depositors who do not wish to participate in litigation may opt out of class proceedings immediately after certification. This is a reasonable way of ensuring that only those Depositors who wish to participate in the litigation are part of the class.

Respondents' Tab I - BC CPA, s. 16

77. It must be borne in mind that this proceeding is, in essence, a liquidation being carried out within the context of a CCAA proceeding. There is no restructuring occurring here; the DIL will cease to operate after its assets are liquidated. The distributive benefits available under the Plan are the same as they would be in a bankruptcy; however, in a bankruptcy the DIL Depositors would not be required to assign their rights to pursue claims against third parties over to an appointed and unaccountable Subcommittee.

78. Accordingly, the Amended Amended DIL Plan offers less benefit to the Depositors than would a forced liquidation, and for that reason should not be judicially sanctioned.

ii. The Representative Action Provisions of the Plan are not Fair and Reasonable to the DIL Depositors

79. The Representative Action provisions of the Amended Amended DIL Plan limit and discourage, rather than (as the Applicant says) "streamline" the residual claims of the DIL Depositors against the Applicant and third parties.

a. The Representative Action definitions are circular

80. The definition of "Representative Action Claim(s)" is circular, leading to confusion and misunderstanding as to what types of claims are included in the Representative Action;

b. The Representative Action Provisions do not Provide for Information about the Representative Action to be Provided to the DIL Depositors Prior to the Opt-in/Opt-out Deadline

81. The Plan does not provide for any information about the Representative Action to be provided to the DIL Depositors prior to the opt-in/opt-out deadline. If, as the Applicant suggests, Depositors' willingness to participate in litigation may depend on whether the named defendants are religious entities, the Depositors will need that information upon which to exercise their principles and make their decisions at an early date. However, the Plan does not contemplate that the information will be provided. In the absence of substantive information about the Representative Action, it is reasonable to expect that many DIL Depositors will elect not to participate in it. This is benefit to DIL and to the the third parties against whom claims may be advanced in the Representative Action, including Mr. Taman and Bishop & McKenzie LLP.

82. Under class proceedings legislation, the opt-out deadline is typically set by way of the certification order for a reasonable period of time (60 to 120 days) after the date of certification. This is to allow class members to learn about the class proceeding, to read the pleadings, and to contact class counsel to ask questions about the case before making a determination about whether to participate. The Amended Amended Plan provides the DIL Depositors with no such opportunity to make an informed decision about the Representative Action.

Respondents' Tab I - BC CPA, s.16

c. The Representative Action Provisions do not Provide for Adequate and Reliable Financial Disclosure to the DIL Depositors regarding the Cost of the Representative Action

83. The DIL Depositors will not know the extent of their financial commitment to the costs of the Representative Action until after the opt-out deadline has passed and their Proportionate Share of the Representative Action Holdback has been determined. Further, the Plan does not provide for (as it should) the replenishment of the Representative Action Holdback in the event that the sum is depleted. That the DIL Depositors have not been informed that they will be required to replenish the Holdback in the event that it is depleted is a significant factor militating against the Plan.

84. In the absence of reliable information about the extent of their financial commitment to the Representative Action, it can reasonably be expected that many if not most DIL Depositors will be content to receive their distribution under the Plan and forgo the balance of their claims by electing not to participate in the Representative Action. Again, this is a benefit to the Applicant and to the third parties against whom claims may be advanced in the Representative Action.

d. The Subcommittee is not Accountable to the DIL Depositors

85. Neither the Subcommittee tasked with instructing the Representative Counsel nor Representative Counsel him or herself has no duty to communicate with the Depositors or to solicitor their views as to the conduct of the Representative Action. However, the DIL Depositors are responsible for paying for the decisions of the Subcommittee and the Representative Counsel made in the course of the litigation. Again, a reasonable person would be very reluctant to commit to such a process, which is again a benefit to the Applicants and third parties.

86. The Monitor indicates that the conduct of the Subcommittee will be governed by a set of principles contained in the "Subcommittee Documents". Those documents are not in evidence before the Court, and are not part of the Amended Amended DIL Plan.

Monintor's Brief, para. 25

e. The Subcommittee is in an Actual or Potential Conflict of Interest with the Representative Plaintiff and/or the DIL Depositors

87. Further, there is an irreconcilable conflict of interest between the Subcommittee and the Representative Plaintiff that can be expected to mar the Representative Action. Unlike the Subcommittee tasked with instructing counsel, the Representative Plaintiff bears the sole financial responsibility for paying an adverse costs award. If the Representative Action Holdback is (or is likely to be) insufficient to fully indemnify the Representative Plaintiff as contemplated by Art. 5.8, it is reasonable to expect that there may be a divergence of views between the Subcommittee and the Representative Plaintiff as to the conduct of the Representative Action. This puts the future of the Representative Action and the interests of the participating DIL Depositors at risk.

88. Finally, given the multitude of religious affiliations and relationships which overlay these proceedings, it is certainly possible that the interests of one or more members of the Subcommittee will conflict with those of other Depositors. However, unlike a class proceeding where a proposed representative plaintiff can be cross-examined as to the

existence of conflicts of interest, the Subcommittee is not a party to the Representative Action or subject to the court's processes, and is therefore effectively shielded from scrutiny. However, they will dictate the prosecution of the Representative Action and the DIL Depositors will pay for the decisions that they make.

89. In summary, the compromise of third party claims in the context of CCAA proceedings is extraordinary relief. As such, DIL has the heavy burden of establishing that the Representative Action provisions of the Amended Amended DIL Plan fall within the legitimate purposes of the CCAA. It has not met that burden. The objectives of the Plan, which is to achieve a liquidation of DIL's assets for the benefit of the creditors, can be met without the Representative Action. There is no rational connection between the objectives of the Plan and the Representative Action.

90. The Representative Action provisions of the Amended Amended Plan are obfuscatory and intimidating, and they limit and discourange, rather than "streamline" participation in the Representative Action. They have been advanced for the sole purpose of limiting the liability of third parties, including the Applicant's counsel Mr. Taman and his law firm Bishop & McKenzie LLP. It is an abuse of the CCAA, these proceedings, and the processes of this Court. Accordingly, the Respodents respectfully request that the Court refuse to sanction the Amended Amended DIL Plan pursuant to s. 6 of the CCAA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED: Feb. 24, 2016

Erin A. Poyner

Counsel for Elvira Kroeger and Randall Kellen

TABLE OF AUTHORITIES

A.	*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282
B.	*Locking v. McCowan,* 2015 ONSC 4435
C.	*Locking v. McCowan,* 2016 ONCA 88
D.	*Northland Properties Ltd. et al. v. Excelsior Life Assurance Co. of Canada and Guardian Insurance Company of Canada* (1989), 73 C.B.R. (N.S.) 195
E.	*Pacific Coastal Airlines Ltd. v. Air Canada,* 2001 BCSC 1721 (CanLII), [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.)
F.	*Re: 229531 BC Ltd.,* (1989), 73 C.B.R. (N.S.) 310 (BCSC)
G.	*Re: Dorman Long & Co. Ltd.,* [1933] All E.R. Rep. 460

OTHER MATERIAL

H.	*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss.1-6
I.	*B.C. Class Proceedings Act,* [RSBC 1996] c. 50

Indexed as:

Elan Corp. v. Comiskey

Elan Corp. and Nova Metal Products Inc.
v. Michael Comiskey, trustee of a debenture issued
to Joseph Comiskey and all secured creditors of Elan Corp.
and Nova Metal Products Inc.

[1990] O.J. No. 2180

1 O.R. (3d) 289

41 O.A.C. 282

1 C.B.R. (3d) 101

23 A.C.W.S. (3d) 1192

Action Nos. 684/90 and 685/90

Court of Appeal for Ontario

Finlayson, Krever and Doherty JJ.A.

November 2, 1990*
*Released November 23, 1990

Counsel:

F.J.C. Newbould, Q.C., and G.B. Morawetz, for Bank of Nova Scotia.

John Little, for Elan Corp. and Nova Metal Products Inc.

Michael B. Rotsztain, for RoyNat Inc.

Kim Twohig and M. Olanow, for Ontario Development Corp.

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

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1 **FINLAYSON J.A.** (KREVER J.A. concurring) (orally):-- This is an appeal by the Bank of Nova Scotia (the Bank) from orders made by Mr. Justice Hoolihan 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 three 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 [am. R.S.C. 1985, c. 25 (3rd Supp.), s. 26] of the Bank Act, R.S.C. 1985, c. B-1. 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 $12,000,000. 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 to 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 Ltd. 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 (Doc. 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 9:00 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 receivables 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 six 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 8:00 a.m. Farley J. dismissed the application on the grounds that the CCAA required that there be more than one debenture issued by each company. Later on the same day, August 31, 1990, Elan and Nova each issued two debentures for $500 to the wife of the principal of Elan through her sister as trustee. The debentures provided for payment of interest to commence on August 31, 1992. Cheques for $500 were delivered that day to the companies but not deposited in the bank account until September 4, 1990. These debentures conveyed the personal property in the assets of Elan and Nova to the trustee as security. Once again it is conceded that the debentures were issued for the sole purpose of meeting the requirements of s. 3 of the CCAA. No consent was obtained from the Bank as required by the loan terms, nor was any consent obtained from the receiver.

14 On August 31, 1990, following the creation of the trust deeds and the issuance of the

debentures, Elan and Nova commenced new applications under the CCAA which were heard late in the day by Farley J. He adjourned the applications to September 10, 1990 on certain terms, including a stay preventing the Bank from acting on its security and allowing Elan to spend up to $321,000 from accounts receivable collected by it.

15 The plan of arrangement filed with the application provided that Elan and Nova would carry on business for three months, that secured creditors would not be paid and could take no action on their security for three 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 three 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, 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 Ltd. 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 (Kerr on Receivers, 16th ed. by Raymond Walton (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 (Re Hat Development Ltd. (1988), 64 Alta. L.R. (2d) 17, 71 C.B.R. (N.S.) 264 (Q.B.), affd (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 $12,000,000. 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. Rep. 246, 41 W.R. 4 (C.A.), at pp. 579-80 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. Ltd., [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626 (H.C.J.), at p. 659 O.R. He also quoted another English authority [Re Alabama, New Orleans, Texas & Pacific Junction Railway Co., [1891] 1 Ch. 213, [1886-90] All E.R. Rep. Ext. 1143, 60 L.J. Ch. 221 (C.A.)] at p. 658 O.R.:

> 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 O.R.:

> 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), 31 B.C.L.R. (2d) 35, 73 C.B.R. (N.S.) 166, and the other in the same volume [of C.B.R.] at p. 175. Trainor J. was upheld on appeal on both judgments. The first judgment of the British Columbia Court of Appeal is unreported (September 16, 1988) [now reported 32 B.C.L.R. (2d) 309]. The judgment in the second appeal is reported sub nom. Northland Properties Ltd. v.

Excelsior Life Insurance Co. of Canada at (1989), 34 B.C.L.R. (2d) 122, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363.

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 C.B.R.).

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 a common interest" (p. 8 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):--

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 $30,000,000 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 four 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 of 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 Ltd. 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 (Companies' Creditors Arrangement Act, 1933, 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 co-operation of the debtor companies' creditors and shareholders: Re Avery Construction Co. (1942), 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. H.C.J.), Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at pp. 592-93; 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 (Carrothers, Cumming and Gibbs JJ.A.) in Chef Ready Foods Ltd. v. HongKong Bank of Canada, an unreported judgment released October 29, 1990 [summarized 23 A.C.W.S. (3d) Paragraph976], at pp. 11 and 6 of the reasons. 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 ...

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.

59 Gibbs J.A. also observed (at p. 13 of the reasons) 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 Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", supra, at p. 593.

60 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; Chef Ready Foods Ltd. v. HongKong Bank of Canada, supra, at p. 14 of the reasons.

61 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).

62 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.

63 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.

64 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.

65 If the plan of reorganization is approved by the creditors as required by s. 6, it must then be presented to the court. Once again, the court must exercise a discretion and determine whether it will approve the plan of reorganization. In exercising that discretion, the court is concerned not only with whether the appropriate majority has approved the plan at a meeting held in accordance with the Act and the order of the court, but also with whether the plan is a fair and reasonable one: Re Northland Properties Ltd. (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) [affd sub nom Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada (1989), 34 B.C.L.R. (2d) 122, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363 (C.A.)], at pp. 182-85 C.B.R.

66 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.

67 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.

68 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 (No. 1) (1989), 102 A.R. 161 (Q.B.), at p. 165.

IV. DID HOOLIHAN J. ERR IN HOLDING THAT THE DEBTOR COMPANIES WERE ENTITLED TO INVOKE THE ACT?

69 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

70 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 monies were advanced and debt was created. Appropriate and valid trust deeds were also issued.

71 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 National Insolvency Review 38, at p. 39; C. Keith Ham, " 'Instant' Trust Deeds Under the CCAA" (1988), 2 Comm. Insol. R. 25; G. Morawetz, "Emerging Trends in the Use of the Companies' Creditors Arrangement Act" (1990), Proceedings of the First Annual General Meeting and Conference of the Insolvency Institute of Canada.

Mr. Ham, supra, writes at p. 25, continued on p. 30:

> Consequently, some companies have recently sought to bring themselves within the ambit of the CCAA by creating "instant" trust deeds, i.e., trust deeds which are created solely for the purpose of enabling them to take advantage of the CCAA.

72 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.

73 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.), at pp. 55-56 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 [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.

74 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.

75 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 sub nom. Canadian Co-operative Leasing Services v. United Maritime Fishermen Co-op, 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.

76 The judgment of MacKinnon J. in Re Stephanie's Fashions Ltd. and Children's Corner Fashions Ltd., released January 24, 1990 (B.C. S.C.), 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. 4 of the reasons:

> 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.

77 Re Metals & Alloys Co. 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 requested 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.

78 A similar conclusion is implicit in the reasons of the British Columbia Court of Appeal in Chef Ready Foods Ltd. and HongKong Bank of Canada, supra. 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.

79 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, 1952-53 (1-2 Eliz. 2), vol. II, pp. 1268-69). 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: Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 158, at p. 721 S.C.R., p. 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 C.B.R., I am not persuaded that the comments of the Minister of Justice assist in interpreting s. 3 of the Act in this situation.

80 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.

81 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.

82 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 L. 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

83 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

84 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: Re Hat Development Ltd. (1988), 64 Alta. L.R. (2d) 17, 71 C.B.R. (N.S.) 264 (Q.B.), affirmed 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 Re Hat Development Ltd., supra. 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 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. <u>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.</u>

(Emphasis added)

85 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.

86 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 for 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: Re Hat Development Ltd., supra, at pp. 268-69 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.

87 In my opinion, the debentures and "instant" trust deeds created in August of 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?

88 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: Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act", supra, at pp. 594-95. 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.

89 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.

90 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.

91 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 under-secured 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.

92 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 over-stated 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 two months ago. Nothing was placed before this court to suggest that any of the possibilities described above had come to pass.

93 Even allowing for some over-estimation 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.

94 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.

95 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?

96 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.

97 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
VII. THE INTERIM ORDERS HE MADE?

98 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.

99 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.

100 The orders placed significant restrictions on the Bank for a two-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.

101 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 in Canada, 3rd ed. (Toronto: Carswell, looseleaf), at p. 2-103, describe the purpose of the section:

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

102 A similar sentiment appears in Chef Ready Foods Ltd. v. HongKong Bank of Canada, supra. Gibbs J.A., in discussing the scope of s. 11, said at p. 7 of the reasons:

> 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.

103 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 (1984), 32 Alta. L.R. (2d) 150, 53 A.R. 39, 52 C.B.R. (N.S.) 109, 11 D.L.R. (4th) 576, [1984] 5 W.W.R. 215 (Q.B.), at pp. 42-45 A.R., pp. 114-18 C.B.R.; Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 63 Alta. L.R. (2d) 361, 72 C.B.R. (N.S.) 1 (Q.B.), at pp. 12-15 C.B.R.; Quintette Coal Ltd. v. Nippon Steel Corp. B.C. S.C., Thackray J., released June 18, 1990, at pp. 5-9 of the reasons [now reported 47 B.C.L.R. (2d) 193; and O'Leary, B., "A Review of the Companies' Creditors Arrangement Act", supra, at p. 41.

104 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

105 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.

Case Name:

Locking v. McCowan

RE: Daniel Locking, Plaintiff, and Ronald McCowan, Allen W. Weinberg, Joseph Feldman, Marc Charlebois, Laura Philp, Holyrood Holdings Limited, Samuel N. Nash, Goldman Sloan Nash and Haber LLP, Graham Rawlinson and Torys LLP
PROCEEDING UNDER the Class Proceedings Act, 1992

[2015] O.J. No. 4363

2015 ONSC 4435

Court File No.: CV-14-517117 CP

Ontario Superior Court of Justice

E.P. Belobaba J.

Heard: June 4, 2015.
Judgment: August 19, 2015.

(80 paras.)

Counsel:

Paul Bates and John Archibald, for the Plaintiff.

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Eric R. Hoaken, Larissa C. Moscu, for defendant Allen W. Weinberg.

R. Paul Steep and Shane C. D'Souza, for defendants Joseph Feldman and Marc Charlebois.

J. Thomas Curry and Katie Pentney, for defendants Laura Philp and Holyrood Holdings.

William E. Pepall and Jason Squire, for defendants Samuel N. Nash and Goldman Sloan Nash and Haber LLP.

SECTION 5(1)(a) - CAUSE OF ACTION

1 E.P. BELOBABA J.:-- This is a proposed class action by unit-holders of Partners REIT, an unincorporated real estate investment trust whose units trade on the Toronto Stock Exchange. The unit-holders claim they sustained losses when the REIT's unit price dropped because an improper property transaction had to be set aside.

2 Three properties owned by Laura Philp and her company Holyrood Holdings were vended into the REIT ("the Transaction") at the behest of Ronald McCowan, who was the REIT's CEO at the time. Mr. McCowan failed to disclose that he had a close business and personal relationship with Ms. Philp and, according to the plaintiff, a *de facto* ownership interest in the properties. As soon as Mr. McCowan's conflict of interest was exposed, the Transaction was set aside. In the fall-out, the REIT's unit price dropped by more than 30 per cent. Hence this proposed class action.

The action

3 The plaintiff has targeted eight defendants: Mr. McCowan, Ms. Philp and Holyrood Holdings, the latter party's legal counsel Samuel Nash and Goldman Sloan Nash and Haber LLP ("GSNH") and the REIT's trustees Allen Weinberg, Joseph Feldman and Marc Charlebois. The action against Torys LLP and lawyer Graham Rawlinson (who acted for the Trust when the Transaction was rescinded) was dismissed.

4 The claims against the remaining defendants are breach of fiduciary duty, breach of trust, and knowing assistance in the commission of these breaches.

5 I agreed to bifurcate the certification motion and first determine whether these are viable causes of action under s. 5(1)(a) of the *Class Proceedings Act*.[1] The cause of action test under s. 5(1)(a) of the CPA is the same as the test under Rule 21.01(1)(b) of the *Rules of Civil Procedure*. The question before me is whether it is plain and obvious and beyond doubt that the following claims have no chance of success:

(i) *Against McCowan*: breach of fiduciary duty and knowing assistance.

(ii) *Against Weinberg,*[2] Feldman and Charlebois: breach of fiduciary duty and breach of trust.

(iii) *Against Philp and Holyrood*: knowing assistance.

(iv) *Against Nash and GSNH*: knowing assistance.

6 The facts as set out in the pleadings are, of course, assumed to be true for the purposes of this motion. However, an allegation that a certain duty existed or was breached (whether a fiduciary duty or a breach of trust) is not an allegation of fact but of law and must be tested to determine if it discloses a reasonable cause of action.

7 I will shortly consider each cause of action in turn and whether it applies on the facts as pleaded to the named defendant. Before doing so, however, I will describe the key provisions of the constating document that provides the backdrop and context for this motion.

The DOT agreement

8 The REIT is governed by a board of trustees pursuant to the terms of the Declaration of Trust

("DOT"). The DOT sets out a detailed (75 page) description of the organization and operation of the REIT and the rights and responsibilities of the trustees and the unit-holders. Section 2.7 provides that the terms of the DOT are binding on all unit-holders of the REIT. By purchasing a unit or accepting a certificate of purchase the unit-holder is deemed to be bound by the DOT. This point is reinforced with specific language on each unit certificate.

9 The DOT is essentially a contractual agreement between the trustees and the unit-holders. The key provisions of the DOT that pertain herein can be summarized as follows.

10 The preamble provides, amongst other things, that the Trust was established to provide unit-holders "with an opportunity to participate directly or indirectly in a portfolio of income-producing real property investments" which the trustees hold in trust "for the benefit of the unitholders ... in accordance with and subject to the expressed provisions of this Declaration of Trust."

11 Under section 2.1, the trustees agree to hold and administer the trust assets "for the benefit of the unit-holders on and subject to the terms and conditions of this [DOT]."

12 Section 2.5(1) describes the nature of the Trust:

> The Trust is an unincorporated open-ended limited purpose investment trust. The Trust is not, will not be deemed to be and will not be treated as, a partnership, limited partnership, society, syndicate, association, joint venture, company, corporation or joint stock company, nor will the Trustees or any individual Trustee or the Unit-holders or Special Voting Unit-holders or any of them or any person be, or be deemed to be, treated in any way whatsoever as liable or responsible hereunder as partners, joint venturers or as that of principal and agent or as members of a society, syndicate, association, partnership or limited partnership or shareholders of a corporation or other joint stock company.

13 Sections 2.5(2) and 2.6 and 3.1 make clear that unit-holders' rights are limited to the rights that are "expressly conferred ... by this Declaration of Trust" or "specifically set forth in this Declaration of Trust."

14 Section 10.1 describes the powers of the trustees. Subject to the provisions in the DOT, the trustees have full and exclusive power, control and authority over the trust assets and over the affairs of the trust "to the same extent as if the Trustees were the sole and absolute legal and beneficial owners of the Trust Assets."

15 The trustee's duties and standard of care, as set out in section 10.5, are intended to be "similar to and not any greater than those imposed on a director of a corporation governed by the *Business Corporations Act* (Ontario)".[3] The applicable portion of section 10.5 provides as follows:

> The Trustees, in exercising the powers and authority conferred upon them hereunder, shall act honestly and in good faith with a view to the best interests of the Trust and shall exercise that degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. A Trustee will not be liable in carrying out his or her duties under this Declaration of Trust except in cases where the Trustee fails to act honestly and in good faith with a view to the best interests of the Trust or to exercise the

> degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The duties and standard of care of the Trustees provided as aforesaid are intended to be similar to, and not to be any greater than, those imposed on a director of a corporation governed by the Business Corporations Act (Ontario) ...

16 Section 10.8 deals with limitations of liability and provides an almost complete immunity for actions taken by trustees or officers. The only time that the trustees or officers can be found liable "to the Trust or any Unit-holder" is if they breach the obligations set out in section 10.5 -- that is, if they fail (i) to act honestly and in good faith with a view to the best interests of the Trust or (ii) to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

17 Section 10.11 is directed at conflicts of interest and sets out a disclosure protocol for trustees or officers who are parties to or have a material interest in any contract or transaction involving the Trust. If a trustee or officer fails to make the required disclosure, then under section 10.11(7)

> [T]he Trustees or any Unit-holder, in addition to exercising any other rights or remedies in connection with such failure exercisable at law or in equity, may apply to a court for an order setting aside the contract or transaction and directing that the Trustee or officer account to the Trust for any profit or gain realized.

18 Here, as already noted, the Transaction was set aside shortly after the deal was done and all monies paid were returned to the REIT. The plaintiff, nonetheless, seeks to certify a class action to recover damages sustained by unit-holders when the REIT's unit price dropped following the rescission of the Transaction.

Core issue

19 The two-part issue is this: given the provisions in the DOT (which prescribe with some precision the rights and responsibilities of trustees, officers and unit-holders) can the unit-holders sue for the losses sustained herein, and if so, are the claims against the various defendants reasonable causes of action?

Decision

20 For the reasons set out below, it is not plain and obvious and beyond doubt that, in principle, the unit-holders cannot bring this action. Given the language in some of the DOT provisions, there is at least room for argument. As for the causes of action, I conclude that the breach of fiduciary duty claims against McCowan, Weinberg, Feldman and Charlebois, and the knowing assistance claims against Philp/Holyrood and Nash/GSNH must be struck. The breach of trust claims against Weinberg, Feldman and Charlebois, and the knowing assistance claim against McCowan can proceed. Whether the latter claims will pass the "some basis in fact" test under s. 5(1)(c) of the CPA and result in the certification of the related common issues remains to be seen.

Analysis

(1) Breach of fiduciary duty

21 The plaintiff pleads that former interim CEO McCowan and trustees Weinberg, Feldman and Charlebois breached a fiduciary duty that was owed to the unit-holders. It is clear that each of these defendants owed a fiduciary duty to the REIT itself, but it is equally clear -- indeed it is plain and obvious -- that none of these defendants owed a fiduciary duty to the unit-holders. On the facts as pleaded, the breach of fiduciary duty claim is not a reasonable cause of action.

22 I will deal first with former CEO McCowan and then trustees Weinberg, Feldman and Charlebois.

Interim CEO McCowan

23 Mr. McCowan was the interim CEO and thus an officer of the REIT. Section 8.10 of the DOT provides that each officer's "powers and duties" will be determined from time to time by the trustees and, in the absence of such a determination (which was the case here), the officer's powers and duties "will be those usually applicable to the office held."

24 It is well established in the corporate context that an officer's duties are owed "to the corporation, *and only* to the corporation".[4] In the context of a publicly traded income trust such as the REIT, an officer's duties are owed to the REIT itself (technically, to the trustees in their capacity as trustees of the REIT[5]). If Mr. McCowan owed duties exclusively to the REIT and no direct duties to the unit-holders, it follows that he owed no fiduciary duties to the unit-holders.

25 I also agree that an essential element of fiduciary duty has not been pleaded, namely the existence of "a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party."[6]

26 Counsel for Messrs. McCowan, Weinberg, Feldman and Charlebois make a further submission: that even if a fiduciary duty was owed and breached, the rule in *Foss v. Harbottle*[7] bars both the plaintiff's claim and the recovery of so-called "reflective losses." As I explain later in these reasons, I am not particularly persuaded by the *Foss v. Harbottle* submissions, at least not in the context of a cause of action analysis. I am content to rely on section 8.10 of the DOT and the analysis set out above and conclude on this basis alone that the breach of fiduciary duty claim as against McCowan is not a reasonable cause of action.

Trustees Weinberg, Feldman and Charlebois

27 I also conclude that the breach of fiduciary duty claim as against trustees Weinberg, Feldman and Charlebois is not a reasonable cause of action on the facts as pleaded. I know that Mr. Weinberg is not opposing this motion under s. 5(1)(a) of the CPA but it is still the court's obligation to determine the viability of all of the claims being advanced against all of the defendants.

28 Section 10.5 of the DOT, which deals with the duties of the trustees, provides that "the duties and standard of care of the Trustees provided as aforesaid are intended to be similar to, and not to be any greater than, those imposed on a director of a corporation governed by the *Business Corporations Act* (Ontario)." The case law under both the federal and provincial corporation statutes is clear, however, that the director of a corporation owes a fiduciary duty to the corporation only and not to its shareholders. As the Supreme Court noted in *BCE Inc. v. 1976 Debentureholders*:[8]

> [T]he directors owe a fiduciary duty to the corporation, and only to the corporation...[I]t is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of

stakeholders is simply that the directors act in the best interests of the corporation.[9]

29 The plaintiff's allegations that trustees Weinberg, Feldman and Charlebois owe a fiduciary duty to the unit-holders would impose a legal obligation that would be "greater than" the duties imposed on a director of an Ontario corporation and thus contrary to section 10.5 of the DOT. This is reason enough for my conclusion that it is plain and obvious that the unit-holders' breach of fiduciary duty claim against the three trustees is not a reasonable cause of action and is doomed to fail.

30 The defendant trustees also argue (as did McCowan) that, separate and apart from the section 10.5 argument, the essential elements of fiduciary duty, as summarized by the Supreme Court in *Elder Advocates*,[10] have not been established and the breach of fiduciary duty claim has no chance of success. As already noted, I agree with these submissions, specifically:

(i) The DOT obligates the trustees to act in the best interests of the REIT. There is no similar obligation or undertaking by the trustees to act in the best interests of unit-holders.[11]

(ii) The trustees cannot owe duties to an unknown class of persons.[12] Here, instead of a "confined" duty to a "defined class of persons", the trustees would owe fiduciary duties to an unknown number of unit-holders in the secondary market for varying degrees of time.

(iii) The alleged fiduciary's power must affect the legal or substantial practical interests of the beneficiary.[13] The interest affected must be a specific private law interest to which the person has "a pre-existing distinct and complete legal entitlement."[14] The plaintiff has no pre-existing "legal entitlement" to the price of his units appreciating in the secondary market, stemming from the DOT or otherwise. In any event, the trustees gave no undertaking with respect to the unit's market price and, like corporate directors, have no control over the market price of units trading in the secondary market.

(iv) The trustees cannot owe fiduciary duties to both the REIT and to the unit-holders because such duties may conflict. The Court of Appeal has held that a fiduciary cannot be placed in a situation where a conflict may arise.[15]

(v) The breach of fiduciary duty claim which involves misconduct in the nature of disloyalty or dishonesty[16] has no chance of success against Messrs. Feldman and Charlebois because there is no allegation that either of them breached any duties of loyalty or honesty, pursued their own self-interest, acted for an improper purpose or knowingly assisted the alleged misconduct of others.

31 I therefore conclude that there is no basis for the plaintiff's breach of fiduciary claim against the defendant trustees. In my view, it is plain and obvious that the breach of fiduciary duty claim as pleaded against the trustees Weinberg, Feldman and Charlebois has no chance of success and should be struck.

(2) Breach of trust

32 The breach of trust claim (in essence breach of the DOT agreement) is directed at the trustees

Weinberg, Feldman and Charlebois. Mr. McCowan was not a trustee and is therefore not included in this claim.

33 It is clear from section 10.5 of the DOT that even if the three trustees do not owe fiduciary duties to unit-holders, they are nonetheless obliged (i) to act honestly and in good faith with a view to the best interests of the Trust and (ii) to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

34 The breach of trust claim against Weinberg involves only the first prong (failing to act honestly and in good faith) and the breach of trust claim against Feldman and Charlebois involves only the second prong (negligence). As already noted, there is no allegation that Feldman and Charlebois failed to act honestly and in good faith.

35 The breach of trust claim against Weinberg is supported by the following facts as pleaded: Weinberg knew of McCowan's material interest in the properties and his control over Holyrood; Weinberg knowingly breached his duties to the plaintiff and the other unit-holders by permitting the REIT to enter into the Transaction without the required disclosure and unit-holder approval under section 10.11 of the DOT; Weinberg did so in order to preserve the relationship between his law firm GSNH and long-time client McCowan and to garner future legal work; and in doing so, Weinberg failed to act honestly and in good faith with a view to the best interests of both the REIT and the class.

36 The breach of trust claim against Feldman and Charlebois is that they breached section 10.5 of the DOT by failing to exercise reasonable diligence in preventing self-dealing by McCowan without unit-holder approval and by failing to ensure that the REIT had appropriate internal controls in place that would have prevented McGowan from engineering and executing the Transaction.

37 The dispute here is less about whether the trustees breached section 10.5 and more about the unit-holders' right to sue the trustees for the losses sustained. I can certainly understand the trustees' submission that on reading the DOT in its entirety, and in particular the limited rights of action accorded to unit-holders in the section 10.11 conflict of interest provision, that unit-holders probably do not have standing to bring an action for damages on the facts herein.[17] But my concern is whether it is plain and obvious and beyond doubt that such is the case here.

38 The trustees' submissions are compelling but not determinative. It is true that sections 2.5(2), 2.6 and 3.1 of the DOT provide that unit-holders' rights are limited to the rights that are "expressly conferred ... by this Declaration of Trust" or "specifically set forth in this Declaration of Trust." But it is also true that the section 10.8(1) limitation of liability provision provides that officers and trustees "will be liable to the Trust *or any unit-holders*" if they breach either of the obligations set out in section 10.5 (i.e. by acting dishonestly or negligently). The clear suggestion is that a trustee may be liable to unit-holders for breach of section 10.5 -- but how would this liability be determined unless unit-holders were allowed to bring suit? The point is at least arguable.

39 The trustees also submit that section 10.5 of the DOT excludes unit-holders from the trustee's duty of care by expressly imposing duties on trustees to the Trust and not to unit-holders. It is settled law that a trust instrument may abridge a trustee's common law duties to a beneficiary, but "there is a limit beyond which the abridgement of trustee's duties cannot go."[18] It is therefore at least arguable that a trust instrument such as the DOT cannot eliminate a trustee's duties to a beneficiary wholly and completely without eliminating the trust itself.

40 Both sides agree that the REIT is not a traditional trust, but it is a trust nonetheless and as set out

in section 2.5(2) of the DOT, the relationship of the unit-holders to the Trustees "will be solely that of beneficiaries to the Trust..." It is therefore not plain and obvious that section 10.5 excludes unit-holders as objects of the duties owed by Feldman and Charlebois simply because the DOT does not expressly state that the Trustees owe duties to the unit-holders. That unitholders have *some* rights must be presumed from the nature of the trust relationship as defined in s. 2(5)(2).

41 Nor is it plain and obvious that the section 10.9 indemnification provision bars the breach of trust claims. It is true that section 10.9(2) denies indemnification only where the trustee fails to act honestly and in good faith and the claim against Feldman and Charlebois, as already noted, is negligence. But the mere fact that these trustees may end up being indemnified by the REIT if the plaintiff's action succeeds does not mean that the action itself is unreasonable and doomed to fail.

42 Finally, Feldman and Charlebois submit that section 10.8(1) provides a complete defence to the plaintiff's claims because it exonerates the trustees from any liability relating to a good faith decision based on the advice of a qualified adviser, namely their legal counsel (Torys). Feldman and Charlebois may well have a defence to the plaintiff's claim for breach of trust based on the wording of section 10.8(1). But the fact that a defendant may have a good defence to a claim does not mean the plaintiff lacks a cause of action.[19]

43 In sum, I am not persuaded that it is plain and obvious that a unit-holder on the facts herein is explicitly precluded by the terms and conditions of the DOT from bringing this action.

44 For the sake of completeness, I should deal with the defendants' *Foss v. Harbottle*[20] submissions. The rule in *Foss v. Harbottle* provides that "individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action."[21]

45 The plaintiff offers two reasons why it is at least arguable that the rule in *Foss v. Harbottle* does not apply on the facts herein. First, because the REIT is not a corporation - it is an unincorporated, open-ended, limited purpose investment trust.[22] And, secondly, because the unit-holder class members are not suing to recover losses sustained by the REIT itself. They are suing to recover losses that they sustained *qua* unit-holders -- losses that an unincorporated REIT would be unable to recover via an action for damages.[23]

46 Nor is it plain and obvious that the losses in this case are "reflective losses" as described in the case law.[24] The plaintiff makes a compelling argument that the losses claimed herein are not about the diminution in the value of the REIT's assets. Rather, they are independent losses in unit value sustained by the class of unit-holders because of the dishonest or negligent actions of the trustees.

47 In any event, says the plaintiff, the REIT is a relatively recent business structure.[25] Whether or to what extent the rule in *Foss v. Harbottle* and the related concept of reflective loss applies to unincorporated real estate investment trusts is a matter that raises novel and complex questions that are not fully settled and should not be determined on a motion to strike. The need for a fuller evidentiary record and more comprehensive analysis has been recognized in two related decisions of the Federal Court of Australia which declined to apply the rule in *Foss v. Harbottle* to investment trusts at a preliminary stage of an action.[26]

48 The Australian court noted that while the rule is clearly established in the case of shareholders in a company it was not yet sufficiently established in the case of unit trusts and therefore constituted a

triable issue.[27] The same point was made about the concept of reflective loss in the context of an investment trust. As Perram J. noted in *Mercedes Holdings (No. 3)*:

> There are sufficient significant distinguishing features between a trust and a corporation which make it impossible to say [in a preliminary motion] that a claim based on reflective loss must inevitably fail in the case of a trust.[28]

49 I therefore conclude that it is not plain and obvious that the rule in *Foss v. Harbottle* applies to unincorporated investment trusts and that the breach of trust claims against the defendant trustees fail to disclose a reasonable cause of action. In my view, the breach of trust claims against Messrs. Weinberg, Feldman and Charlebois clear the s. 5(1)(a) hurdle. However, as already noted, it remains to be seen whether the breach of trust claims will satisfy the "some basis in fact"/common issues requirement in s. 5(1)(c) of the CPA.

(3) Knowing assistance

50 The plaintiff says that the defendants McCowan, Philp/Holyrood and Nash/GSNH knowingly assisted the following parties to commit a breach of fiduciary duty or breach of trust:

* McCowan assisted Weinberg's breach of fiduciary duty and breach of trust;

* Philp/Holyrood assisted McCowan's breach of fiduciary duty and Weinberg's breach of trust;

* Nash/GSNH assisted McCowan's breach of fiduciary duty and Weinberg's breach of trust.

51 I have already concluded that the breach of fiduciary duty claims against McCowan and Weinberg (and the other two trustees) are not reasonable causes of action. Therefore the knowing assistance claims that remain to be considered relate to McCowan, Philp/Holyrood and Nash/GSNH assisting Weinberg's breach of trust. That is, knowingly assisting Weinberg in his decision to allow the Transaction to proceed without the disclosure and unit-holder approval required by the conflict of interest provision in the DOT.

52 The three elements that must be established for a claim of knowing assistance to succeed are:

(i) an act of fraud or dishonesty[29] on the part of the trustee;

(ii) the defendant has knowledge of the trustee's dishonest conduct; and

(iii) the defendant assists the trustee in perpetrating the dishonest conduct.[30]

53 The "knowledge" component is particularly important. In *Citadel General Assurance*[31] the Supreme Court noted that the defendant to a knowing assistance claim needs to have either actual knowledge of the fraudulent or dishonest conduct by the trustee or be reckless or willfully blind to it.[32] In *Air Canada v. M & L Travel,*[33] the Court reaffirmed that "constructive knowledge" is not enough and actual knowledge, recklessness or willful blindness is required.[34]

54 In *Gold v. Rosenberg*[35] the Supreme Court added this:

> As the name "knowing assistance" implies, the plaintiff must prove not only that the breach of trust was fraudulent and dishonest, but also that the defendant participated knowingly in that breach of trust.[36]

55 Therefore, if words are to have meaning, "knowing assistance" means more than simply standing by or acquiescing. Assistance or participation in a breach of trust requires, at the very least, that the defendant take a positive step *to help* or *to take part in* the trustee's breach of trust.

56 Has the plaintiff sufficiently pleaded each of the three elements? He has certainly pleaded the first element -- an act of dishonesty on the part of trustee Weinberg by causing the REIT to enter the impugned transaction without the required disclosure or unit-holder approval. The plaintiff has also sufficiently pleaded the second element -- actual knowledge or willful blindness on the part of the defendants McCowan, Philp/Holyrood and Nash/GSNH.

57 The problem arises with respect to the third element -- that the defendant helped Weinberg perpetrate the breach of trust. The pleading must allege and provide some detail about how the defendants McCowan, Philp/Holyrood or Nash/GSNH assisted Weinberg in his decision to allow the Transaction to proceed without the disclosure and unit-holder approval required by section 10.11 of the DOT.

58 As I explain below, the knowing assistance claim against McCowan discloses a reasonable cause of action but the knowing assistance claims against Philp/Holyrood and Nash/GSNH must be struck.

McCowan

59 The plaintiff pleads that Mr. McCowan "knowingly assisted Weinberg's breach of trust" and supports this with the following factual allegations: Weinberg and McCowan had a solicitor-client relationship on property deals pre-dating the Transaction; Weinberg was appointed to the REIT's board of trustees on McCowan's direction; McCowan "orchestrated" the Transaction for his own benefit; McCowan issued a statement to the media denying he had any interest in the Transaction; McCowan had unilateral power and discretion; McCowan knew that Weinberg would be in breach of trust if McCowan's material interest in the Transaction was not disclosed; and Weinberg was under the influence and control of McCowan.

60 I recognize that Rule 25.06(8) requires full particulars when fraud or breach of trust is alleged. I am satisfied, however, that the pleading of knowing assistance against McCowan is sufficiently understandable to clear the low "cause of action" hurdle in s. 5(1)(a) of the CPA. On a fair and generous reading of the pleading, there is a reasonable prospect that a court could find that McCowan persuaded, signaled or otherwise influenced Weinberg in the latter's decision to allow the Transaction to proceed without the required disclosure and approval. Putting it differently, I am not persuaded that it is plain and obvious that the knowing assistance claim against McCowan is doomed to fail.

61 If it is any consolation to Mr. McCowan, my finding that the "cause of action" hurdle has been cleared does not preclude an argument that there is no basis in fact for the certification of the "knowing assistance" common issue under s. 5(1)(c) of the CPA.

Philp and Holyrood

62 The plaintiff pleads a close relationship between Philp/Holyrood and McCowan: that they were acting in concert; that Holyrood was created by Philp and McCowan for the very purpose of selling the properties to the REIT; that Philp knew about McCowan's economic interest in the Transaction and about his intention to assume control over the REIT without paying a premium for that control to unit-holders; that Philp knew about Weinberg's obligations as a trustee and McCowan's obligation to disclose his interest; and that Philp/Holyrood was under the control of McCowan.

63 The plaintiff further pleads that Philp/Holyrood knowingly assisted Weinberg's breach of trust by suppressing the information about Philp's relationship with McCowan and McCowan's economic interest in the Transaction.

64 In my view, the suppression of information, without more, by a third party that otherwise has no obligations to the REIT or its trustees does not satisfy the third element in the "knowing assistance" claim. The so-called suppression of information in these circumstances does not amount to active assistance or participation on the part of Philp/Holyrood in Weinberg's decision to allow the Transaction to proceed without the disclosure and unit-holder approval required by the conflict of interest provision in the DOT. And the plaintiff was unable to cite any authority to the contrary.

65 I therefore have no difficulty concluding that it is plain and obvious that the allegation of knowing assistance as against the Philp/Holyrood fails to disclose a reasonable cause of action. The knowing assistance claim against Philp/Holyrood is struck.

Nash and GSNH

66 The defendants Nash and GSNH represented Holyrood during the course of the Transaction. The plaintiff says that Nash and GSNH knowingly assisted Weinberg's breach of trust by providing legal services to Holyrood and by withholding information from the trustees and their legal counsel about McCowan's relationship with Philp/Holyrood, and his economic interest in the Transaction.

67 It is important to note that the plaintiff has not pleaded that Nash/GSNH acted in concert with client Holyrood and that the two conspired in some fashion to help Weinberg perpetrate his alleged breach of trust. The only allegation is that Nash/GSNH provided legal services to Holyrood and withheld information about the alleged conflict of interest from the trustees and their legal counsel. In my view, neither of these actions are enough to satisfy the third element of the knowing assistance claim.

68 A solicitor providing legal services to his property-vendor client (even if the client is knowingly assisting Weinberg's breach of trust) is not enough to ensnare the solicitor in a knowing assistance claim. The solicitor is not assisting a trustee in breaching a trust because the client (Holyrood) is not a trustee. The solicitor is simply providing legal services to his client. It is settled law that a solicitor owes no duty to the opposite party in a commercial transaction and certainly no duty to that party's shareholders or unit-holders.

69 The consequence of allowing the knowing assistance claim against Nash/GSNH to proceed would not only put solicitors in an intractable conflict of interest, owing simultaneous duties to their own clients, the opposite party and the opposite party's shareholders or unit-holders, but would also result in pleading and discovery that would go to the core of the relationship of confidentiality and privilege that exists between the solicitor and his or her client.

70 Nash/GSNH cannot be sued for allegedly suppressing information that they had no obligation or

capacity to disclose. In my view, the law is clear that more than the existence of an agency relationship is required to implicate a solicitor in the alleged breach of trust of another.[37]

71 The plaintiff also argues Rule 2.02(5) of the Rules of Professional Conduct which provides that "A lawyer shall not ... knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct." However, as Nash/GSHL correctly point out, rules of professional conduct as promulgated by Canadian law societies do not impose civil liability or confer private rights of actions. The distinction between the regulation of professional conduct and the law of negligence was made clear by the Supreme Court in *Galambos*:[38]

> [T]here is an important distinction between the rules of professional conduct and the law of negligence. Breach of one does not necessarily involve breach of the other. Conduct may be negligent but not breach rules of professional conduct, and breaching the rules of professional conduct is not necessarily negligence. Codes of professional conduct, while they are important statements of public policy with respect to the conduct of lawyers, are designed to serve as a guide to lawyers and are typically enforced in disciplinary proceedings. They are of importance in determining the nature and extent of duties flowing from a professional relationship [case reference omitted]. They are not, however, binding on the courts and do not necessarily describe the applicable duty or standard of care in negligence [case references omitted].[39]

72 I therefore agree with Nash/GSNH that if the pleaded facts do not support a recognized civil cause of action, pleading or referring to the Rules of Professional Conduct and alleging a breach of the Rules will not cure the defect.

73 For all of these reasons, the knowing assistance claim against Nash/GSNH is struck.

Vicarious liability

74 The plaintiff argues that GSNH should be held vicariously liable for Weinberg's conduct because of the following: Weinberg was appointed a trustee of the REIT at McCowan's direction shortly after McCowan acquired an interest in the REIT for the purposes of the Transaction; in his capacity as a lawyer with GSNH, and with the law firm's knowledge, Weinberg provided advice to McCowan, Philp, and Holyrood in connection with the Transaction knowing that the Transaction violated the DOT and applicable TSX requirements.[40] These facts, says the plaintiff, are sufficient to ground a vicarious liability claim against GSNH arising from Weinberg's misconduct.

75 I have concluded that a cause of action exists under s. 5(1)(a) against Weinberg for breach of trust. Vicarious liability is typically an "in the course of employment" inquiry and is largely fact-driven. Whether these is evidence (i.e. some basis in fact) justifying the certification of a vicarious liability issue involving GSNH is best left for the common issues analysis under s. 5(1)(c) of the CPA.

Disposition

76 The breach of fiduciary duty claims against McCowan, Weinberg, Feldman and Charlebois do not disclose a reasonable cause of action under s. 5(1)(a) of the CPA and are struck.

77 The knowing assistance claims against Philp/Holyrood and Nash/GSNH are also struck and the

motion for certification as against these defendants is dismissed.

78 The breach of trust claims against Weinberg, Feldman and Charlebois and the knowing assistance claim against McCowan disclose reasonable causes of action and will be considered further at the certification motion that is currently scheduled for early October, 2015.

79 Because success was divided on the claims against McCowan, Weinberg, Feldman and Charlebois,[41] no costs will be awarded vis-a-vis these defendants. However, Philp/Holyrood and Nash/GSNH are entitled to their costs on a partial indemnity basis. If these costs cannot be resolved, Philp/Holyrood and Nash/GSNH should forward brief written submissions within 14 days and the plaintiff within 14 days thereafter.

80 I am grateful to all counsel for their assistance.

E.P. BELOBABA J.

1 Section 5(1)(a) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA").

2 Defendant Weinberg is not opposing the s. 5(1)(a) motion.

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

4 *BCE Inc v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, at para. 66 (emphasis added). See also *Peoples Department Stores v. Wise*, [2004] 3 S.C.R. 461 at para. 43: "At all times, directors and officers owe their fiduciary obligation to the corporation. The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders."

5 *Waters' Law of Trusts in Canada*, 3rd ed. (2005) at 1203-1204.

6 *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at para. 33.

7 The submissions relating to the rule in *Foss v. Harbottle* (1843), 67 E.R. 189 are discussed below at para. 44 *et seq.*

8 *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69.

9 *Ibid* at para. 66.

10 *Elder Advocates of Alberta Society v. Alberta,* [2011] 2 S.C.R. 261.

11 *Elder, supra* note 10 at para. 30, citing with approval *Galambos v. Perez*, 2009 SCC 48 at para. 75: "What is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her." Also see *Elder* at para. 32: "The undertaking may be found in the relationship between the parties ... or under an express

agreement to act as a trustee of the beneficiary's interests."

12 *Elder*, *supra* note 10 at paras. 33 and 36: "[F]iduciary duties do not exist at large; they are confined to specific relationships between particular parties" ... the alleged fiduciary duty must be owed to "a defined person or class of persons". A fiduciary should not be exposed to duties (and liabilities) for an indeterminate time to an indeterminate class: *NPV Management Ltd. v. Anthony*, 2003 NLCA 41, leave to appeal ref'd, [2003] S.C.C.A. No. 436.

13 *Elder*, *supra* note 10 at para. 34.

14 *Elder*, *supra* note 10 at para. 51.

15 *Rose v. Rose* (1914), 22 D.L.R. 572 (Ont. C.A). The case involved a trustee who acquired shares in a trust company thereby reducing the trust's shareholdings below a majority position in the trust company. The court ruled that the situation was one that created the possibility of conflict and therefore was untenable on the part of the fiduciary.

16 *Kang v. Sun Life Assurance Company of Canada*, 2011 ONSC 6335 at para. 140.

17 Only Feldman and Charlebois make this submission; Weinberg, as already noted, is not opposing the s. 5(1)(a) motion.

18 *Lewin on Trusts*, 18th ed. (2008) at 1604-1605.

19 I also agree with the plaintiff that section 10.11(7), the conflict of interest provision, adds little to the cause of action analysis. There is no allegation of conflict of interest against any of the trustees.

20 *Foss v Harbottle* (1843), 67 E.R. 189.

21 *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 59.

22 Section 2.5(1) of the DOT, as already noted, makes clear that "The Trust is not, will not be deemed to be and will not be treated as ... a corporation ..."

23 *Quadrangle Group LLC et al v. Attorney General of Canada*, 2015 ONSC 1521 (Comm. List) at para. 21; *Johnson v. Gore Wood & Co.*, [2001] 1 All E.R. 481 (H.L.) at 503.

24 That is, losses that reflect diminution in the value of the company's or the trust's assets and that can be recovered in an action by the company or by the trustees. See *Johnson v. Gore Wood, supra* note 23, at 503.

25 Developed in Canada in the 1990s primarily for tax-related purposes, the publicly-traded real estate investment trust continues to grow in importance, accounting for more than half of all IPOs and more than 100 listings on the TSX. But the scope and content of its governance structure is not yet fully settled. See Gillen, "A Comparison of Business Income Trust Governance and Corporate Governance: Is There a Need for Legislation or Further Regulation?" (2006) 51 McGill L.J. 327.

26 *Mercedes Holdings Pty Limited v. Waters (No. 2)* [2010] F.C.A. 472 at paras. 108-111; *Mercedes Holdings Pty Ltd v. Waters (No. 3)*, [2011] F.C.A. 236 at paras. 37- 56.

27 *Mercedes Holdings Pty Ltd v. Waters (No 3)*, [2011] F.C.A. 236 at paras. 55-56.

28 *Ibid* at para. 55.

29 *Citadel General Assurance v Lloyd's Bank Canada*, [1997] S.C.J. No. 92 at para. 22. The case law typically uses the term "fraud" but it is clear that fraud includes dishonesty: see *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 at paras. 42, 44 and 46. I will therefore use the word "dishonesty" because it fits more easily with the plaintiff's allegations herein.

30 *Air Canada, supra* note 29 at para. 37.

31 *Citadel General Assurance, supra* note 29.

32 *Ibid.* at para. 22.

33 *Air Canada, supra* note 29.

34 *Ibid* at para. 39.

35 *Gold v. Rosenberg,* [1997] 3 S.C.R. 767.

36 *Ibid.* at para. 32.

37 *Air Canada, supra* note 29 at para. 41. Also see Perell, "Intermeddlers or Strangers to the Breach of Trust or Fiduciary Duty", (1999) 21 Adv. Q. 84 at 108: "A consequence of the knowledge requirement under the doctrine of knowing assistance is that employees, agents, solicitors and banks that act as agents for trustees and fiduciaries are not unduly exposed to liability for the misconduct of others who may have been assisted by their services."

38 *Galambos v. Perez, supra* note 11.

39 *Ibid* at para. 29.

40 TSX Company Manual, Part VI, Changes in the Capital Structure of Listed Issuers. The plaintiff submits that the Transaction was in breach of TSX Rules 604 and 611 that require unit-holder approval in cases involving a change in control or where an insider (i.e. McCowan) receives more than 10 per cent of the REIT's issued units, as happened here. I have not discussed the impact of the TSX Rules because I was able to decide this motion on the basis of the applicable rules of civil procedure and common law principles.

41 McCowan prevailed on the fiduciary duty claim but not on the knowing assistance claim; Weinberg, Feldman and Charlebois prevailed on the fiduciary duty claim but not on the breach of trust claim. Recall, as well, that Weinberg did not oppose this s. 5(1)(a) motion.

Case Name:

Locking v. McCowan

Between
Daniel Locking, Plaintiff (Appellant), and
Ronald McCowan, Allen W. Weinberg, Joseph Feldman, Marc Charlebois, Laura Philp (a.k.a. Laura Phelp, a.k.a. Laura Philps, a.k.a. Laura Philip, a.k.a. Laura Philips), Holyrood Holdings Limited, Samuel H. Nash, Goldman Sloan Nash & Haber LLP, Graham Rawlinson, and Torys LLP, Defendants (Respondents)
PROCEEDING UNDER the Class Proceedings Act, 1992

[2016] O.J. No. 509

2016 ONCA 88

Docket: C61038

Ontario Court of Appeal

E.E. Gillese, J.L. MacFarland and K.M. van Rensburg JJ.A.

Heard: January 20, 2016.
Judgment: January 29, 2016.

(23 paras.)

Civil litigation -- Civil procedure -- Pleadings -- Striking out pleadings or allegations -- Grounds -- Failure to disclose a cause of action or defence -- Appeal by plaintiff from decision on a certification motion striking out knowing assistance claims against respondents Philip and Holyrood Holdings in proposed class proceeding allowed -- Plaintiff, a unit holder in real estate investment trust, alleged respondents failed to disclose conflict of interest that caused a real estate transaction to be reversed and the unit price to drop -- As active participants in the transaction, it was not plain and obvious that the claim against respondents for knowing assistance in breaches of trust and fiduciary duties could not possibly succeed.

Appeal by the plaintiff from a decision on a certification motion striking out the claims against the respondents Philip and Holyrood Holdings in a proposed class proceeding. The proposed class consisted of unit holders in an unincorporated real estate investment trust. The appellant claimed that the class sustained losses when the trust's unit price dropped because an improper property transaction had to be

set aside. The respondents sold three properties to the trust at the behest of the defendant McCowan, the trust's interim CEO. McCowan failed to disclose that he had a longstanding, close personal and business relationship with Philip and, according to the appellant, a de facto ownership interest in the properties and de facto control of Holyrood. When McCowan's conflict of interest was exposed, the transaction was set aside. Weinberg allegedly knew of McCowan's material interest in the properties and control over Holyrood and knowingly breached his duties by permitting the trust to enter into the transaction without the required disclosure and unit holder approval. The appellant sued the trustees, including Weinberg, for breach of trust, McCowan for breach of fiduciary duty and knowing assistance in Weinberg's breach of trust and the respondents for knowing assistance in Weinberg's breach of trust and McCowan's breach of fiduciary duty. The motions judge struck the knowing assistance claim against the respondents on the basis that the pleaded facts did not amount to active assistance or participation by the respondents in Weinberg's decision to allow the transaction to proceed.

HELD: Appeal allowed. The claim against the respondents was legally plausible. The motions judge erred in failing to accurately and generously construe the claim made against the respondents. They did only suppress information which they had a duty to disclose but actively participated in the transaction by selling the properties to the trust while intentionally concealing information and falsely portraying themselves as an arm's length vendor. This role enabled Weinberg to commit the breaches of trust alleged against him. What amounted to assistance had not yet been fully explored in the jurisprudence. It might be that silence was, in certain circumstances, sufficient to constitute assistance. Thus, it was not plain and obvious that the claim against the respondents could not possibly succeed.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, s. 5(1)(a)

Appeal From:

On appeal from the order of Justice Edward P. Belobaba of the Superior Court of Justice, dated August 19, 2015, with reasons reported at 2015 ONSC 4435.

Counsel:

John Archibald and Paul Bates, for the appellant.

J. Thomas Curry and Julia G. Brown, for the respondents.

The judgment of the Court was delivered by

E.E. GILLESE J.A.:--

FACTS IN BRIEF

1 The appellant is the representative plaintiff in a proposed class action by unit holders of Partners REIT, an unincorporated real estate investment trust whose units trade on the Toronto Stock Exchange. The appellant claims that the class sustained losses when the REIT's unit price dropped because an improper property transaction had to be set aside.

2 Partners REIT is governed by a board of trustees.

3 Ronald McCowan and Allen W. Weinberg are two of the named defendants and, as will be seen, are central to this appeal. McCowan was the REIT's interim CEO at the relevant time and Weinberg was one of the trustees. The other named defendants in the proposed class action include two other trustees and those who sold the properties to the REIT.

The Transaction

4 On April 2, 2014, the respondent Laura Philp and her company Holyrood Holdings Limited ("Holyrood") (together, the "Respondents") sold three properties to the REIT (the "Transaction") at McCowan's behest. McCowan failed to disclose that he had a longstanding, close personal and business relationship with Philp and, according to the appellant, a *de facto* ownership interest in the properties and *de facto* control of Holyrood.

5 When McCowan's conflict of interest was exposed, the Transaction was set aside and all monies paid were returned to the REIT. However, it is alleged that the fall-out caused the REIT's unit price to drop by more than 30 per cent.

The Proposed Class Action

6 For the purposes of this appeal, the relevant claims in the Amended Statement of Claim are as follows:

* against Weinberg, Feldman and Charlebois, the defendant trustees at the relevant time: breach of trust;

* against McCowan: breach of fiduciary duty and knowing assistance in Weinberg's breach of trust; and

* against the Respondents: knowing assistance in Weinberg's breach of trust and McCowan's breach of fiduciary duty.

The Underlying Motion

7 A certification motion was brought.

8 The motion was bifurcated, with the motions judge first determining whether the claims constituted viable causes of action under s. 5(1)(a) of the *Class Proceedings Act*, S.O. 1992, c. 6 ("*CPA*"). As the motions judge correctly noted, for the purposes of the motion, the facts as set out in the pleadings are assumed to be true.

THE DECISION UNDER APPEAL

9 By order dated August 19, 2015 (the "Order"), among other things, the motions judge permitted the breach of trust claim against Weinberg[1] (and the other defendant trustees) and the knowing assistance claim against McCowan to proceed. However, he struck the knowing assistance claim against the Respondents.

10 In respect of Weinberg, the motions judge noted that the breach of trust claim is supported by the

following facts as pleaded: Weinberg knew of McCowan's material interest in the properties and control over Holyrood; he knowingly breached his duties by permitting the REIT to enter into the Transaction without the required disclosure and unit holder approval; he did so in order to preserve the relationship between his law firm and McCowan, its long-time client, and to garner future legal work; and, in so doing, he failed to act honestly and in good faith, with a view to the best interests of both the REIT and the class.

11 In respect of McCowan, the motions judge noted the following factual allegations: Weinberg and McCowan had a solicitor-client relationship on property deals that pre-dated the Transaction; Weinberg was appointed to the board of trustees on McCowan's direction; McCowan orchestrated the Transaction for his own benefit; McCowan knew that Weinberg would be in breach of trust if McCowan's material interest in the Transaction was not disclosed; and, Weinberg was under McCowan's influence and control. The motions judge concluded that there was a reasonable prospect that a court could find that McCowan persuaded, signaled or otherwise influenced Weinberg in Weinberg's decision to allow the Transaction to proceed without the required disclosure and unit holder approval. Accordingly, the claim that McCowan knowingly assisted Weinberg in Weinberg's breach of trust could proceed.

12 The motions judge struck the knowing assistance claim against the Respondents on the basis that the pleaded facts did not amount to active assistance or participation by the Respondents in Weinberg's decision to allow the Transaction to proceed. He said, "the suppression of information, without more, by a third party that otherwise has no obligations to the REIT or its trustees" does not satisfy the requirement of active assistance or participation in a breach of trust.

THE ISSUE

13 While the appellant raises a number of grounds of appeal, in essence, they are all targeted at a single issue: did the motions judge err in striking the knowing assistance claim against the Respondents?

ANALYSIS

14 I agree with the appellant that the claim against the Respondents is legally plausible. In my view, the motions judge erred in two ways in reaching the conclusion that the pleadings failed to disclose a reasonable cause of action as against the Respondents. To explain, I begin by summarizing the motions judge's reasoning on this matter.

15 Relying on the Supreme Court's decisions in *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, 1997 CanLII 334, *Air Canada v. M&L Travel Ltd.*, [1993] 3 S.C.R. 787, 1993 CanLII 33, and *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, 1997 CanLII 333, the motions judge correctly stated that for a knowing assistance claim to succeed, the plaintiff must establish:

(i) an act of fraud or dishonesty on the part of the trustee;

(ii) that the defendant had knowledge of the trustee's dishonest conduct; and

(iii) that the defendant assisted the trustee in perpetrating the dishonest conduct.

16 The motions judge found that the appellant had sufficiently pleaded the first two elements: an act of dishonesty on the part of trustee Weinberg and the Respondents' actual knowledge of, or wilful blindness to, that conduct.

17 In respect of the third element, the motions judge stated that for the words "knowing assistance" to have meaning, they must mean more than simply standing by or acquiescing. Consequently, the motions judge said, assistance or participation in a breach of trust requires, at the very least, that the defendant take a positive step to help or take part in the trustee's breach of trust. Based on that view, the motions judge concluded that the Respondents' mere suppression of information did not amount to active assistance or participation in a breach of trust.

18 The motions judge's first error was in failing to accurately and generously construe the claim made against the Respondents. He read the Amended Statement of Claim as alleging that the Respondents' only assistance or participation in the breach of trust was their suppression of information which they had no duty to disclose. On the pleadings, however, the Respondents did not simply stand by and remain silent as the trustee Weinberg, a lawyer acting at the behest of his client McCowan, authorized a self-interested transaction for McCowan's benefit. Rather, it is pleaded that the Respondents were active participants -- playing the roles of genuinely disinterested arm's length parties who were the sole owners of the properties -- who concealed the improprieties underlying the Transaction and sold those properties to the REIT. Without the Respondents, the Transaction could not have taken place. They actively participated in the Transaction, selling the properties (which McCowan actually owned) to the REIT while intentionally concealing information and falsely portraying themselves as an arm's length vendor. This role enabled Weinberg to commit the breaches of trust alleged against him.

19 The motions judge's second error relates to his approach to the third element of the knowing assistance claim against the Respondents. The motions judge viewed this element as requiring "that the defendant take a positive step *to help or to take part in* the trustee's breach of trust." [Emphasis in original.] Consequently, the motions judge concluded that suppression of information was not sufficient to amount to assistance or participation.

20 As the motions judge recognized, the test under s. 5(1)(a) of the *CPA* is the same as the test under rule 21.01(1)(b) of the *Rules of Civil Procedure*: see *Kang v. Sun Life Assurance Co. of Canada*, 2013 ONCA 118, at paras. 26-27. Accordingly, the Respondents had to demonstrate that it was "plain and obvious" that the claim against them could not possibly succeed.

21 What amounts to assistance -- or, in the words of the motions judge, "helping" or "taking part" -- has not yet been fully explored in the jurisprudence. It may be that silence is, in certain circumstances, sufficient to constitute assistance. Thus, it is not plain and obvious that the claim against the Respondents could not possibly succeed.

22 However and in any event, as I have explained, on the pleadings, the Respondents' role was more than a mere suppression of information. They worked in concert with McCowan and intentionally concealed information in order to cloak the true nature of the Transaction and assist Weinberg, who entered into the Transaction in breach of his trust obligations.

DISPOSITION

23 Having determined that the Amended Statement of Claim pleads facts which assert a legally plausible claim against each of the Respondents under s. 5(1)(a) of the *CPA*, I would allow the appeal, and order that the Order be amended accordingly. I would order costs of the appeal and motion below in favour of the appellant, fixed at $20,000, all inclusive.

E.E. GILLESE J.A.
J.L. MacFARLAND J.A.:-- I agree.

K.M. van RENSBURG J.A.:-- I agree.

1 Weinberg did not oppose the s. 5(1)(a) motion.

1988 CarswellBC 558
British Columbia Supreme Court

Northland Properties Ltd., Re

1988 CarswellBC 558, 73 C.B.R. (N.S.) 175

Re NORTHLAND PROPERTIES LIMITED et al.

Trainor J.

Judgment: December 12, 1988
Docket: Vancouver A880966

Counsel: *H.C. Clark, R.D. McRae* and *R. Ellis*, for petitioners.
G.W. Ghikas and *C.S. Bird*, for Bank of Montreal.
F.H. Herbert, Q.C., and *N. Kambas*, for Excelsior Life Insurance Company of Canada and National Life Assurance Company of Canada.
S. Strukoff and *R. Argue*, for Metropolitan Trust Company.
A. Czepil, for Guardian Trust Company.
L.A. Jensen, for Royal Trust Corporation of Canada.
A. Bensler, for Canada Trustco Mortgage Company and Guaranty Trust.
D.W. Donohoe, for Thorne Riddell.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by Court — "Fair and reasonable"

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Order approving reorganization plan — Plan approved by majority of creditors as required under s. 11 — Court enumerating principles to be considered when approving a plan — Principles favouring approval of plan — Plan not affecting rights of dissenting minority priority mortgagees seriously enough to find plan unfair and unreasonable.

The debtors were a number of companies engaged in the business of real estate investment and development. By the spring of 1988 the debtors owed about $200,000,000 and had assets of approximately $100,000,000. At this time their bank, which was owed about $117,000,000, commenced a receivership action. Before a decision was given in those proceedings, the debtors petitioned under the Companies' Creditors Arrangement Act for permission to make a proposal to their creditors. The debtors were authorized to file a reorganization plan and all proceedings against them were stayed until further order of the court. The debtors reached a settlement agreement with their bank and a copy of this settlement agreement along with

the reorganization plan, an information circular and other documents were provided to the creditors. The class meetings and a general meeting of creditors were held. At that time additional information was disclosed which had arisen between the time the plan was mailed to the creditors and the date of the meetings.

Under the plan, the priority mortgagees would all be treated in a similar manner. The mortgages were to remain in full force on their existing terms, except that the terms were all to be varied to five years, with interest rates at 12 per cent or less, and the amount of each mortgage was to be varied to the amount the priority mortgagee would get on a receivership with no loss for costs.

All classes of creditors, except the class of priority mortgagees, voted unanimously in favour of the plan. Of the priority mortgagees, 11 of the 15, representing 73.33 per cent of the number of mortgagees voting and 78.35 per cent of the value of the mortgages, voted in favour of the plan.

The debtors applied to the court for an order sanctioning the reorganization plan. The application was opposed by the dissenting priority mortgagees.

Held:

Application granted.

The legislation is intended to protect creditors and allow the orderly administration of the assets and affairs of debtors. Section 6 of the Companies' Creditors Arrangement Act says that where a majority in number representing three-fourths in value of the creditors, or class of creditors, voting at the meeting agrees to a proposed compromise or arrangement, the compromise or arrangement may be sanctioned by the court and will be binding on all the creditors.

In this case the plan was approved by a majority in number of each class representing at least 75 per cent of the value in that class. Therefore, the sole issue was whether the court should approve and sanction the plan.

In the exercise of this discretion the court should consider three criteria: whether there has been strict compliance with all statutory requirements; whether anything has been done which was not authorized by the Act; and whether the plan is fair and reasonable.

With respect to the first criteria, the court was satisfied that there had been strict compliance with all statutory requirements.

With respect to the second criteria, the principal concern was whether the classes of creditors were properly established. The general considerations for constituting a class are: whether or not there is security; the nature of any security; the nature of the claim; and what contractual rights exist.

The priority mortgagees should properly all be in the same class. The nature of the debts were the same: moneys advanced as a loan. Each was a corporate loan by a sophisticated lender; the security in each case was a first mortgage and the remedies would have been the same: foreclosure proceedings and receivership. No possible reorganization plan would give the lender more than the value of the property less carrying costs and legal costs (unless the creditor were given the property to hold for a possible appreciation in value). All the creditors were to be treated the same under the reorganization plan. The only dissimilarities were that the mortgages involved separate properties and there were differences in the values of the securities for the loans. The vast majority of the creditors accepted the concept of a consolidated plan.

With respect to the final criteria, the plan was fair and reasonable. There were no secret agreements and all negotiations with various creditors were reported to both the class and the general meetings. The agreement with priority mortgagee R.

to reduce its mortgage in return for a cash sum at a later date was only a negotiation as to agreed price and not an attempt to buy R.'s vote to ensure the necessary majority in the class.

The denial of the right of a priority mortgagee to hold the property after an order absolute was not significant enough that it should affect the proceedings. In view of the speculative nature of holding the property, this right should be subsumed to the benefit of the majority. The objecting priority mortgagees would be no worse off under the proposed plan than if there were no plan and they could possibly be put in a position to save carrying and legal costs. Denying them the option of holding the properties after order absolute was not serious enough to find that the plan was unfair and unreasonable.

Table of Authorities

Cases considered:

Alabama, New Orleans, Texas & Pac. Junction Ry. Co., Re, [1891] 1 Ch. 213 (C.A.) — *considered*

Associated Investors of Can. Ltd., Re, 67 C.B.R. (N.S.) 237, [1988] 2 W.W.R. 211, 56 Alta. L.R. (2d) 259, 38 B.L.R. 148, (sub nom. *Re First Investors Corp. Ltd.)* 46 D.L.R. (4th) 669 (Q.B.) [reversed 71 C.B.R. (N.S.) 71, 60 Alta. L.R. (2d) 242, 89 A.R. 344 (C.A.)] — *considered*

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

Br. Amer. Nickel Corp. Ltd. v. O'Brien, [1927] A.C. 369 (P.C.) — *considered*

Companies' Creditors Arrangement Act, Re; A.G. Can. v. A.G. Que., [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 — *considered*

Dairy Corp. of Can. Ltd., Re, [1934] O.R. 436, [1934] 3 D.L.R. 347 (C.A.) — *considered*

English, Scottish & Australian Chartered Bank, Re, [1893] 3 Ch. 385, [1891-94] All E.R. Rep. 775 (C.A.) — *considered*

Hochberger v. Rittenberg (1916), 54 S.C.R. 480, 36 D.L.R. 450 [Que.] — *distinguished*

Langley's Ltd., Re, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) — *considered*

Meridian Dev. Inc. v. T.D. Bank; Meridian Dev. Inc. v. Nu-West Ltd., 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39 (Q.B.) — *considered*

Snider Bros., Re, 18 B.R. 230 (Mass. Bankruptcy Court, 1987) — *considered*

Sovereign Life Assur. Co. v. Dodd, [1892] 2 Q.B. 573 (C.A.) — *considered*

Wellington Bldg. Corp. Ltd., Re, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626 (S.C.) — *referred to*

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1970, c. C-25 [now R.S.C. 1985, c. C-36]

s. 6

s. 7

s. 11

Authorities considered:

Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 590, pp. 595, 602.

Application for an order approving plan of reorganization over objections of minority of creditors.

***Trainor J.* (orally):**

1 This is an application for an order under the Companies' Creditors Arrangement Act, approving and sanctioning a reorganization plan submitted to the petitioners' creditors. It was unanimously approved by all classes of creditors except the priority mortgagees. That class, however, did approve the plan by the majority provided in the Act. The particular order sought is lengthy and is set out in the minutes attached to the motion by which this application is brought.

2 In the course of considering the plan, the various steps taken to obtain creditors' approval, all of the evidence and the submissions on behalf of the minority of the priority mortgagees who voted against approval of the plan, I will deal with the elements of the order sought.

3 The petitioners are a number of companies engaged in the business of real estate investment and development in western Canada and the western United States. They collectively own and operate a number of office buildings and a chain of 20 hotels and motels in western Canada known as the Sandman Inns. The hotels, inns and office buildings, with a couple of exceptions, were constructed by the companies as new facilities.

4 Financial problems started in 1981, with declining revenues and rising interest rates. By the spring of 1988 the companies owed about $200,000,000 and had assets of about $100,000,000. The Bank of Montreal was owed about $117,000,000 by the companies, and it authorized the commencement of a receivership action.

5 Before a decision was given in those proceedings, the companies petitioned under the Companies' Creditors Arrangement Act for an order directing meetings of the secured and unsecured creditors of the companies to consider a proposed compromise or arrangement between the creditors and the companies.

6 I heard that petition on 7th April 1988 and ordered, as an initial step, that the companies were authorized to file a reorganization plan with the court, and that in the meantime the companies would remain in possession of their undertaking, property and assets, and could continue to carry on their businesses. I further ordered, pursuant to s. 11 of the Act, that all proceedings against the companies be stayed until further order of this court.

7 The thrust of this legislation is the protection of creditors and the orderly administration of the assets and affairs of debtors.

8 Duff C.J.C., who gave the judgment of the court in *Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que.*, [1934] S.C.R. 659 at 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75, said:

> 9 ... the aim of the Act is to deal with the existing condition of insolvency, in itself, to enable arrangements to be made, in view of the insolvent condition of the company, under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation.

10 Mr. Justice Wachowich, in *Meridian Dev. Inc. v. T.D. Bank; Meridian Dev. Inc. v. Nu-West Ltd.*, 52 C.B.R. (N.S.) 109 at 114, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39 (Q.B.), said:

> 11 The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

12 Earlier, I indicated, and I now reassert, my adoption of those judicial statements indicating the purpose of this legislation and the underlying purpose behind the order which I made on 7th April last.

13 In reasons which I gave in this matter on 5th July 1988 [reported 69 C.B.R. (N.S.) 266 at 273, 29 B.C.L.R. (2d) 257 (S.C.)], I said:

> 14 At the time I made that order I was satisfied on the basis of the material filed in support of the petition that the companies should have an opportunity to lay before their creditors a proposal as to how their liabilities could be met and the companies continue in operation. The purpose of this legislation is to keep companies in business if possible. That is the sense in which this legislation is to be distinguished from winding-up or bankruptcy proceedings: *Re Avery Const. Co.*, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.).

15 A number of motions to this court sought changes or definition of rights and procedures. The companies filed a plan in August, but that was amended, particularly with respect to classification of creditors. I will deal later with the question of classes of creditors, but for now I merely wish to say that, in the first instance, it is the responsibility of the debtor companies to define the classes and make the proposal to them.

16 One of the interim applications which I heard in this matter on the motions of the companies and the bank dealt with the composition of classes. My ruling that two classes of bondholders should be recognized, namely, the "A bondholders" and the "put debt claimants and C bondholders" was upheld by the Court of Appeal. Throughout that application and decisions it was of paramount importance that it only related to the question of the classes into which the securities held by the bank should be divided.

17 I did, however, rule that in addition to the individual meetings of classes of creditors and at the conclusion of those meetings a general meeting of all creditors should be convened to consider the plan. That in fact was done.

18 The plan proposed by the companies was based on the following classes of creditors:

Class Name	Definition
shareholder creditors	a creditor who is a shareholder (except the bank)
A bondholders	the holder of a series A bond issued by the petitioners, except B & W, under the trust deed
put debt claimants and C bondholders	the bank in respect of the put debt and as holder of a series C bond issued by Northland pursuant to the trust deed
priority mortgagees	a creditor other than the

	bank, a bondholder or the trustee having a mortgage against a property
government creditors	a creditor with a claim that arises pursuant to a municipal by-law or a provincial, state or federal taxing statute, who is not a property tax creditor
property tax creditors	a creditor having a claim for unpaid municipal property taxes
general creditors	a creditor not falling within any other class, but does not include a contingency claimant

19 Other applications were brought which dealt with notices, proxies, proof of claim forms, exchange rate and directions for the calling of meetings.

20 The companies and the Bank of Montreal reached an agreement on 20th October 1988 by which they settled all outstanding claims against each other. It deals with the amounts owing to the bank by the companies, claims by the companies and others against the bank in relation to a lender liability lawsuit and the terms of a compromise between the bank and the companies. This agreement is referred to in the material as the "settlement agreement". It recites that it is the entire agreement between the parties, and a copy of it was provided to creditors, along with such other documents as notice of the meetings, the reorganization plan and an information circular.

21 The class meetings and the general meeting of creditors were held in Vancouver on 31st October and 1st November 1988. W.J. Little, a vice-president of Dunwoody Limited, acted as chairman of all meetings. He supervised the conduct of scrutineers who recorded the votes cast for and against the plan at each of the meetings. At each of the meetings additional information which had arisen between the time the plan was mailed to the creditors and the date of the meeting was disclosed to the creditors.

22 Particulars of the disclosures are set out in the affidavit of Terrence King, sworn 14th November 1988 and filed herein. Most deal with variations to the plan with respect to priority mortgagees.

23 The report of Mr. Little, as chairman of the meetings, is contained in his affidavit sworn 9th November 1988. All classes of creditors voted unanimously in favour of the plan, except the class of priority mortgagees. The result of the vote in that class is:

24 — Priority mortgagees meeting of petitioners held on 31st October 1988. The priority mortgagees present in person or by proxy, to the value of $77,087,531.69. The number of mortgagees total 15.

25 — Voting for in person or by proxy, $60,397,607.50. The percentage of value is 78.35 per cent. The number of mortgagees voting for is 11, which amounts to a percentage of 73.33 per cent.

26 — Voting against in person or by proxy, $16,689,924.19, which is a percentage of 21.65 per cent. Four mortgagees voted against, and that percentage is 26.67 per cent.

27 The two main opponents of the plan were Guardian Trust Company and the holders of a joint mortgage, Excelsior Life Assurance and National Life Assurance. Guardian and Excelsior have participated in this application and I have received and considered their submissions.

28 It will be seen that 11 of 15, that is, 73.33 per cent of the priority mortgagees voted in favour of the plan, and that those who favoured the plan represented 78.35 per cent of the value of the mortgages in this class. Based on that result, the companies now apply for an order approving and sanctioning the reorganization plan. The Companies' Creditors Arrangement Act provides (and I want to set out both ss. 6 and 7):

> 29 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 such sections, agree to any compromise or arrangement either as proposed or as altered or modified at such meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding 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 is also binding on the company, and 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 course of being wound up under the *Winding-up Act*, is also binding on the trustee in bankruptcy or liquidator and contributories of the company.
>
> 30 7. Where an alteration or modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, such meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and such directions may be given as well after as before adjournment of any meeting or meetings, and the court may in its discretion direct that it shall not be 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 a compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

31 In summary, the two conditions which must be met are approval of the plan by the creditors, and approval and sanction by the court. Here each class of creditor voted in favour of the plan by a majority in number who represented at least 75 per cent of the value of the creditors in that class. Consequently, the sole issue is whether the court should approve and sanction the plan.

32 In the exercise of its discretion, the court should consider three criteria, which are:

33 1. There must be strict compliance with all statutory requirements.

34 2. All material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the Companies' Creditors Arrangement Act.

35 3. The plan must be fair and reasonable.

36 As I indicated, I have had the benefit of full submissions by counsel. I will refer to a number of the cases cited by them.

37 I refer to a decision of the Alberta Court of Queen's Bench, Berger J., in *Re Associated Investors of Can. Ltd.*, 67 C.B.R. (N.S.) 237, [1988] 2 W.W.R. 211 at 218, 56 Alta. L.R. (2d) 259, 38 B.L.R. 148, (sub nom. *Re First Investors Corp. Ltd.)* 46 D.L.R. (4th) 669, where he said:

> 38 Assistance in interpreting s. 6 may thus be obtained from other company and corporation Acts which have their genesis in the British statute and are akin in wording to the Companies' Creditors Arrangement Act.

And then he went on to set out elements which are similar to the ones to which I have referred.

39 In *Re Alabama, New Orleans, Texas & Pac. Junction Ry. Co.*, [1891] 1 Ch. 213 at 238-39, a decision of the English Court of Appeal, Lindley L.J. said:

> 40 ... what the Court has to do is to see, first of all, that the provisions of that statute have been complied with; and, secondly, that the majority has been acting *bona fide*. The Court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the Court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by business men. The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting *bona fide*, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it.

41 In the Ontario Court of Appeal in *Re Dairy Corp. of Can. Ltd.*, [1934] O.R. 436 at 439, [1934] 3 D.L.R. 347, Middleton J.A. said:

> 42 Upon this motion I think it is incumbent upon the Judge to ascertain if all statutory requirements which are in the nature of conditions precedent have been strictly complied with and I think the Judge also is called upon to determine whether anything has been done or purported to have been done which is not authorized by this Statute. Beyond this there is, I think, the duty imposed upon the Court to criticize the scheme and ascertain whether it is in truth fair and reasonable.

43 And the English Court of Appeal again, in *Re English, Scottish & Australian Chartered Bank*, [1893] 3 Ch. 385, [1891-94] All E.R. Rep. 775, referred to in the judgment, again by Lindley L.J., to what he had said in the decision to which I have referred earlier, *Re Alabama*. He confirmed that, and he also quoted what Fry L.J. said in that earlier decision [pp. 778-79]:

> 44 It is quite obvious from the language of the Act and from the mode in which it has been interpreted that the court does not simply register the resolution come to by the creditors, or the shareholders, as the case may be. If the creditors are acting on sufficient information and with time to consider what they are about and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the court can be. I do not say it is conclusive, because there might be some blot in a scheme which had passed unobserved and which might be pointed out later. But giving them the opportunity of observation, I repeat that I think they are much better judges of a commercial matter than any court, however constituted, can be. While, therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted, and have considered the matter from a proper point of view — that is, with a view to the interests of the class to which they belong, and that which they are empowered to bind — the court ought to be slow to differ from them. It should do so unhesitatingly if there is anything wrong about it. But it ought not to do so, in my judgment, unless something is brought to the attention of the court to show that there has been some great oversight or miscarriage.

45 And again, in the Ontario Court of Appeal in *Re Langley's Ltd.*, [1938] O.R. 123 at 141-42, [1938] 3 D.L.R. 230, Masten J.A. said:

> 46 I desire to make my view clear with regard to the function of the Court upon an application of this kind, so far as it relates to the fairness and reasonableness of the compromise or arrangement itself. It is in the nature of such a proceeding that it will alter and affect the respective rights of shareholders and different classes of shareholders, and it appears to me that, granted the compromise or arrangement proposed is placed fairly and squarely before the shareholders, the meeting or meetings is or are called and conducted in accordance with the provisions of the statute, and that 75 per cent of the shares of each class represented agree to the compromise or arrangement, the Court is entitled to sanction it. In such a case the Court is not, in my opinion, to substitute its view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the shareholders themselves.

47 And in *Re Wellington Bldg. Corp. Ltd.*, [1934] O.R. 653, 16 C.B.R. 48 at 53, [1934] 4 D.L.R. 626 (S.C.), Kingstone J. [quoting Bowen L.J.] said:

> 48 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.

49 I want to refer as well to an article by Stanley Edwards ["Reorganizations Under the Companies' Creditors Arrangement Act"] which ap pears in vol. 25 of the Canadian Bar Review. I refer specifically to p. 595, where he said:

> 50 In addition to being feasible, a reorganization plan should be fair and equitable as between the parties. In order to make the Act workable it has been necessary to permit a majority of each class, with court approval, to bind the minority to the terms of an arrangement. This provision is justified as a precaution that minorities should not be permitted to block or unduly delay the reorganization for reasons that are not common to other members of the same class of creditors or shareholders, or are contrary to the public interest.

51 And on p. 602 he spoke of the classification of creditors, and said:

> 52 Classification of the creditors is the next problem which the court will face. Creditors should be classified according to their contract rights, — that is according to their respective interests in the company.

53 He said at p. 612 that votes must be made in good faith and referred to a decision of the judicial counsel in *Br. Amer. Nickel Corp. Ltd. v. O'Brien*, [1927] A.C. 369 at 373-74 (P.C.), where Viscount Haldane, in giving the opinion, said:

> 54 ... their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member. The second principle is a negative one, one which puts a restriction on the completeness of freedom under the first, without excluding such freedom wholly.

55 The reorganization plan, as I indicated, was distributed and considered. In putting forward the plan, there are a number of recitals which indicate the hope of the companies for their future. For example, recital "H" is:

> 56 Management is of the opinion that the Companies can return substantially more to their Creditors from the continued operation of the Properties than could reasonably be expected to be realized from their sale on a liquidation.

And recital "I":

> 57 Management is also of the opinion that the Companies will be able to return more to the Creditors following the anticipated refinancing, since the Companies' debt structure will have been significantly improved and management's time and efforts will once again be concentrated on the business and operations of the Companies.

58 The reorganization plan contains as art. 1.01:

> **Purpose of Plan**
>
> 59 The purpose of this Plan is to permit the Companies to remain in possession of their undertaking, property and assets, and to continue to carry on their businesses, as reorganized, with the intent that the Companies will be able to pay each Creditor as much or more on account of its Claim, calculated on a Net Present Value basis, than it would on a liquidation of the Companies' assets via alternate proceedings available to wind up the affairs or liquidate the assets of insolvent debtors or other proceedings which might be initiated by Creditors to recover their Claims or enforce security granted to them by the Companies.
>
> **1.02 Effect of Plan**

60 This Plan involves the amalgamation and refinancing of the Companies and, generally, the amendment of certain terms of and the extension of time for satisfaction of debts of the Companies. Management believes that this Plan will allow the Companies to fulfill their obligations hereunder from the Trustco financing and income from their operations.

1.03 Principles of Plan

61 This plan has been formulated on the basis of the following principles:

62 (a) The acceptance of this Plan will allow the Companies to utilize their large tax loss position to assist in raising capital to repay the Creditors on the basis of their Claims, as restructured. Those tax losses are not available to the Companies or the Creditors in a bankruptcy of the Companies.

63 (b) The Companies' financial position permits them to take advantage of tax-assisted methods of financing under the Tax Act which will effectively reduce the cost of refinancing below the cost of any conventional method of refinancing. The First Distress Preferred Share issue will result in Net Proceeds sufficient to satisfy all cash payment obligations of the Companies to the Bank pursuant to the Settlement Agreement.

64 The plan goes on in a number of other paragraphs under the topic of "Principles of Plan" to discuss the details of that.

65 One of the relevant definitions is that of "Agreed Price", which is defined to mean:

66 ... the amount agreed to among the Companies and a Creditor as the value of a Property for the purposes of a Sale of that Property under this Plan or, in the absence of agreement within the time limited for such agreement by this Plan [the amount determined as a result of a specific system of appraisals or by arbitration].

67 Article III deals with the plan summary:

3.01 Amalgamation

68 The Companies will amalgamate to form the Amalgamated Company. The Amalgamated Company may, for tax purposes, incorporate a wholly- owned subsidiary to issue Distress Preferred Shares and loan the Net Proceeds to the Amalgamated Company. The Net Proceeds will be used by the Amalgamated Company to fulfill its obligations to Creditors in accordance with this Plan.

3.02 Financing of Debt Restructuring

69 The Companies have entered into the Settlement Agreement for the purpose of resolving all matters among the Companies, the Principals and the Bank. The Companies have received a firm commitment from Trustco to provide them with sufficient financing to permit $33,550,000 to be paid to the Bank under the Settlement Agreement. In addition, the Companies are currently negotiating with a bank to act as Guarantor to assist the Companies in raising sufficient funds to satisfy all their indebtedness to Priority Mortgagees and Property Tax Creditors. As a result, the Companies are now in a position to propose to their Creditors the following arrangements:

(a) The Bank

70 By the Settlement Agreement the Companies have agreed, inter alia, that on or before January 17, 1989 or such later date, not later than February 6, 1989, as may be agreed by the Bank, the Companies will, at their option, either pay the Bank the sum of $41,650,000 or pay the Bank the sum of $33,550,000 and deliver to the Bank title to all Non-Core Properties and the Mortgage Receivables, in consideration of which the Bank will acknowledge reduction of the Bank Debt by the sum of $41,650,000 and transfer and assign to Holdco or its nominee the remaining Bank Debt and the security therefor.

71 All actions commenced by the Companies against the Bank have been or have been agreed to be discontinued or dismissed by consent at the earliest practicable time after the execution of the Settlement Agreement. All actions

commenced by the Bank in respect of past dealings between them have been or are to be discontinued or dismissed by consent and the relationship between the Companies and the Bank will, upon performance of all conditions and obligations to be performed by the parties to the Settlement Agreement, be at an end. In the event of a default on the part of the Companies, including non-approval of this Plan by the requisite majority of Creditors of each Class or the Court within the time limits prescribed in the Settlement Agreement, the Bank may immediately become or cause its nominee to become the sole owner of all outstanding shares in the Companies and/or take title to such of the assets of the Companies, as the Bank shall require in its discretion.

(b) First Distress Preferred Share Issue

72 It is the intention of the Companies to cause Finco [a wholly-owned subsidiary of the Amalgamated Company] to issue sufficient Distress Preferred Shares to Trustco to realize Net Proceeds therefrom sufficient to pay $33,550,000 to the Bank. It is the intention of the Companies to satisfy their remaining obligations to the Bank under the Settlement Agreement either by raising monies on the Non-Core Properties and Mortgage Receivables as may be necessary to pay an additional $8,100,000 to the Bank or by transferring the Non-Core Properties and Mortgage Receivables to the Bank. The Companies have applied to Revenue Canada, Taxation for an advance tax ruling to authorize the issuance by a subsidiary of the Amalgamated Company of Distress Preferred Shares. The Companies have been advised by their tax advisors that such a ruling should be available to them in their current situation.

(c) Priority Mortgagees

73 After the Effective Date [i.e. the date upon which a final order is accepted for filing by the Registrar of Companies], a mortgage held by a Priority Mortgagee against a Property:

(i) will remain in full force and effect on its Existing Terms except as modified hereby;

(ii) will have its term extended to the earlier of the fifth anniversary of the Effective Date and March 31, 1994;

(iii) will have the interest payable thereunder adjusted to the applicable Five Year Rate or such lower rate as may be agreed between the Priority Mortgagee and the Companies.

This Plan contains provisions that govern the amount to be received by a Priority Mortgagee on the Sale of a Property and special provisions relating to interest rates and early redemption during the first six months of the extended term.

74 Article IX deals with priority mortgagees. Two particularly relevant sections are:

9.02 (d)

75 If a Property has been determined by the Companies, or is determined by the Companies as at the Effective Date, to be worth less than the amount due to all Priority Mortgagees holding mortgages against the Property and the Companies then determine and notify the appropriate Priority Mortgagee in writing not later than March 31, 1989:

76 (i) that the Property is integral to this Plan, then the Priority Mortgagee that would not receive the full amount of its Claim from the Sale Proceeds of the Property will reduce the amount of its mortgage to the Agreed Price and will sell and assign the balance of its Claim to Holdco or its nominee for $1.00; or

77 (ii) that it is in the best interests of the Companies, necessary under this Plan or required by the provisions of this plan to dispose of that Property, then the Priority Mortgagee that would not receive the full amount of its Claim from the Sale Proceeds of that Property will:

78 (A) cause a nominee of the Priority Mortgagee to purchase that Property at the Agreed Price by assumption of that portion of that Priority Mortgagee's Claim which is equal to the Agreed Price for that Property, and

79 (B) sell and assign the balance of its Claim to Holdco or its nominee for $1.00.

9.04 Agreement with Companies

80 Notwithstanding anything contained in this Article IX, if the Companies, before the Meetings:

(a) agree with any Priority Mortgagee as to specific provisions of its mortgage which may differ materially from those set out in this Plan; and

(b) those provisions are fully disclosed to the Creditors and the Bank before or at the Meetings;

the terms of that agreement will override the specific provisions of this Plan as they relate to that Priority Mortgagee and its mortgage.

81 The information circular which was distributed to creditors contains a complete list of the priority mortgagees. It deals with the subject of classes of creditors and talks about community of interest. Recited at p. 45 of the information circular is what the companies say happened with respect to changes in class designations.

82 The five Classes of Priority Mortgagees originally contemplated by the Proof of claim have been consolidated, following the Order of The Honourable Mr. Justice Trainor of July 5, 1988 permitting the Companies to file a consolidated Plan and the Companies' considerations in the development of the Plan, into one Class, Priority Mortgagees. Insofar as the treatment of Priority Mortgagees under the Plan is not dependent on or related to ownership of the various Properties and the mortgages will be serviced out of the continued Revenue generated by the Amalgamated Company, it was determined that Classes should not be constituted on the basis of the Company owning the Property. Instead, Priority Mortgagees are classified on the basis of the treatment of their Claims envisaged by the Plan and on the further premise that their Claims and priorities are not so dissimilar so as to make it impossible for them to consult together with a view to their common interest. Although the Priority Mortgagees are for the most part secured by charges against different Properties, their relative security positions are essentially the same. It is the Companies' position that differing terms of payment (i.e. maturity date and rate of interest) and differing security (i.e. Properties) do not sufficiently differentiate the Priority Mortgagees so as to require separate Classes. The Amended Petition filed with the Court by the Companies on August 25, 1988 contemplated two distinct classes of Priority Mortgagees, however, that distinction was made solely on the basis of how the Plan, at that time, affected the rights of various Priority Mortgagees. As a result of the Settlement Agreement and the consequent amendments to the Plan, that distinction is no longer relevant.

83 As I indicated earlier, the settlement agreement with the bank was distributed and there was disclosure of all the negotiations which occurred after documents were sent to the creditors.

84 Referring back to the three criteria which I mentioned and with respect to the first, which is strict compliance with all statutory require ments, I am satisfied that the companies have complied. There has been disclosure and full and adequate explanation of the proposal and how, in the opinion of the companies, it will function. The meetings were properly conducted in circumstances of disclosure and open response.

85 The second criteria is that all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the Act. With respect to this criteria I have read and considered all of the material which has been filed throughout the course of many proceedings and applications which I have heard in this matter, and I have, of course, considered the submissions which have been made to me by counsel.

86 The principal concern under this criteria is whether the classes of creditors were properly established. The only class to which objection has been taken is the priority mortgagee class. There was a dispute earlier about the bondholder classes, but as I indicated earlier in these reasons, that was resolved by an application to the court.

87 I want to refer again to the decision of Mr. Justice Kingstone in *Re Wellington*, supra, where [at p. 53] he refers with approval to the *Re Alabama* case, and then he refers to the case of *Sovereign Life Assur. Co. v. Dodd*, [1892] 2 Q.B. 573 (C.A.), and the judgment of Lord Esher M.R. who said:

> 88 The Act says that the persons to be summoned to the meeting ... are persons who can be divided into different classes — classes which the Act of Parliament recognizes, 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 ...
>
> 89 It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

90 Classes of creditors should be established, having in mind the principles found in the cases to which I have referred. Generally, one should consider, first, whether the debt is secured or not. That distinction is recognized in the Act. If there is security, what is the nature of it, what is the nature of the claim and what contractual rights exist? In these proceedings the companies first proposed to establish separate classes based on the fact that each mortgage was on a separate property.

91 If the companies' proposal for a consolidated approach to the plan is accepted, then, in my view, there can be no basis for separate classes on the ground that each mortgage is on a separate piece of property.

92 In the reasons for judgment which I gave in this matter on 5th July last, at p. 21 [C.B.R., p. 280] I referred to a decision of the United States Bankruptcy Court in *Re Snider Bros.*, 18 B.R. 230 (Mass. Bankruptcy Court, 1987), and I said:

> 93 I accept the analysis contained in the *Snider* case. It would be improper for the court to interfere with or appear to interfere with the rights of the creditors. In my view, that appearance would be created by making an order that the reorganizations be merged and consolidated for all purposes. The order sought in this part of the motion is refused. Of course that does not mean that the companies are barred from seeking from the creditors their approval of a consolidated plan. I say that consolidation is not appropriate at this time. The creditors may decide to accept a consolidated plan when they have had a full opportunity to consider the reorganization plans submitted to them.

94 That consolidated plan was put to the creditors, and it would seem that the vast majority of the creditors have accepted that concept.

95 An examination of the relationship between the companies and the priority mortgagees satisfies me that they are properly in the same class. The points of similarity are:

96 1. The nature of the debt is the same, that is, money advanced as a loan.

97 2. It is a corporate loan by a sophisticated lender who is in the business and aware of the gains and risks possible.

98 3. The nature of the security is that it is a first mortgage.

99 4. The remedies are the same — foreclosure proceedings, receivership.

100 5. The result of no reorganization plan would be that the lender would achieve no more than the value of the property, less the costs of carrying until disposal, plus the legal costs as well would come out of that. A possible exception would be if an order absolute left the creditor in the position of holding property for a hoped for appreciation in value.

101 6. Treatment of creditors is the same. The term varied to five years, the interest rates 12 per cent or less, and the amount varied to what they would get on a receivership with no loss for costs; that is, it would be somewhat equivalent to the same treatment afforded to the Bank of Montreal under the settlement agreement.

102 The points of dissimilarity are that they are separate properties and that there are deficiencies in value of security for the loan, which vary accordingly for particular priority mortgagees. Specifically with respect to Guardian and Excelsior, they are both in a deficiency position.

103 Now, either of the reasons for points of dissimilarity, if effect was given to them, could result in fragmentation to the extent that a plan would be a realistic impossibility. The distinction which is sought is based on property values, not on contractual rights or legal interests.

104 I turn then to the last of the criteria, that is, that the plan must be fair and reasonable. There can be no doubt that a secret, clandestine agreement giving an advantage as the price for voting support would defeat the proceedings.

105 The Supreme Court of Canada in *Hochberger v. Rittenberg* (1916), 54 S.C.R. 480, 36 D.L.R. 450 at 452 [Que.], dealt with this question. Fitzpatrick C.J.C. said:

> 106 Here there was a previous secret understanding that the appellants should receive security for their debt and a direct advantage over all the others who were contracting on the assumption that all were being treated alike. The notes sued on were given in pursuance of an agreement, which was void, as made in fraud of the other creditors ...

107 At p. 455 Duff J. said:

> 108 Any advantage, therefore, obtained by them as the price of their participation, which was not made known to the other parties, must be an advantage which they could not retain without departing from the line of conduct marked out in such circumstances by the dictates of good faith.

109 The material before me does not indicate any agreement of that kind. The plan permitted negotiation, and in fact there was negotiation with both Guardian and Excelsior before the meetings. All the results from negotiations which took place with other priority mortgagees were reported to both the class and the general meetings.

110 Guardian and Excelsior submit that by the special agreement reached with Relax its vote was bought in order to ensure the necessary majority in the class. They say it violates the principle of equality and that the vote cannot be considered bona fide for the purpose of benefitting the class as a whole.

111 The particulars with respect to the Relax mortgage and the negotiations which took place are set out in the material which has been filed. The basic and fundamental difference between the facts as presented by the companies on the one hand and Guardian and Excelsior on the other relates to the value of the property. There is an appraisal which indicates value in the amount of $3,700,000 and there is other material before me which indicates a value of something between $4,500,000 and $4,600,000.

112 The negotiations which took place and the arrangement which was made and which was presented to the meeting of the priority mortgagees involved a payment of a cash sum to Relax at some future date, not later than 18 months from the effective date, in return for a reduction of the Relax mortgage from something over $6,000,000 down to about $4,000,000.

113 The negotiations might, on the surface, appear to have been in the nature of an excessive payment to Relax for the consideration in their agreement, which agreement, incidentally, included an undertaking to vote in favour of the plan. But the answer given by the companies is that what in effect was happening at that meeting was a negotiation as to the agreed price and that this negotiation took place earlier rather than later and that the parties in fact came to an accord with respect to the agreed price and that the settlement between them was on that basis.

114 If that is so, it is something which took place in accordance with what is proposed by the reorganization plan. I have reviewed and re-read a number of times the submissions by the companies and particularly by counsel on behalf of Guardian and Excelsior. I am satisfied that I should accept the explanation as to what took place, which has been advanced on behalf of the companies.

115 The question, of course, is whether or not there is some preference which is given to one mortgagee over the other mortgagees, or the other creditors. This has been canvassed thoroughly in the submissions under the headings of interclass preferences and intraclass preferences.

116 I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence of values. There are the principles to which I have referred, as well as to the rights of majorities and the rights of minorities. Certainly, those minority rights are there, but it would seem to me that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

117 There is in the submissions considerable discussion of the personal guarantee given by Robert Gaglardi of the amount owing under the mortgages to the priority mortgagees who complain of the plan. That guarantee is there. The guarantee does not form part of the reorganization plan, in my view. It is not mentioned in the plan, that I remember, insofar as a negotiating factor is concerned, in any event, and it is something which should not form part of the negotiations.

118 The fact of the matter is that if the reorganization plan is not approved, then, no doubt, the bankruptcy proceedings would go ahead, and under those proceedings the second position with respect to real property interests would go to the Bank of Montreal who are in a position of having something like $120,000,000 owing to them at this time, so any claim for a shortfall by a first mortgagee, having in mind the possibility of collecting on a guarantee of Mr. Gaglardi's, would rank second to the Bank of Montreal's claim of $121,000,000. In those circumstances I just do not think it has any value.

119 What is the effect of the plan and those two priority mortgagees? In my view, neither is worse off than the "no plan condition", and they could stand to gain the amount otherwise thrown away in carrying costs and in legal costs.

120 In the circumstances and on the basis of the material before me, I would not think giving them the option of holding the properties after order absolute would be a viable choice weighty enough to find the companies' course to be unfair and unreasonable.

121 In conclusion, I am satisfied that the companies have complied with all statutory requirements regarding service, notice, convening and conduct of meetings and so on, and other matters of that kind. The plan which has been prepared is in conformity with the object of the Act and, in particular, the companies have properly classified the creditors of the companies.

122 The plan was approved by each class of creditors under the plan. The approval was unanimous in all cases except the priority mortgagees, and in that instance the required statutory majority in number and threequarters in value of the creditors voted in favour of it.

123 I do not find that the plan is unjust, unfair or is in the nature of a confiscation of the rights of creditors. So I am satisfied that the order should go in the form in which it is set out in the minutes attached to the motion.

124 I specifically would like to confirm that I would ask that the order contain a request to the United States Bankruptcy Court which had earlier indicated that it would await the outcome of these proceedings before taking any further steps in matters pending before it, and that request would be that they would consider the plan and approve and sanction it as they see fit, having in mind the proceedings which have taken place here and the reasons which I have given for my approval and sanction of the plan.

Application granted.

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Case Name:

Pacific Coastal Airlines Ltd. v. Air Canada

Between
Pacific Coastal Airlines Limited, plaintiff, and
Air Canada and Air BC Limited, defendants

[2001] B.C.J. No. 2580

2001 BCSC 1721

19 B.L.R. (3d) 286

110 A.C.W.S. (3d) 259

Vancouver Registry No. S003953

British Columbia Supreme Court
Vancouver, British Columbia

Tysoe J.

Heard: November 19 - 20, 2001.
Judgment: December 7, 2001.

(59 paras.)

Estoppel -- Estoppel by record (res judicata) -- Records of courts -- Res judicata as a bar to subsequent proceedings -- Cause of action estoppel v. issue estoppel -- Collateral issues decided in prior proceedings -- Practice -- Pleadings -- Striking out pleadings -- Grounds, abuse of process, hopeless suit -- Torts -- Interference with economic relations.

Application by Air Canada to dismiss Pacific's claims in tort. The claims were based upon conduct prior to an Order sanctioning a plan of compromise and arrangement restructuring Canadian Airlines Corporation and Canadian Airlines International under the Companies' Creditors Arrangement Act, (CCAA). Pacific was a regional carrier for Canadian. Canadian ran into financial difficulties and Air Canada agreed to merge with Canadian upon a financial restructuring. Pacific's tort claims arose from the termination by Canadian of its rights to operate its routes using their code

and its inability to obtain bookings using the code. In the CCAA proceeding Pacific's claim was determined to be $370,000. Pacific disputed this amount and stated that there were claims for damages for breach of contract, inducing breach of contract, breach of fiduciary duty and other economic torts which claims had not been formalized or adjudicated. On approval Pacific's claim was classified as that of an unsecured creditor to be paid 14 cents on the dollar of their claim. Pacific did not accept or appeal the determination and returned the payment. Pacific commenced this action asserting four tort claims and two claims pursuant to the Competition Act. This application was restricted to the tort claims for inducing breach of contract, unlawful interference with contractual relations, conspiracy and breach of confidence. Air Canada asserted that these claims were precluded by the CCAA proceedings on the basis of res judicata or abuse of process. It further maintained that the claims could not succeed because Pacific could not establish the causation link between their damages and the conduct of Air Canada since the CCAA proceedings had found that Canadian would have ceased operations if Air Canada had not provided financial support to it.

HELD: Application dismissed. The causes of action asserted by Pacific could not have been pursued in the CCAA proceedings. There was no basis for invoking the doctrine of res judicata or cause of action estoppel because the CCAA proceeding did not deal with disputes between creditors of Canadian and third parties. Issue estoppel did not apply as none of the criteria and matters considered in the CCAA proceeding involved a decision on an issue which was required to be proven by Pacific in order to establish their tort claims. The principal question in the CCAA proceeding was whether the restructuring plan was fair and reasonable. The re-alignment of the routes which gave rise to this action was only an incidental issue. The CCAA proceeding did not require an inquiry into matters prior to the filing of the plan of arrangement. The amount determined by the claims officer as owing to Pacific was based upon inadequate notice of termination of Pacific's agreement with Canadian and not upon Pacific's tort claims. There was no abuse of process as this action was not repetitious of the CCAA proceedings which did not involve a determination of any of Pacific's tort claims. It was not demonstrated that Pacific was unable to establish causation between the damages suffered and the improper actions of Air Canada.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, Competition Act, Rule 18A.

Counsel:

V. Philippe Lalonde and Kenneth P. Regier, Q.C., for the plaintiff.
Sean F. Dunphy and Michael J. Libby, for the defendants.

TYSOE J.:--

INTRODUCTION

1 The Defendants apply under Rule 18A for an order dismissing the Plaintiff's claims sounding in tort. These claims are based upon allegations of conduct by the Defendants prior to the Order granted on June 27, 2001 by the Alberta Queen's Bench sanctioning the plan of compromise and arrangement (the "Restructuring Plan" or the "Plan") of Canadian Airlines Corporation and Canadian Airlines International Ltd. (which I will refer to individually and collectively as "Canadian", unless the context requires them to be identified individually, in which case I will refer to them as "CAC" and "CAIL") under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA").

2 The Plaintiff's claims against the Defendants fall into two categories. The first category includes the tort claims of inducing breach of contract, unlawful interference with contractual relations, conspiracy and breach of confidence. The second category of claims relates to alleged breaches of the Competition Act, R.S.C. 1985, c. C-34, as amended. This Rule 18A application focuses only on the tort claims and does not relate to any of the claims based on the Competition Act. In addition, the Defendants have not required the Plaintiff to prove the elements of the tort claims on this application and it is agreed that I am to assume for the purposes of this application that the Plaintiff would be able to prove all of the requisite elements of the alleged torts. It is the position of the Defendants that, even if the Plaintiff could prove all of the requisite elements of the alleged torts, it is estopped from pursuing the tort claims as a result of determinations made in Canadian's CCAA proceedings or it is unable to prove that the Defendants' actions caused its loss.

FACTS

3 I will now set out the facts which underlie this matter. In view of the assumption which it has been agreed I am to make for the purposes of this application, it is not necessary for me to make any findings with respect to disputed facts. I will set out facts which I believe to be undisputed and I am being asked to give effect to findings of fact made by the Alberta Queen's Bench in the CCAA proceedings.

4 Canadian and Air Canada were the two national airlines in Canada during the years leading up to 2000. The two airlines flew planes on major national and international routes, and they made arrangements with regional carriers to service smaller communities within Canada. The Plaintiff was one of the regional carriers which worked with Canadian. Air BC Limited, which is a wholly owned subsidiary of Air Canada, has been one of the regional carriers for Air Canada.

5 On or about November 1, 1997, the Plaintiff and CAIL entered into an agreement (the "Agreement") in which it was agreed that the Plaintiff would operate its air services to carry passengers and cargo on behalf of CAIL on the route between Nanaimo and Vancouver. The routes covered by the Agreement were subsequently expanded to include routes between Vancouver and

two other communities on Vancouver Island, Comox and Campbell River. The Agreement permitted the Plaintiff to use CAIL's flight designator code (the "CP Code") on these routes. This permission enabled the Plaintiff to sell tickets with the CP Code, which facilitated connections to Canadian's national and international flights departing from and arriving in Vancouver. The Agreement provided that it was to renew automatically for one year periods from November 1 to October 31 in each year after 1997 unless terminated by 120 days' notice prior to November 1 (or cancelled pursuant to provisions of the Agreement which are not relevant to this application).

6 Canadian encountered financial difficulties through most of the 1990s. It underwent financial restructurings in 1994 and 1996, but continued to sustain losses. Canadian had discussions with Air Canada in early 1999 about a potential merger or other transaction but they were unable to reach an agreement. Canadian then pursued other alternatives but was not successful. On November 11, 1999, a numbered company named 853350 Alberta Ltd. ("853350"), which was financed and partially owned by Air Canada, made a take-over bid to acquire all of the shares of CAC (which owned the majority of the shares of CAIL). Air Canada indicated that it would merge with Canadian but only if Canadian completed a financial restructuring which would enable Air Canada to effect the acquisition on a financially sound basis.

7 In December 1999, Air Canada purchased certain assets from Canadian for $45 million in order to allow Canadian to have sufficient liquidity to continue operations until the completion of the take-over bid. In early January 2000, 853350 purchased 82% of CAC's common shares and all of its preferred shares. Canadian and Air Canada then embarked on efforts to restructure the financial affairs of Canadian on a consensual basis without having to resort to formal proceedings.

8 It is alleged in the present action that on or about January 17, 2000, a representative of Canadian Regional Airlines Ltd. ("Canadian Regional"), a subsidiary of CAIL, told the Plaintiff that the use of the CP Code was being taken away from it. By letter dated February 4, 2000, the Plaintiff was advised the following by Canadian Regional:

> This letter is to notify you that effective April 2, 2000 the flying you are currently doing under CP code pursuant to the Commercial Agreement on Vancouver to Nanaimo, Campbell River and Comox will be terminated.

Effective April 2, 2000, Air BC Limited began operating the three routes using the CP Code (as well as the AC code, which it had been previously using as the regional carrier for Air Canada). It is alleged that all bookings made with the Plaintiff on these routes prior to April 2, 2000 were transferred to Air BC Limited and that the Plaintiff's flights using the CP Code were removed from the computer reservation systems so that no bookings using the CP Code could be made for the benefit of the Plaintiff after April 2, 2000.

9 On February 1, 2000, Canadian announced a moratorium on payments to its lenders and lessors. It continued with its private negotiations but pressure from certain creditors forced it to commence the CCAA proceedings in the Alberta Queen's Bench on March 24, 2000. A stay order

was obtained by Canadian on that day and it provided, among other things, that Canadian was authorized to terminate or cancel such contracts and agreements as it deemed advisable, provided that there was to be provision in the Restructuring Plan for the consequences of any such terminations or cancellations.

10 By Orders in the CCAA proceedings dated April 7 and May 8, 2000, Paperny J. appointed a claims officer and set out a procedure for the creditors of Canadian to dispute the amounts of their claims for voting and distribution purposes should they disagree with the amounts set out in claims lists prepared by Canadian. The procedure included an appeal to the court in the event that the creditor disagreed with the amount of its claim as determined by the claims officer. The April 7 Order also provided that Canadian was to file its Restructuring Plan by April 25 and that meetings of Canadian's creditors were to be held on May 26 to consider and vote upon the Plan.

11 Canadian listed the Plaintiff's claim to be in the amount of $370,000. The Plaintiff did not accept this figure and filed a Voting/Distribution Dispute Notice dated May 4, 2000 (the party filling out the form was given the choice of indicating whether it disputed the amount of its claim for purposes of voting and for purposes of distribution, and the Plaintiff indicated that it was disputing the amount of its claim for purposes of distribution). In the Dispute Notice, the Plaintiff stated that the Agreement was wrongfully and effectively terminated on April 1, 2000 and that Air Canada had taken over the routes previously operated by the Plaintiff. The Dispute Notice stated that there were claims for damages against both Canadian and Air Canada for breach of contract, inducing breach of contract, breach of fiduciary duty and certain other economic torts and that the claims had not been formalized for court or regulatory purposes as yet. Attached to the Dispute Notice was an appendix setting out the Plaintiff's dollar claim in the amount of $1,537,818, together with a further sum of $64,000 regarding computerized reservation system charges. The Dispute Notice stated that, in addition, there were claims in an, as yet, undetermined amount for damages for breach of contract, inducing breach of contract, breach of fiduciary duty and other economic torts and that the position and liability of Air Canada in relation to both Canadian and the Plaintiff had yet to be determined.

12 Canadian filed its Restructuring Plan and the creditor groups approved it at the meetings held on May 26, 2000. The Plan provided different treatment for four creditor groups. The Plaintiff fell within the class called the affected unsecured creditors which had total claims of approximately $700 million. The Plan proposed that the affected unsecured creditors would receive 14 cents on the dollar of their claims. This payment was to be funded by Air Canada. The Plan had the usual type of release provision, by which the affected creditors were deemed to release Canadian and its subsidiaries of all claims against them upon the implementation of the Plan.

13 In accordance with the provisions of the CCAA, it was necessary to have the Restructuring Plan sanctioned by the court. The court hearing, which is often referred to as the fairness hearing, was set before Paperny J. on June 5, 2000, and it lasted until June 19, 2000. There were two vociferous opponents of the Plan, Resurgence Asset Management LLC (which is colloquially

referred to as a vulture fund) and four minority shareholders of CAC. Paperny J. gave her decision on June 27, 2000 (cited as Re Canadian Airlines Corp., 2000 ABQB 442; [2000] A.J. No. 771). I will subsequently deal with her reasons in some detail but I will simply indicate at this stage that she sanctioned the Plan and dismissed applications which had been brought by Resurgence and the minority shareholders.

14 An articled student at the Alberta law firm representing the Plaintiff attended at the fairness hearing on June 16 to seek a date for an application in the following week for the Plaintiff to be excluded from the CCAA proceedings. Another member of the law firm appeared on June 19 and stated that she was finalizing her instructions but had drafted a notice of motion and affidavit.

15 On June 22 the Plaintiff's Alberta law firm wrote a letter to the claims officer, with a copy to Canadian's lawyers, stating that the Plaintiff would not be participating in the claims procedure as it did not intend to claim any distribution under the Plan. On June 26 Canadian's lawyers wrote back pointing out that the Plaintiff would nevertheless remain an affected unsecured creditor and have its claim compromised in accordance with the provisions of the Plan. The Plaintiff's lawyers replied on June 28, stating that (i) the Plaintiff would not be making a claim for distribution and would not be participating in the process, and (ii) the claims officer had neither the role nor the jurisdiction to continue with the disputed claims process vis-a-vis the Plaintiff. On July 10, the Plaintiff's lawyers wrote a letter to the claims officer stating that the Plaintiff intended to sue Air Canada in British Columbia and that the Plaintiff withdrew its Dispute Notice and took no position on the quantum of its claim against CAIL for the purposes of compromise under the Plan.

16 The claims officer proceeded with the determination of the Plaintiff's claim. He considered submissions made by Canadian's lawyer and, on July 12, he determined the Plaintiff's claim in the amount of $370,000. No appeal was taken from this determination

17 The Restructuring Plan was implemented and Canadian was subsequently merged with Air Canada. The Plaintiff was sent a cheque in the amount of $51,800 as part of the distribution under the Plan but counsel for the Plaintiff returned the cheque to Canadian.

18 This action was commenced by the Plaintiff on July 20, 2000 against Air Canada and Air BC Limited. The Plaintiff asserts four tort claims and two claims pursuant to the Competition Act. As mentioned earlier, the present application is restricted to a consideration of the four tort claims of inducing breach of contract, unlawful interference with contractual relations, conspiracy and breach of confidence.

ISSUES

19 The issues on this application, as framed by counsel for the Defendants with some modification by me, are as follows:

(a) do the doctrines of res judicata or abuse of process prevent the Plaintiff

from asserting the tort claims?

(b) should the tort claims be dismissed on the basis that the Plaintiff cannot establish causation between the conduct of the Defendants and the damages it suffered?

DISCUSSION

(a) Res Judicata and Abuse of Process

20 Much has been written in case decisions and textbooks about the doctrines of res judicata and abuse of process. Although many people commonly refer separately to the doctrines of res judicata and issue estoppel, they are properly viewed as part of the principle of estoppel by res judicata, the two components of which are cause of action estoppel and issue estoppel. In simple terms, the doctrines of res judicata and abuse of process within the present context stand for the proposition that a party may not litigate a cause of action or an issue which has been or could have been litigated in earlier proceedings. Counsel do not have a fundamental disagreement about the relevant law, and the dispute on this application concerns the application of the law to the present circumstances.

21 The decision in 420093 B.C. Ltd. v. Bank of Montreal (1995), 128 D.L.R. (4th) 488 (Alta. C.A.) contains an excellent discussion of the topics of cause of action estoppel, issue estoppel, collateral attack on prior orders and abuse of process. As the decision is reported, I will not quote from it extensively. After pointing out that estoppel by res judicata is a rule of evidence, O'Leary J.A. summarized the principle in the following terms:

> A prior judicial decision will not raise an estoppel by res judicata, either issue estoppel or cause of action estoppel, unless (i) it was a final decision pronounced by a court of competent jurisdiction over the parties and subject matter; (ii) the decision was, or involved, a determination of the same issue or cause of action as that sought to be controverted or advanced in the present litigation; and (iii) the parties to the prior judicial proceeding or their privies are the same persons as the parties to the present action or their privies. (p. 494)

In dealing with the topic of abuse of process, the Alberta Court of Appeal relied on another leading authority, the decision of the Manitoba Court of Appeal in Solomon v. Smith (1987), 45 D.L.R. (4th) 266, 22 C.P.C. (2d) 12, [1988] 1 W.W.R. 410. O'Leary J.A. quoted the following portion of a passage from that decision discussing the use of the doctrine of abuse of process in circumstances where res judicata cannot be invoked:

> I agree ... that a plea of issue estoppel is not available. However, to permit the Statement of Claim to proceed would be an abuse of process and that is the principle applicable. In considering this doctrine, it seems to me prudent to avoid hard and fast institutionalized rules such as those which attach to the plea of issue

> estoppel. By encouraging the determination of each case on its own facts against the general principle of the plea of abuse, serious prejudice to either party as well as to the proper administration of justice can best be avoided. ... we must be vigilant to ensure that the system does not become unnecessarily clogged with repetitious litigation of the kind here attempted. There should be an end to this litigation. To allow the plaintiff to retry the issue of misrepresentation would be a classic example of abuse of process - - a waste of time and resources of litigants and the court and an erosion of the principle of finality so crucial to the proper administration of justice. (p. 275 of 45 D.L.R. (4th) and pp. 504-5 of 128 D.L.R. (4th))

I will now address each of these principles in the context of the present circumstances.

(i) Cause of action estoppel

22 Cause of action estoppel is clearly inapplicable in the present circumstances. The causes of action being asserted in the present litigation were not and could not have been pursued in the CCAA proceedings. There was no determination in the CCAA proceedings with respect to the causes of action alleged against the Defendants of inducing breach of contract, interference with contractual relations, conspiracy and breach of confidence.

23 Counsel for the Defendants submits that res judicata can extend to matters that ought to have been raised and is not restricted to issues actually determined on the merits. I agree with that proposition but I do not agree with the attempt of counsel to extend it to the present case by arguing that the Plaintiff could have advanced the allegations in its Dispute Notice before the Alberta Court and is now precluded from advancing them in this action.

24 It is true that, in addition to alleging breach of contract by Canadian, the Dispute Notice made reference to allegations against Air Canada for inducing breach of contract, breach of fiduciary duty and other economic torts. However, the Plaintiff could not have pursued those claims in the CCAA proceedings. The purpose of a CCAA proceeding, as reflected in the preamble to the legislation, is to "facilitate compromises and arrangements between companies and their creditors". Its purpose is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

25 A somewhat analogous situation arose in Royal Bank v. Gentra Canada Investments Inc., [2000] O.J. No. 315 (Ont. Sup. Ct.). The Royal Bank sought to recover from Gentra an amount paid by it on a letter of credit issued to Gentra in connection with obligations of a company which subsequently initiated CCAA proceedings. In the CCAA proceedings, title to one of the debtor company's properties was vested in Gentra and the Royal Bank had been given notice of the application to have the property vested in Gentra. One of the issues in the subsequent litigation was

whether the Royal Bank was estopped from objecting to the allocation which Gentra made to the funds received under the letter of credit in respect of this property, given that it could have appeared at the hearing of the application to have the property vested in Gentra. Lederman J. held that there was no basis for invoking the doctrine of res judicata or issue estoppel because the CCAA proceeding did not deal with disputes between creditors inter se and there was no provision in the restructuring plan expressly delineating the dispute between Gentra and the Royal Bank.

26 I hold that the Plaintiff is not prevented by the doctrine of cause of action estoppel from pursuing its tort claims in this action.

(ii) Issue estoppel

27 The question here is whether there was a determination of an issue in the CCAA proceedings which the Plaintiff is estopped from denying and which fatally affects its claims in this litigation. The two potential sources of such a determination are the ruling of Paperny J. in sanctioning the Restructuring Plan and the ruling of the claims officer in ascertaining the amount of the Plaintiff's damages.

28 The global issue before Paperny J. was whether the Restructuring Plan should be sanctioned. She stated that the criteria which needed to be satisfied were as follows:

> (1) there must be compliance with all statutory requirements;
> (2) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
> (3) the plan must be fair and reasonable.
>
> (para. 60)

In connection with the fairness and reasonableness of the Plan, Paperny J. considered the following matters in addition to the favourable vote of the creditors:

> a. The composition of the unsecured vote;
>
> b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;
>
> c. Alternatives available to the Plan and bankruptcy;
>
> d. Oppression;
>
> e. Unfairness to Shareholders of CAC; and

f. The public interest.

(para. 96)

After considering these matters, Paperny J. concluded that the Plan was fair and reasonable.

29 In my view, none of the above criteria and matters considered by Paperny J. involved a decision on an issue which is required to be proven by the Plaintiff in order to sustain its tort claims in this action. Paperny J. was directing her mind to the statutory requirements and to the fairness and reasonableness of the Plan. She was not directing her mind to activities of Air Canada in connection with Canadian's relationship with the Plaintiff.

30 The closest that Paperny J. came to considering matters relevant to this litigation was when she dealt with the allegation of Resurgence that Canadian and Air Canada had oppressed, unfairly disregarded or unfairly prejudiced their interests. In its Notice of Motion, Resurgence alleged, among other things, that (i) Air Canada induced Canadian to breach its obligations under its contract with Resurgence and other noteholders, (ii) Air Canada conspired with Canadian to default on the notes and to cause the failure of Canadian, and (iii) Air Canada and 853350 used their control of Canadian to, among other things, cause Canadian to re-align its flight route networks, thereby decreasing Canadian's revenues and increasing Air Canada's profitability through reduced competition.

31 In her Reasons for Decision, Paperny J. summarized Resurgence's allegations in the following two passages:

> Resurgence alleges that it has been oppressed or had its rights disregarded because the Petitioners and Air Canada disregarded the specific provisions of their trust indenture, that Air Canada and 853350 dealt with other creditors outside of the CCAA, refusing to negotiate with Resurgence and that they are generally being treated inequitably under the Plan. (para. 146)

> Resurgence complained that certain transfers of assets to Air Canada and its actions in consolidating the operations of the two entities prior to the initiation of the CCAA proceedings were unfairly prejudicial to it. (para. 153)

Paperny J. found either that these allegations were not proven or did not constitute unfairness. All but one of these allegations are unrelated to the Plaintiff's tort claims. The only one of the allegations that has some relevance to the Plaintiff is the one which Resurgence referred to as the re-alignment of the flight route network and which Paperny J. referred to as a consolidation of the operations of Air Canada and Canadian prior to the commencement of the CCAA proceedings. I quote the relevant portions of the two paragraphs in which Paperny J. dealt with this allegation:

> The evidence establishes that the financial support and corporate integration that has been provided by Air Canada was not only in Canadian's best interest, but its only option for survival. The suggestion that the renegotiations of these leases, various sales and the operational realignment represents an assumption of a benefit by Air Canada to the detriment of Canadian is not supported by the evidence.
>
> I find the transactions predating the CCAA proceedings, were in fact Canadian's life blood in ensuring some degree of liquidity and stability within which to conduct an orderly restructuring of its debt. There was no detriment to Canadian or to its creditors, including its unsecured creditors.
>
> (para. 155 and 156)

32 On a fair reading of the Reasons for Decision, the most that can be said in respect of the operational realignment is that Paperny J. held that the evidence did not support a conclusion that Air Canada had received an overall benefit or that the creditors of Canadian were prejudiced. She did not absolve Air Canada of any torts which it may have committed in connection with the operational realignment. In stating that there was no detriment to Canadian's creditors, she was referring to the ability of the creditors to recover from Canadian's assets and she was not suggesting that there was no detriment to creditors such as the Plaintiff who claimed to be harmed by torts committed by Air Canada.

33 In his oral submissions, counsel for the Defendants borrowed language found in constitutional cases and submitted that the pith and substance of the reasons of Paperny J. was that the re-alignment of the routes was fair and reasonable and that the very issue before her was the integration of the routes. I disagree. The principal question before Paperny J. was whether the Restructuring Plan was fair and reasonable. The re-alignment of the routes was an incidental issue in the sense of determining whether the process leading up to the Plan was unfair on the basis that Air Canada was obtaining an unfair benefit. She was not giving a global blessing or release in respect of all actions taken by Air Canada in connection with the re-alignment of the routes, including any torts it may have committed. Nor was she deciding that any of the requisite elements of the torts alleged in this action did not exist.

34 A similar situation existed in Samos Investments Inc. v. Pattison, [2000] B.C.J. No. 1344, although that decision involved a consideration of the principle by which collateral attacks on orders are prohibited. In that case, an order had been made approving a company's plan of arrangement under the Company Act by which the shares of minority shareholders were acquired at a price of $70 a share. One of the minority shareholders subsequently sued numerous parties alleging that prior to the plan of arrangement there had been a conspiracy to increase the number of

shares in the company held by the majority shareholder and thereby dilute the value of the minority shares (from $100 a share to the $70 acquisition value). The majority of the B.C. Court of Appeal held that the subsequent action did not constitute a collateral attack on the order approving the plan of arrangement and refused to grant a stay of proceedings in respect of the subsequent action.

35 Rowles and Mackenzie JJ. wrote concurring judgments on behalf of the majority. Rowles J. held that the inquiry by the Court on the application to approve the plan of arrangement was limited by the terms of the plan and the relevant legislation, and that an application to approve a plan does not require an inquiry into past matters. Mackenzie J. agreed with the position taken by the company at the hearing to approve the plan that the objections made by the minority shareholders (and which were the subject matter of the subsequent action) were outside the scope of the arrangement hearing.

36 Similarly in the present case, the application to sanction the Restructuring Plan did not require an inquiry into past matters such as the actions of the Defendants prior to the filing of the Plan in relation to the Agreement. Those past matters were outside the scope of the fairness hearing before Paperny J. Although Paperny J. did consider past matters when she dealt with the allegations of oppression, she was required to do so because Resurgence had filed a notice of motion alleging that the actions of Canadian, Air Canada and 853350 were oppressive and unfairly prejudicial within the meaning of s. 234 of the Business Corporations Act, S.A. 1981, c. B-15. While there may be occasion when a court will have to consider past matters in order to determine whether a restructuring plan under the CCAA is fair and reasonable, those past matters would have to be related to the contents of the restructuring plan. In the instant case, the actions in relation to the breach or termination of the Agreement were not related to the provisions of the Plan and were not matters which Paperny J. was asked to consider in deciding whether the Plan was fair and reasonable.

37 The second potential source of a determination in the CCAA proceedings of an issue which may be in contention in this action is the ruling of the claims officer in determining the amount of the Plaintiff's claim. The claims officer did not decide an issue which is fatal to the Plaintiff's tort claims in this litigation because he accepted that there had been inadequate notice of termination of the Agreement and he assessed the damages flowing therefrom. Although the Plaintiff's Dispute Notice made reference to economic tort claims, the claims officer did not deal with any of them and restricted his findings to damages caused by Canadian's inadequate notice of termination.

38 During the course of submissions, I raised the possibility that the Plaintiff may be estopped in this action from denying the amount of the damages caused by the alleged torts on the basis that those damages are the same as the damages caused by Canadian's breach or wrongful termination of the Agreement. Counsel for the Plaintiff responded that the measure of damages for a tort is different from the measure of damages for breach of contract. Counsel referred me to two texts on the topic of damages, J.G. Fleming, Law of Torts, 9th ed. (Sydney: LBC Information Services, 1998) at p. 765 and H.D. Pitch and R.M. Snyder, Damages for Breach of Contract, 2nd

ed.(Vancouver: Carswell, 1989 and updates) at pp. 1-1 and 1-2 where, among other things, it is stated that it may be possible to recover aggravated and exemplary damages in tort claims, but not in actions for breach of contract.

39 I have concluded that I should not decide on this application whether the Plaintiff is estopped from asserting compensatory damages in this action which are different from the damages assessed by the claims officer in the CCAA proceeding. The Notice of Motion for this application requests an order dismissing the Plaintiff's tort claims. If I were to conclude that the Plaintiff is estopped from asserting different compensatory damages, it would only limit the amount of its damages which can be recovered in this litigation and it would not lead to a dismissal of any of its tort claims. Hence, it is my view that I would be going beyond the purview of the Notice of Motion if I made a ruling on this point. In addition, the point was raised by me during the course of submissions and counsel did not have a full opportunity to research and consider the issue. I leave the point open for further argument at trial (or on a subsequent Rule 18A application if leave were to be granted pursuant to Rule 18A(12)).

40 I hold that there was not a determination of any issue in the CCAA proceedings which the Plaintiff is estopped from denying and which would lead to the dismissal of any of its tort claims.

(iii) Abuse of process

41 As noted in Solomon v. Smith, the doctrine of abuse of process may be invoked to prevent repetitious litigation when the requirements of estoppel by res judicata have not been technically fulfilled.

42 In my view, with the potential exception of the amount of compensatory damages, the present litigation is not repetitious of the CCAA proceedings. Those proceedings dealt with the restructuring of Canadian's financial affairs as a prelude to a merger with Air Canada, including the compromising of the claims of Canadian's creditors. The present litigation involves a determination of whether Air Canada and its subsidiary, Air BC Limited, committed any torts against the Plaintiff in connection with the re-alignment of Canadian's regional routes (in particular, the three regional routes flown by the Plaintiff under the terms of the Agreement). The CCAA proceedings did not involve a determination of any of those tort claims or of any of the requisite elements of the tort claims.

43 In addition to submitting that the Plaintiff is attempting to undermine the CCAA process by re-litigating the very issues and factual determinations already made by the Alberta Court (a submission which I have rejected), counsel for the Defendants argues that this proceeding is an affront to the Court because it ignores that the very foundation of its allegations was expressly permitted by the Alberta Court in advance of the breach of the Agreement and was subsequently absolved by it.

44 There is a disagreement between the parties as to whether Canadian breached the Agreement

or wrongfully terminated it. A sub-issue in this regard is whether the wrong was committed when the February 4, 2000 letter was sent (or on January 17, 2000 when the Plaintiff was orally advised that the CP Code was being taken away from it) or when Air BC Limited began flying the routes using the CP Code on April 2, 2000. In making the submission, counsel for the Defendants is relying on the fact that the March 24, 2000 stay order in the CCAA proceedings authorized Canadian to terminate such contracts and agreements as it deemed advisable.

45 Even assuming that Canadian's wrong was a termination of the Agreement which occurred after the March 24, 2000 stay order, it cannot be said that the Alberta Court authorized the commission of any torts by the Defendants. All it did was authorize Canadian to terminate contracts and agreements, provided that it made provision for any consequences in the Restructuring Plan. Canadian was still liable for any wrongful terminations, albeit that the damages in respect of any wrongful terminations could be compromised by the Plan (provided that the Plan received the requisite approval or sanctioning by Canadian's creditors and the Alberta Court). The authorization contained in the March 24 order did not relieve Canadian, much less the Defendants, of any liability incurred as a result of the termination of any of Canadian's contracts or agreements.

46 Nor did the Alberta Court subsequently absolve either Canadian or the Defendants in respect of the breach or termination of the Agreement. The most the Alberta Court held in connection with the re-alignment of flight routes was that it did not render the Restructuring Plan unfair or unreasonable. It did not purport to relieve either Canadian or the Defendants of the consequences of the breach or termination of the Agreement or any other of Canadian's contracts or agreements. The relief achieved by Canadian in connection with the breach or termination of the Agreement was that the consequential damages were compromised by operation of the CCAA when the Plan was approved or sanctioned by Canadian's creditors and the Alberta Court. This compromise operated for the benefit of Canadian, not the Defendants (this statement is subject to an argument which was not pursued on this application to the effect that Air Canada is entitled to the benefit of the release contained in the Plan as a result of its subsequent merger with Canadian).

47 I hold that it is not an abuse of process to allow the Plaintiff to pursue the tort claims in this action.

(b) Causation and Damages

48 One of the findings made by Paperny J. from the evidence introduced at the fairness hearing was that Canadian would have ceased operations if Air Canada had not provided financial support to it commencing in December 1999. Counsel for the Defendants submits that based on this finding, the Plaintiff cannot succeed on its tort claims because it would have suffered its losses in any event of the Defendants' actions. In support of this submission, counsel relies on the decisions in Cabral v. Metzger (1991), 83 Alta. L.R. (2d) 271 (C.A.), Edwin Hill & Partners v. First National Finance Corp., [1988] 3 All E.R. 801 (C.A.), Rogers Cable TV Ltd. v. 373041 Ontario Ltd., [1996] O.J. No. 2033 (Gen. Div.) and Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate

Ltd., [1983] 6 W.W.R. 385 (S.C.C.).

49 In my view, these decisions are all distinguishable. None of them stand for the proposition that when a party provides financial support to allow a company to continue in business, that party is not liable in respect of torts involving or related to the company which it may subsequently commit on the basis that the torts are not the cause of any damages.

50 In both the Edwin Hill and Rogers Cable decisions, the Court relied on the concept of superior rights. In Edwin Hill, a property developer encountered financial difficulties and a mortgagee of the developer's property was in the position to exercise its power of sale and appoint a receiver. The mortgagee agreed that it would finance the development rather than pursue its remedies but, as a condition of this agreement, it required the developer to terminate its contract with an architect. In an action by the architect against the mortgagee for procuring a breach of its contract, the Court held that the mortgagee was not liable on the basis that it was justified to interfere with the contract as a result of its superior right to receive payment of its loan.

51 Similarly, in Rogers Cable, an owner of an apartment building was sued for interfering with a contract between Rogers Cable and tenants of the building. The Court held that the owner of the apartment building was justified in interfering with the contractual rights because it had a superior right to deal with the tenants of the building.

52 In my opinion, these two decisions have no application to the circumstances giving rise to this action. It has not been shown that the Defendants had any rights which were superior to the rights of the Plaintiff. The fact that Air Canada provided financial support to Canadian by way of purchasing assets from Canadian does not give it superior rights over other parties, including the Plaintiff.

53 The Cabral case involved a personal injury claim. The trial judge simply held that the plaintiff had not proved that his hearing loss was caused by the motor vehicle accident in question, especially in view of the fact that he had worked in a noisy environment for some years. This conclusion was upheld on appeal. In my view, the decision is distinguishable from the present circumstances because in Cabral, there were two competing potential causes of the hearing loss and the trial judge held that it had not been proven that the accident was the cause. In the case at bar, the Plaintiff's damages were caused by a breach or a termination of the Agreement, and there was no other competing cause in operation at the relevant time.

54 The fourth case relied upon by counsel for the Defendants on this point is Canada Cement LaFarge. In that case, the Court held that there was no causal connection between the unlawful activities of the defendant and the demise of the plaintiff's enterprise because it was not shown that the defendant's use of an imported raw material which competed with the plaintiff's product was part of an unlawful scheme to injure the plaintiff in its business. This decision is also distinguishable because it was not proven in that case that the unlawful activities of the defendant were a cause of the plaintiff's demise. In the present case, the breach or termination of the Agreement did give rise to the Plaintiff's loss and the issue at trial will be whether the Defendants

tortiously participated in the breach or termination.

55 The Defendants' argument may have had a more solid footing if the financial support provided to Canadian was causally linked to Canadian's breach or termination of the Agreement. For example, Air Canada could possibly have acquired superior rights if it was a condition to its provision of financial support that Canadian terminate the Agreement, but there is no evidence of any conditions being attached to Air Canada's $45 million purchase of assets from Canadian. In addition, it should be noted that the financial support was in the form of purchases of assets and, while the purchase monies provided liquidity for Canadian, there is nothing to indicate that the aggregate purchase price was in excess of the fair market value of the assets.

56 Similarly, the Defendants' argument would have more force if the alleged tortious acts had saved Canadian from its demise and the evidence established that Canadian would inevitably have failed if those acts had not been taken. In my view, the evidence before me does not go that far. Air Canada had announced that it would only merge with Canadian if there was a financial restructuring so that the acquisition could be accomplished on a financially sound basis but that condition did not necessarily involve a breach or termination of the Agreement. In response to Resurgence's complaint that Air Canada caused Canadian to re-align its flight route networks, Paperny J. did state that the financial support and corporate integration provided by Air Canada was Canadian's only option for survival. However, this finding does not mean that Canadian's only option for survival was the breach or wrongful termination of the Agreement. Canadian may have been able to survive if it gave timely notice to bring the Agreement to an end as of October 31, 2000, and it has not been demonstrated that it was essential to Canadian's continued existence for the Agreement to be breached or wrongfully terminated as of April 2, 2000.

57 The evidence before me does not establish that the Agreement would inevitably have been breached or terminated apart from the February 4, 2000 letter (or the January 17, 2000 conversation) and the actions which took place on April 2, 2000. In other words, it has not been shown that these matters did not cause the Plaintiff's loss because there was another cause which would have inevitably brought about the loss.

58 I hold that it has not been demonstrated that the Plaintiff is unable to establish causation between the conduct of the Plaintiff and the damages it suffered as a result of allegedly improper actions of the Defendants.

CONCLUSION

59 I dismiss the Defendants' application. I grant costs of the application to the Plaintiff in the cause.

TYSOE J.

cp/i/qlsng/qlbrl

1989 CarswellBC 330
British Columbia Supreme Court

229531 British Columbia Ltd., Re

1989 CarswellBC 330, [1989] B.C.W.L.D. 641, [1989] C.L.D. 381, 13 A.C.W.S. (3d) 303, 72 C.B.R. (N.S.) 310

Re 229531 B.C. Ltd.

Hinds J.

Heard: November 14, 15 and 17, 1988
Judgment: January 16, 1989
Docket: Vancouver No. A881623

Counsel: *D.W. Donohoe* , for petitioner.
P.S. Hyndman , for Pontiac Holdings Ltd.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by Court — "Fair and reasonable"

Application dismissed.

The debtor company operated a cabaret in premises leased from P. Ltd. which had been renovated at the debtor's expense. It failed to pay for most of the renovations, and liens were filed against the premises. The major lien holder B. Corp. obtained judgment against both the debtor, who authorized the renovations, and P. Ltd. who owned the building. The combination of this judgment, the other liens, and rental arrears owing to P. Ltd. caused the debtor to become insolvent and to seek relief under the Companies' Creditors Arrangement Act. An ex parte order was granted authorizing the debtor to file a reorganization plan between it and its secured and unsecured creditors.

A meeting of creditors was held. P. Ltd. attended and, prior to the convening of the meeting, attempted to obtain changes to the plan. P. Ltd. was unsuccessful, and left prior to the formal commencement of the meeting. The plan was unanimously approved by the secured and unsecured creditors who voted. The debtor applied under s. 6 for court approval of the plan.

Held:

Application dismissed.

Before exercising discretion to approve a plan of arrangement, a judge should consider whether all statutory requirements which are in the nature of conditions precedent have been strictly complied with, whether anything not authorized by statute has been done and whether the plan of arrangement is fair and reasonable. In this case all statutory requirements which were conditions precedent under the Act had been strictly complied with, but the material sent out to the creditors did not comply with s. 277 of the Company Act. Furthermore, things had been done which were not authorized by statute. The debtor had not identified the various classes of creditors, as required by ss. 4, 5 and 6, but had simply taken a pool vote.

The arrangement was not fair and reasonable to P. Ltd., as the plan would release the principals of the debtor company from liability under their personal guarantees to P. Ltd. The plan relied upon the use of a liquor licence which was treated as an asset of the debtor but which belonged to the principals of the debtor and had been pledged to P. Ltd. as additional security for rent. P. Ltd. argued that it was a secured creditor. If this were held to be so, the plan likely was not approved by at least three-fourths of that class of creditors, as required by the Act. In addition, the plan assumed a dramatic reversal in the debtor's business, and appeared to be economically unfeasible.

As well, there were shortcomings in the manner in which the debtor's original ex parte application had been brought. The Act refers to "a summary application", which does not necessarily mean an ex parte application. Also, the material filed on that application failed to disclose some material information. While none of these individual circumstances would necessarily be fatal to the application, their cumulative effect should cause the court to exercise its discretion under s. 6 of the Act and refuse to sanction the plan.

Table of Authorities

Cases considered:

Alabama, New Orleans, Texas & Pac. Junction Ry. Co., Re, [1891] 1 Ch. 213 , 60 L.J. Ch. 221 (C.A.) — *considered*

Can. Hidrogas Resources Ltd., Re, [1979] 6 W.W.R. 705, 8 B.L.R. 104 (B.C.S.C.) — *referred to*

Dairy Corp. of Can., Re, [1934] O.R. 436, [1934] 3 D.L.R. 347 (C.A.) — *applied*

Northland Properties Ltd., Re (1988), 31 B.C.L.R. (2d) 35 (S.C.) — *distinguished*

Wellington Bldg. Corp., Re, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626 (S.C.) — *referred to*

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3 [now R.S.C. 1985, c. B-3]

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

s. 276

s. 277(1)

Companies' Creditors Arrangement Act, R.S.C. 1970, c. C-25 [now R.S.C. 1985, c. C-36]

ss. 2-7

Application for approval of reorganization plan.

Hinds J. **:**

Introduction

1 The petitioner has applied under s. 6 of the Companies' Creditors Arrangement Act, R.S.C. 1970, c. C-25 ("the Act"), for sanction of a compromise or arrangement reached between the petitioner and most of its creditors under the provisions of the Act. It will be called the "reorganization plan". It is opposed by Pontiac Holdings Ltd. ("Pontiac").

Background and Chronology of Events

2 Since October 1986 the petitioner has operated a cabaret at 1250 Richards Street, Vancouver, **British Columbia**, under the name of "Graceland". The premises were leased from Pontiac and were renovated by the petitioner at its expense. It failed to pay for much of the renova tions, with the result that liens totalling approximately $475,000 were filed against the premises. The major lien holder, Barclay Construction Corp. ("Barclay"), sued the petitioner and Pontiac and after a trial in the spring of 1988, judgment was granted against both the petitioner, as the party authorizing the renovations, and Pontiac, as the owner of the building in which the leased premises were located.

3 Due to the foregoing judgment, the claims of the other lien holders, the claim of Pontiac for rental arrears of approximately $378,000 and other business reverses, the petitioner became insolvent. The two shareholders of the petitioner, who are the sole directors and officers of the company, decided to attempt to obtain relief under the provisions of the Act, rather than apply under the Bankruptcy Act, R.S.C. 1970, c. B-3.

4 The Act came into force in 1933. It was part of Canada's depression legislation. It was frequently used during the depression years, but later it fell into disuse. Recently reliance upon it has been revived.

5 On 3rd June 1988 the petitioner filed under the Act a petition and supporting affidavits. The matter was heard ex parte on 6th June 1988, and an order was granted ("the first order") whereby, inter alia, the petitioner was authorized to file on or before 15th July 1988 the reorganization plan between the petitioner and its secured and unsecured creditors. On 15th July 1988 an amended petition was filed, which incorporated a number of matters referred to in the first order.

6 On 4th August 1988 Barclay filed a notice of motion to set aside the first order. Negotiations ensued between Barclay and the petitioner and they reached a compromise. The Barclay application was adjourned sine die.

7 The meeting of creditors which had been scheduled to be held on 19th August 1988 was adjourned to 8th September 1988, by an order dated 11th August 1988 ("the second order"). On 30th August 1988 a further amended petition was filed. On 8th September 1988 the meeting of creditors scheduled to be held on that date was adjourned to 26th September 1988 by a further order ("the third order"). On the date last mentioned the meeting of creditors was finally held. Pontiac and its solicitors attended the meeting and, before it was formally convened, they endeavoured to obtain changes in the reorganization plan. They were unsuccessful and they left the meeting before its formal commencement. The reorganization plan was approved unanimously by the secured and unsecured creditors who voted at the meeting.

8 On 31st October 1988 a notice of motion and a further further amended petition were filed by the petitioner. The matter was adjourned from time to time and eventually came on before me on 14th November 1988.

9 The hearing of the "further-further-amended" petition was supported by voluminous affidavits with numerous exhibits attached thereto, filed by both sides. During the course of the hearing counsel for the petitioner was granted leave, over the objection of counsel for Pontiac, to file a further affidavit. Following the completion of the hearing counsel for the petitioner forwarded to the registry, with the consent of counsel for Pontiac, a letter requesting a number of amendments to the proposed order, which would include minutes pertaining to the details of the reorganization plan. In effect, it amounts to a further-further-further-amended petition.

Issue

10 The issue to be determined on this application is whether, under s. 6 of the Act, the reorganization plan should be sanctioned by the court.

The Act

11 In order to place the foregoing issue in perspective, reference to ss. 2 to 7 of the Act will be of assistance.

12 Section 2 provides for various definitions, including a definition for "debtor company". It is defined to mean:

13 ... any company that is bankrupt or insolvent or has committed an act of bankruptcy within the meaning of the *Bankruptcy Act* or is deemed insolvent within the meaning of the *Winding-up Act* , whether or not proceedings in respect of such company have been taken under either the *Winding-up Act* or the *Bankruptcy Act* , or has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy Act* , or is in course of being wound up under the *Winding-up Act* because the company is insolvent ...

14 Section 3 deals with the application of the Act; it states:

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

16 (*a*) the debtor company has outstanding an issue of secured or unsecured bonds, debentures, debenture stock or other evidences of indebtedness 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

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

18 Section 4 deals with a compromise involving unsecured creditors; it provides:

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

20 Section 5 deals with a compromise involving secured creditors. In all other respects it is the same as s. 4.

21 Section 6 involves the sanction of a compromise by the court. It states:

22 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 such sections, agree to any compromise or arrangement either as proposed or as altered or modified at such meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding 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 is also binding on the company, and 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 course of being wound up under the *Winding-up Act* , is also binding on the trustee in bankruptcy or liquidator and contributories of the company.

It is noted that the sanction to be given by the court is discretionary, not mandatory.

23 Section 7 deals with directions which may be given by the court. It states:

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

25 Unlike the Bankruptcy Act, which has many sections and involves much detailed legislation, the Act has only a limited number of sections and is sparse in detail. Its final section, s. 20, provides that the Act is to be applied conjointly with other federal and provincial Acts. It states:

> 26 20. The provisions of this Act may be applied conjointly with the provisions of any Act of Canada or of any province, authorizing or making provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

27 Pursuant to the provisions of s. 20, both counsel acknowledged that some sections of the Company Act, R.S.B.C. 1979, c. 59 ("the Company Act"), may be applicable to the circumstances of this application.

Principles Involved in Discretionary Sanction

28 In *Re Dairy Corp. of Can.*, [1934] O.R. 436, [1934] 3 D.L.R. 347 (C.A.) , Middleton J.A., in considering the provisions of the Ontario Companies Act, stated, at p. 439:

> 29 Upon this motion I think it is incumbent upon the Judge to ascertain if all statutory requirements which are in the nature of conditions precedent have been strictly complied with and I think the Judge also is called upon to determine whether anything has been done or purported to have been done which is not authorized by this Statute. Beyond this there is, I think, the duty imposed upon the Court to criticize the scheme and ascertain whether it is in truth fair and reasonable.

30 That statement of general principle has been cited with approval in many subsequent cases and is applicable to the sanction by the court of an arrangement made under the Act and under the Company Act: see *Re Wellington Bldg. Corp.*, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626 (S.C.) , and *Re Can. Hidrogas Resources Ltd.*, [1979] 6 W.W.R. 705, 8 B.L.R. 104 (B.C.S.C.) , respectively.

31 The first matter to be determined is whether there was compliance with the statutory requirements in the nature of conditions precedent. Counsel for Pontiac conceded that the petitioner comes within the definition of a "debtor company" in s. 2 of the Act, and that it has an outstanding issue of secured or unsecured bonds, as required by s. 3 of the Act. Compliance was therefore made with the conditions precedent under the Act.

32 By s. 20 of the Act the provisions of the Company Act making provision for the sanction of compromises or arrangements is to be applied conjointly with the provisions of the Act. Section 276 of the Company Act provides for court sanction of a compromise or arrangement between a company and its creditors in terms not dissimilar to the terms contained in the Act. Section 277(1) of the Company Act deals with the information respecting the compromise or arrangement which is to be sent to the creditors. It states:

> 33 277. (1) Where a meeting is convened under section 276, the company shall include in any notice of the meeting
>
> 34 (*a*) that is sent to a creditor or member of a company, a statement, which may be included in the information circular or a reporting company, explaining the effect of the compromise or arrangement and in particular stating
>
> 35 (i) any material interest of every director and officer, whether as director, officer, member or creditor of the company, or otherwise; and
>
> 36 (ii) the effect of the compromise or arrangement on those persons in so far as it is different from the effect on the like interests of other persons ...

37 The material which accompanied the notice of meeting of creditors sent out by the petitioner failed to comply with the requirements of s. 277(1)(*a*)(i) and (ii) of the Company Act.

38 The second general principle to be considered is "whether anything has been done or purported to have been done which is not authorized by the statute". Unlike the more careful procedures followed in *Re Northland Properties Ltd.* , a decision of Trainor J., 5th August 1988, Vancouver No. A880966, B.C.S.C. [now reported 31 B.C.L.R. (2d) 35], no application was made to the court for directions for the determination of the constitution of classes of creditors prior to the meeting of creditors held on 29th September 1988. At that meeting there was no separation of the major groups of creditors, secured or unsecured, and there was no separation of the classes within those major groups of creditors. A pool vote of all creditors was taken. That procedure fell short of the underlying requirements of ss. 4, 5 and 6 of the Act, where the "unsecured creditors or any class of them", the "secured creditors or any class of them", and "three-fourths in value of the creditors, or class of creditors, as the case may be" are referred to, respectively.

39 In *Re Wellington Bldg. Corp.* , supra, Kingstone J. accepted the following statements made in *Re Alabama, New Orleans, Texas & Pac. Junction Ry. Co.*, [1891] 1 Ch. 213 , 60 L.J. Ch. 221 (C.A.), which set forth the reason for creditor classification in the type of legislation contained in the Act. At p. 243 [Ch.] Bowen L.J. stated:

> 40 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.

At p. 245 [Ch.] he stated:

> 41 It is in my judgment desirable to call attention to this section, and to the extreme care which ought to be brought to bear upon the holding of meetings under it. It enables a compromise to be forced upon the outside creditors by a majority of the body, or upon a class of the outside creditors by a majority of that class.

42 The third general principle to be considered is whether the compromise or arrangement is fair and reasonable.

43 In general terms, the essence of the reorganization plan is that for a period starting in August 1988 and continuing until the autumn of 1989, or perhaps a little longer, a monthly amount will be paid by the petitioner to a trustee which will enable interest at 5 per cent per annum to be paid on the debts of the petitioner, which will amount to approximately $1,800,000. The liquor licence presently used by the cabaret is a preclearance class C licence. It is anticipated that in the fall of 1989 application can be made for a permanent liquor licence. It is then intended to sell the cabaret and to distribute the proceeds equally between all of the creditors save and except Messrs. Vincent Alvaro and Neil McPherson, the two shareholders of the petitioner, who are creditors of the petitioner to the extent of approximately $450,000 and who shall not receive repayment until all other creditors have been paid in full. There is some vague indication in the material that the cabaret with a permanent liquor licence may be worth $600,000. If that selling price is achieved, and if the claims of Messrs. Alvaro and McPherson are excluded, the other creditors may receive approximately 50 per cent of their claims. The amount they receive on the sale of the cabaret will be deemed to be satisfaction in full of their total claims.

44 The reorganization plan is unacceptable to Pontiac, for several reasons. It holds the joint and several personal guarantee of Messrs. Alvaro and McPherson with respect to the payment of rent by the petitioner. The anticipated distribution to creditors under the reorganization plan would release Messrs. Alvaro and McPherson of their liabilities to Pontiac under the guarantee.

45 The pre-clearance class C licence is held in the names of Messrs. Alvaro and McPherson. It was pledged by them to Pontiac as additional security for the payment of rent by the petitioner. The reorganization plan improperly treats it as an asset belonging to the petitioner. In effect, the reorganization plan confiscates, for the benefit of all of the other creditors, the security held by Pontiac.

46 Pontiac claims that it is a secured creditor of the petitioner due to its status as its landlord. It further claims that the lien holders are secured creditors and if Pontiac is obliged to pay off the lien holders it will be subrogated to their secured creditor

status. The petitioner rejects the contention that Pontiac occupies the position of a secured creditor, but no application to court for directions has been made. If Pontiac is held to be a secured creditor, the approval of the reorganization plan by at least three-fourths of that class of creditors would likely fail.

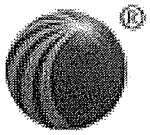
47 The evidence on the hearing of the petition establishes that in the past the cabaret has not been profitable. Indeed, it has been highly unprofitable. The petitioner now proposes to set aside $1,000 per week starting 22nd August 1988, for 11 consecutive weeks, and then to set aside $2,000 per week for 41 weeks, at the end of which time the trustee receiving the weekly payments would have accumulated $93,000. That would be just sufficient to pay interest at 5 per cent per annum for one year on the petitioner's outstanding debts of $1,800,000. The reorganization plan presupposes a dramatic reversal in the business fortunes of the petitioner. The petitioner has not provided to the creditors or to the court a balance sheet or appraisals of the market value of the cabaret. Some evidence was led concerning a recent increase in the gross sales of the petitioner but, significantly, no evidence was adduced concerning an improvement in the net profit of the petitioner. An increase in gross sales does not necessarily result in an increase in net profits.

48 On the evidence I am not satisfied that the reorganization plan is fair and reasonable. Looking at it critically, I am not satisfied that it is economically feasible.

49 There are other matters of concern involved in this application. Sections 4 and 5 of the Act refer to an application "in a summary way". That does not necessarily mean an application ex parte, which was the procedure followed in this case. Moreover, the material filed in support of the ex parte order (the first order) failed to disclose to the court some material information. It failed to disclose: that the cabaret licence was pledged to Pontiac; that it owed approximately $350,000 in lease arrears to Pontiac; and that, while it had made payments of $65,000 to the lien claimants, it had done so only by means of discontinuing rental payments to Pontiac.

50 In summary, I do not consider that the failure of the petitioner to comply with the requirements of s. 277(1) of the Company Act, its failure to comply with the second general principle above described, its failure with respect to the third general principle (that the reorganization plan be fair and reasonable), or the shortcomings with respect to the ex parte application, taken individually, are necessarily fatal to this application. However, the cumulative effect of the foregoing matters causes me to exercise my discretion under s. 6 of the Act and to refuse to sanction the reorganization plan. That particular relief sought in the petition is denied. Costs will follow the event.

Application dismissed.



15 of 15 DOCUMENTS

Re Dorman, Long & Co Ltd; Re South Durham Steel and Iron Co Ltd

CHANCERY DIVISION

[1933] All ER Rep 460, Also reported [1934] Ch 635; 103 LJ Ch 316; 151 LT 347; 78 Sol Jo 12

HEARING-DATES: 22, 23, 24, 28, 29 , 30 November 1933

30 November 1933

CATCHWORDS:

Company - Scheme of arrangement - Grounds on which court will sanction - Requirements as to contents of explanatory statements issued by directors - Voting - Proxy - Validity of general form - Need to lodge before meeting - Use by directors - Companies Act 1929 (19 & 20 Geo 5, c 23) s 153(1) (2).

HEADNOTE:

In determining whether a scheme of arrangement should be sanctioned under s 153(2) of the Companies Act 1929 [now s 206(2) of the Companies Act 1948], the court, to have jurisdiction to deal with the matter, must first ascertain that the resolutions of the shareholders and stockholders agreeing to the scheme have been passed by the majority, in number end value, prescribed by the subsection at a meeting or meetings duly convened and held. The court must then determine whether the proposed scheme is such that an honest and intelligent member of the class concerned, acting in respect of his interest, might reasonably approve of it.

Especially in the case of large companies where only a small portion of the members can attend meetings it is essential that the court, in determining whether or not the necessary resolutions have been duly passed, should see that explanatory circulars sent out by the board are perfectly fair, and, so far as possible, give all the information reasonably necessary to enable the recipients to decide how to vote.

Section 153(2) of the Act of 1929 [s 206(2) of the Act of 1948] gave a general right of voting by proxy, and that statutory right could not be affected by Practice Notes or Directions issued or given by the court. The power to summon a meeting involves a power to fix the date of the meeting and nominate the chairman. It may also involve a power to direct and settle a form of notice to be sent out at the expense of the company by the persons who are asking the court to summon a meeting under s 153(1) but it does not involve a power to prescribe an exclusive form of proxy. A general form of proxy can be used, ie, a proxy by which a shareholder or stockholder appoints another member of the class to represent him at the meeting, to listen to all that is

said on both sides, and then to vote as he may think proper having regard to what has been said.

Proxies may be used at a meeting whether or not they have been lodged before the meeting.

Directors who, pursuant to an order of the court, hold a meeting and get proxies for and against the proposed scheme, have no option whether or not they will use them. No discretion is given in the matter. The directors are bound to use them save in the absence of the proxy-holder, or all the proxy-holders, named.

Observations on the contents of an explanatory statement sent to debenture stockholders by directors putting forward a scheme, and its failure (i) to disclose that trustees for the debenture holders, who recommended the scheme, had a very strong interest in its being adopted, and (ii) to give full particulars of a re-valuation of assets; and also on provisions in the scheme for compensation on a generous scale to those members of the board who were not to obtain employment in the amalgamated company which would result from the adoption of the scheme and for remuneration at an increased rate to be given to some of the directors who were going to be employed in the future.

Petitions presented under ss 153 and 154 of the Companies Act 1929

By the first petition Dorman, Long & Co Ltd (hereinafter called "Dorman Long") sought the confirmation of the court to a reduction of capital from 11,248,146 pounds to $1,750,678 pounds, and also the sanction of the court to a schema of arrangement for the acquisition by Dorman Long of the business and assets of the South Durham Steel and Iron Co Ltd. By the second petition the South Durham Steel and Iron Co, Ltd (hereinafter called "South Durham") sought the sanction of the court to the amalgamation of its business with Dorman Long.

Dorman Long was incorporated under the Companies Acts 1882 to 1886, in the year 1889. Its capital at the date of the petition was 11,248,146 pounds, divided into 883,918 6 per cent cumulative preference shares of 1 pound each, 2,052,746 8 per cent preferred ordinary shares of 1 pound each, and 8,311,482 ordinary shares of 1 pound each, all issued and fully paid up. The company had also issued 400,000 pounds 4 per cent first mortgage perpetual debenture stock (hereinafter called the "4 per cent debenture stock") secured by a trust deed dated 28 May 1900, which was a specific charge on certain freehold premises and a floating charge on all Dorman Long's other property and undertaking with certain exceptions. The proposed scheme of arrangement did not touch these debentures. There was also outstanding 5,135,944 pounds 5 [1]/2 per cent first mortgage redeemable debenture stock (hereinafter called the "5 [1]/2 per cent debenture stock") repayable at par on 1 May 1963, or earlier, by

operation of a sinking fund at any time after 1 May 1943, at 102 per cent The 5 [1]/2 per cent debenture stock was secured by a trust deed made 26 July 1923, between Dorman Long and Barclays Bank, Ltd, under which Barclays Bank Ltd was the trustee and the stockholders had a specific charge on the company's freehold and leasehold properties and a floating charge upon its undertaking and other property with certain exceptions, subject to the prior charge in favour of the 4 per cent debenture stockholders.

At the date when the petition came before the court Dorman Long was in a serious financial position. It was being financed by four banking companies, to whom it owed the aggregate sum of approximately 2,420,000 pounds, that sum being secured only to the extent of 1,715,000 pounds. Barclays Bank, Ltd, was one of the four banks financing Dorman Long, and the share of the indebtedness due to Barclays Bank amounted at that date to 1,411,000 pounds. The interest on the 51 per cent debenture stock was in arrear.

The South Durham company was incorporated in 1898. At the date of the petition its capital was 1,250,000 pounds, divided into 300,000 preference shares of 1 pound each, 350,000 ordinary shares of 1 pound each, all issued and fully paid up, and 600,000 "B" ordinary shares of 1 pound each, 587,820 of which were issued and fully paid up. There was outstanding at this date 300,000 pounds 4 [1]/2 per cent perpetual debenture stock, secured by a trust deed dated 1 May 1900, under which the stock was a specific charge on the hereditaments and premises of the company and a floating charge on its undertaking. At the date of the petition South Durham owned 980,516 shares in the capital of Cargo Fleet Iron Co Ltd, being 98 per cent of such capital. This latter company had at the date of the petition certain debentures outstanding which were redeemable upon terms at the company's option. At the date of the petition South Durham was, notwithstanding the depression in the steel and iron trade, in a flourishing condition.

With a view to the unified control of practically the whole of the iron and steel industries of the Tees-side area of the north-east coast, on 15 June 1933, a provisional agreement was entered into between Dorman Long and South Durham for the acquisition by Dorman Long of the whole of the undertaking and assets of South Durham, including the 98 per cent of the share capital of Cargo Fleet Iron Co Ltd then held by the latter company. The scheme was conditional, first, upon its acceptance by the debenture stockholders and shareholders of Dorman Long; secondly, on its acceptance by the debenture stockholders and shareholders of South Durham; and thirdly, on the sanction of the court being obtained before 31 December 1933.

The scheme of arrangement proposed by Dorman Long was shortly as follows. The capital of the company was to be reduced from 11,248,146 pounds to 1,750,678 pounds divided into 919,530 preferred ordinary shares of 1 pound each and 831,148 deferred ordinary shares of 1 pound each, to be kept by the then shareholders. The capital was then to be restored to 11,248,146 pounds by the creation, first, of 1,985,784 pounds 6 per cent non-cumulative preference shares ranking both as to capital and dividend in priority to the preferred ordinary shares; secondly, of 2,323,284 preferred ordinary shares of 1 pound each to be issued under the scheme for amalgamation to the shareholders of South Durham, to the 5 [1]/2 per cent redeemable debenture holders of Dorman Long and to Dorman Long's bankers; thirdly, one management share and 5,188,399 shares not to be immediately issued.

The scheme provided for the reorganisation of Dorman Longs debenture issue and indebtedness to the banks as follows: 2,567,972 pounds of the 5,135,944 pounds 5 [1]/2 per cent debenture stock was to be surrendered, the holders being given in exchange for each 100 pounds of such stock, thirty 6 per cent preference shares and thirty preferred ordinary shares of 1 pound each in Dorman Long's reorganised capital. Of the surrendered stock, 650,000 was to be re-issued as "A" 5 [1]/2 per cent redeemable stock, of this 643,910 was to be issued in part payment for South Durham's undertaking. The balance of the surrendered debenture stock was to be cancelled. The remainder of the 5 [1]/2 per cent debenture stock, retained by the stockholders, was to

be converted into "B" stock with interest contingent on profits and not cumulative for a certain period.

Interest on the debenture stock was to be cancelled from 1 November 1932, to the dale of the coming into operation of the scheme. The debenture stockholders were also to waive their right to repayment in 1963 and to consent to the cancellation of the existing sinking fund arrangement. At the same time 2,500,000 pounds 5 per cent redeemable prior lien stock was to be created, charged both on Dorman Long's assets and on the assets to be acquired as a result of the amalgamation with South Durham. Such lien stock was to rank in priority to the "A" and "B" 5 [1]/2 per cent debenture stocks.

The indebtedness to the banks was to be dealt with by issuing 145,000 preference and 145,000 ordinary shares in the reorganised capital of Dorman Long at par to satisfy 290,000 pounds of the debt due to the bankers. The rest of the indebtedness, except for the sum of 150,000 pounds and amounts owing on certain special accounts, was, up to 1,650,000 pounds, to carry interest at 3 per cent for three years and subsequently at 4 per cent payable out of profits estimated in the manner provided by the scheme. The result (in effect) of this scheme was that about 700,000 pounds of the indebtedness to the bankers was left unprovided for and might be called in at any time.

Subject to Dorman Long's scheme and the South Durham scheme being sanctioned, Messrs NM Rothschild & Sons had agreed to subscribe for the 5 per cent redeemable prior lien stock on terms producing 2,007,000 pounds, of this sum 1,287,930 pounds was to be used for distribution to the debenture stockholders and shareholders of South Durham and as a loan to Cargo Fleet Iron Co Ltd to pay off its debenture stock. The scheme further provided for the one management share to be vested in a stockholders' committee, conferring on them a controlling voting power until Dorman Long had made the first payment to the sinking fund established under the scheme.

Under South Durham's scheme, on the transfer of its undertaking to Dorman Long, 110 pounds in cash was to be paid to the debenture stockholders for each 100 pounds of South Durham's debenture stock held by them. South Durham's preference, ordinary and "B" ordinary shareholders were to receive for their shares in the case of the former a

cash payment and debentures, and in the case of the latter various shares in Dorman Long's reorganised capital. Cargo Fleet Iron Co's debenture stock was to be paid off at a premium.

On 19 June 1933, the court made an order directing Dorman Long to convene meetings of its 5 [1]/2 per cent debenture stockholders, cumulative preference shareholders, preferred ordinary shareholders, and ordinary shareholders. A further order was made directing South Durham to convene separate meetings of its debenture stockholders, preference and ordinary shareholders, and "B" ordinary shareholders. In each case the meetings were convened "for the purpose of considering and, if thought fit, approving, with or without modification," the respective schemes. The orders further directed that a print of the scheme, and a properly stamped form of proxy in the form settled in chambers, should be sent to the debenture holders and the various classes of shareholders.

On 3 July 1933, Dorman Long sent out notices of the meetings ordered by the court to its debenture stockholders and shareholders, together with proxies in the form settled in chambers, and voting cards. The notices were accompanied by a circular signed by the company's secretary. This circular, after setting out the company's difficulties, continued:

"The whole of the assets have, therefore, been re-valued upon the basis of their earning power; and this re-valuation has been confirmed by the well-known valuer, P Michael Faraday, and by Mr John E James. . . . The directors have consulted representatives of the insurance companies and investment trust companies, who are substantial holders of the 5 [1]/2 per cent debenture stocks and share of your company, and they consider that the only alternative to the scheme now submitted is the appointment of a receiver. The terms of

the scheme have been referred to the trustees of the stockholders, who, after making a careful investigation of the whole position, recommend the proposals for the approval of the stockholders. . . . The bankers of the company have agreed that upon the scheme coming into operation they will accept the allotment credited as fully paid up, of 145,000 6 per cent preference shares and 145,000 preferred ordinary shares of 1 pound each in the reorganised capital of the company in satisfaction of 290,000 pounds of the company's indebtedness to them, and will permit the balance of such indebtedness (exclusive of certain sums) to remain outstanding up to but not exceeding 1,650,000 pounds, with the benefit of certain securities at present deposited with or on behalf of the bankers. Interest will be payable on the amount outstanding at the rate of 3 per cent per annum for the remainder of the financial year then current, and for the next two financial years, and thereafter at the rate of 4 per cent per annum. The bank interest will only be payable out of profit available as defined in the scheme, and will be non-cumulative until the interest on the 5 [1]/2 per cent debenture stock becomes fixed. One-half of the profits available after payment of bank interest will be used to repay the bankers, but the company will not in any year be required to repay more than 5 per cent per annum of the original amount permitted to remain outstanding."

Four forms of proxy for the debenture stockholders and the three classes of shareholders were sent with the notice of the meetings and the above circular. The proxies began by stating that the stockholder or shareholder, as the case might be, appointed the chairman, Charles Mitchell, or, failing him, the Hon Roland Dudley Kitson, or, failing him, Arthur Dorman, as proxy

"to act for at the meeting . . . to be held on July 27, 1933, . . . for the purpose of considering and, if thought fit, approving, with or without modification, the proposed schemes of arrangement referred to in the notice convening the meeting, and . . . to vote for and in [my] name the said scheme either with or without modification as [my] proxy may approve."

Opposite the blank immediately before the words "the said scheme" was a marginal note:

"If for, insert 'for'; if against, insert 'against' and strike out the words after 'scheme' and initial such alteration."

The proxy had the following note at the foot:

"This proxy must be signed and lodged with the secretary at the registered office of the company . . . not later than six o'clock in the afternoon of the 25th day of July, 1933."

Along the margin of each voting card was written in red ink:

"If you are voting as proxy for other holder(s) please write the name of holder(s) on the back of this card."

On 30 June 1933, notice of the meetings ordered by the court, and proxies in the form settled in chambers, were sent out to the debenture stockholders and shareholders of South Durham. A circular was also enclosed signed by the secretary stating inter alia as follows:

"The basis upon which the negotiations for the amalgamation . . . have proceeded has been, not on the book figures of the assets as appearing in the balance-sheets, but on the earning power of the assets to be acquired under the scheme. A re-valuation of the company's assets was, accordingly, made on the above basis by Messrs Peat, Marwick, Mitchell & Co, and their figures have been confirmed by Mr Faraday, the well-known valuer, and Mr John F James. . . . Your board have investigated and considered the scheme in its entirety, and are prepared as large debenture holders or shareholders to accept the terms offered; and taking all the circumstances into consideration, and having regard to the great probability of the coming change in independent

conduct of the industry, and the favour with which suitable amalgamations are viewed politically and financially, recommend their fellow stockholders and fellow shareholders to accept it. . . ."

The circular went on to give particulars of the re-constitution of Dorman Long's board of directors and of the arrangement by which certain of South Durham's directors were to join that board. It also contained particulars of a scheme for compensation for loss of office for those directors who were not to join the reconstituted board and of the remuneration of those who continued in office. The circular continued:

"It is urgently requested . . . that if you are unable to attend personally you will complete and sign the respective proxies for debenture stock or shares which you may hold and return to the company . . . so that they may arrive not later than twelve o'clock noon on Saturday, July 15 next. Your particular attention is invited to the instructions set out in the proxies as to their due completion."

Forms of proxy, also in the form settled in chambers and similar to those sent out with the notices convening Dorman Long's meeting, accompanied the notice of the South Durham's meetings, but in this the date of the meeting was to be 19 July 1933, and the proxies had to be lodged not later than twelve o'clock noon on July 15.

Both schemes roused considerable opposition. The leader of the opposition in the case of the South Durham scheme was Mr Hyde, a shareholder both in South Durham and in the Cargo Fleet Iron Co Ltd. On 3 July 1933, be sent a letter to the shareholders of both companies asking them not to sign proxies in favour of the amalgamation, which he stated was not in the best interests of the companies. He sent a second letter to the shareholders on 10 July 1933, with further particulars of the reasons for his opposition to the scheme and enclosing proxy forms for the various classes of shareholders.

On 19 July 1933, meetings of the debenture stockholders and of the various classes of shareholders of South Durham were held. At the meeting of the preference shareholders the chairman rejected certain proxies, including 270 representing 41,319 pounds of shares purporting to appoint Mr. Hyde as proxy. Similarly, at the ordinary shareholders' meeting, the chairman rejected as invalid 502 proxies representing 60,246 pounds of shares, and, at the meeting of "B" ordinary shareholders, he rejected 544 proxies representing 43,302 pounds, in each case appointing Mr Hyde or Mr Carter as proxy. In each case the chairman gave as the ground of such rejection the fact that the proxies in question were not in the form settled in chambers as they expressly directed Mr Hyde or Mr Carter as proxy to vote against the scheme. In his report of 8 August 1933, the chairman stated that, if these proxies were properly excluded, the scheme was carried by the requisite statutory majority. If the rejected proxies were admitted, there was a majority in number,

but not the three-fourths majority in value, for the scheme.

A committee of 5 [1]/2 per cent debenture stockholders of Dorman Long, who opposed the company's scheme, sent out after 19 July 1933, a circular to all holders of 200 pounds of debenture stock or more, asking them to vote against the scheme. About half the stockholders on the register were thus circularised. Mr AR Linsley was the leader of this opposition.

The meetings of the debenture stockholders and shareholders of Dorman Long were held on 27 July 1933, Mr C Mitchell, of Dorman Long, being in the chair. Mr Linsley attended the meeting and spoke. He subsequently made an affidavit criticising the conduct of the meeting of debenture stockholders. The learned judge found as a fact that the meeting had been fairly conducted. At this meeting 4,237 persons, representing 2,902,811 pounds, voted in person or by proxy. Of these 167 were present in person, holding 152,492 pounds of stock. Those present voted by cards on which was the red ink note referred to above, and there was some confusion as

to the proper method of filling up these cards. On 10 August 1933, Mr Mitchell, as chairman, reported that at the meeting of the debenture stockholders, and the meetings of all classes of shareholders, resolutions approving the scheme without modification were passed.

Both petitions came on for hearing on 22 November 1933. The Dorman Long petition, which was heard first, was opposed by certain of the 5 [1]/2 per cent debenture stockholders on the grounds that the scheme was unfair to them, that there were irregularities in the meetings at which the various resolutions confirming the scheme had been passed, and that certain proxies which ought to have been admitted had been wrongly rejected. The chairman of Dorman Long gave evidence denying that there had been any irregularities in the conduct of the meetings. The South Durham petition, which was heard at the same time, was opposed by Mr Hyde, representing dissenting shareholders.

The Companies Act 1929, s 153, provided:

"(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application in a summary way of the company or any creditor or member of the company, or, in the case of a company being wound-up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.

"(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shell, if sanctioned by the court, be binding on all the creditors or class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in course of being wound-up, on the liquidator and contributories of the company."

NOTES:

Notes

The Companies Act 1929, was repealed by the Companies Act 1948, s 153(1) and (2) of the Act of 1929 being re-enacted in s 206(1) and (2) of the Act of 1948. As to proxies see now s 136 of the Act of 1948.

Referred to: Re Imperial Chemical Industries Ltd, [1936] 2 All ER 463; Re Old Silkstone Collieries Ltd, [1954] 1 All ER 68.

As to schemes of arrangement, see 6 HALSBURY'S LAWS (3rd Edn) 764 et seq, and for cases see 10 DIGEST (Repl) 1126 et seq. For Companies Act 1948, see 3 HALSBURY'S STATUTES (2nd (Edn) 452.

[1933] All ER Rep 460, Also reported [1934] Ch 635; 103 LJ Ch 316; 151 LT 347; 78 Sol Jo 12

CASES-REF-TO:

Cases referred to:

(1) Re Alabama, New Orleans, Texas and Pacific Junction Rail Co, [1891] 1 Ch 213; 60 LJ Ch 221; 64 LT 127; 7 TLR 171; 2 Meg 377, CA; 10 Digest (Repl) 803, 5213.

(2) Re English, Scottish and Australian Chartered Rank, [1893] 3 Ch 385; 62 LJ Ch 825; 69 LT 268; 42 WR 4; 9 TLR 581; 37 Sol Jo 648; 2 R 574, CA; 9 Digest (Repl) 613, 4071.

(3) Re Magadi Soda Co, [1925] WN 50; 94 LJ Ch 217; 41 TLR 297; 69 Sol Jo 365; [1925] B & CR 70; 10 Digest (Repl) 1135, 7598.

COUNSEL:

Wilfrid A Greene KC, WP Spens KC, and DLl Jenkins for Dorman Long.; HAH Christie for opposing 5 [1]/2 per cent debenture holders. ; F Ashe Lincoln for a group of debenture holders of Dorman Long. ; Wilfrid A Greene KC, WP Spens KC, and DLl Jenkins in reply. ; Wilfrid A Greene KC, WP Spens KC, and W Gordon Brown for South Durham. ; Fergus D Morton KC and ML Gedge for Mr Hyde.; Roger Turnbull for Boughton Estates Ltd, mineral lessors of South Durham.

Solicitors: Freshfields, Leese, & Munns; G Houghton & Son; Lincoln & Lincoln; Johnson, Weatherall, Sturt, & Hardy; Crossman, Block & Co, for J H Smith & Graham, West Hartlepool; Nicholl, Manisty & Co.

Reported by MISS BA BICKNELL, Barrister-at-Law.????????

PANEL: Maugham J

JUDGMENTBY-1: MAUGHAM J:

JUDGMENT-1:

MAUGHAM J:

There are two petitions before me, the first relating to Dorman, Long & Co Ltd, and the second relating to the South Durham Steel and Iron Co Ltd. Each of them is presented under s 153 of the Companies Act 1929.

I will first state my view as to the function of the court in determining whether the compromise or arrangement should be sanctioned by the court. It is plain that the duties of the court are twofold. The first is to see that the resolutions are passed by the statutory majority in value and number, in accordance with s 153(2) at a meeting or meetings duly convened and held. Upon that depends the jurisdiction of the court to confirm the scheme. The other duty is in the nature of a discretionary Tower, and it has been the subject of two decisions in the Court of Appeal, the first being Re Alabama, New Orleans, Teas, and Pacific Junction Rail Co (1) and the second Re English, Scottish, and Australian Chartered Bank (2). In the first of these cases it is true that LINDLEY LJ observed:

"The court must look at the scheme and see . . . whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an

objection to it as that any reasonable man might say that he could not approve of it."

I think that those phrases, which were contained in a judgment which had not been reserved, do not represent exactly what the lord justice intended. I prefer, as representing the view of the Court of Appeal, the language in the statement of BOWEN LJ that

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

and he added, to explain that:

". . . 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."

FRY LJ said:

". . . the court . . . must be satisfied that the proposal was at least so far fair and reasonable, as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve of it."

In Re English, Scottish, and Australian Chartered Bank (2) LINDLEY LJ does not seem to have had his attention drawn to the fact that what he had said in Re Alabama, New Orleans, Texas, and Pacific Junction Rail Co (1) was not quite the same as what BOWEN LJ and FRY LJ had said, but he plainly approved of what BOWEN LJ and FRY LJ had said, for he so stated, and he quoted what FRY LJ had said in the previous case. He also said this:

"If the creditors are acting on sufficient information, and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the court can be. . . . While, therefore, I protest that the court are not merely to register their decisions, but to see that they have been properly convened, and have been properly consulted, and have considered the matter from a proper point of view . . . the court ought to be slow to differ from them."

In my opinion, then, so far as this second duty is concerned, what I have to sec is whether the proposal is such that an intelligent and honest man, a member of the class concerned, and acting in respect of his interest, might reasonably approve of it. The schemes before me are attacked on both grounds. It is said that the resolutions have not been duly passed, and that the court in considering the nature of the schemes ought to Come to the conclusion that a reasonable business man would not approve of them.

I now turn to consider with regard to Dorman, Long's Case the question whether the resolutions have been duly passed. I observe by way of preliminary that huge sums are involved. Large sums are often involved in the schemes of arrangement which come before this court for confirmation, and the court has found it necessary to protect shareholders and creditors alike in connection with such schemes. It may be observed that when the Joint Stock Companies Arrangement Act 1870, was passed, in the majority of cases all the persons concerned with an arrangement could go to the meeting, listen to what was said, and vote for or against the arrangement according to the views which they were persuaded to take. In these days, in many of the cases that come before me, only a fraction of the persons who are concerned can get into the room where the meeting is proposed to be held, and in the great majority of cases the proxies given to the directors before the meeting begins have in effect settled the question of the voting once for all. It is, perhaps, not unfair to say that in nearly every big case not more than 5 per cent of the interests involved are present in person at the meeting. It is for that reason the court takes

the view that it is essential to see that the explanatory circulars sent out by the board of the company are perfectly fair and, as far as possible, give all the information reasonably necessary to enable the recipients to determine how to vote. I am assuming, of course, that, following the usual procedure, explanatory circulars are sent out, because I may observe there is nothing in the Act to render them essential.

In a sense, in all these cases, the dice are loaded in favour of the views of the directors. The notices and circulars are sent out at the cost of the company, the board have had plenty of time to prepare the circulars, all the facts of the case are known to them, proxy forms are made out in favour of certain named directors, and, although it is true that the

words "for" or "against" may be inserted in the modern proxy form, the recipients of the circulars very often are in doubt whether the persons named as proxies are bound to put in votes by proxy with which they are not in agreement. If we contrast with that position the position of a class of objectors, it is to be observed that a member of the class who receives a notice of a meeting and a circular from the directors is generally alone, he has no funds with which to fight the case, and he has no information, except sometimes that information which has been contained in reports and balance-sheets, which have probably long ago been relegated to the wastepaper basket. In any case, he has a minimum of information, his personal interest in the matter may be exceedingly small, probably he knows few persons in the same position as himself, and if he manages to get into touch with them they together have to raise funds for the purposes of an opposition which is often an expensive matter; they have then to get the names and addresses of the members of the class who are concerned, and to frame and send out a circular representing their views. Very often there is scarcely sufficient time for those purposes between the moment when the notice of the meeting reaches objectors by post and the date of the meeting. Proxies sent out by the directors can easily be lodged forty-eight hours before the meeting. It is quite plain that opponents may find it most difficult, after they have come together and have raised the necessary funds, and have agreed on a circular and have sent out their notices, to lodge such proxies as they may have been able to obtain forty-eight hours before the meeting.

In my opinion, the court ought to bear in mind these considerations when it has before it, as it often has, a case where the whole matter is really determined by the proxies that have been given before the meeting is held. They should also be borne in mind in relation to the important point, and one of far-reaching importance in many cases besides this one, as to the power of members of the class to vote by proxy. Section 153 simply says that a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting may agree to a compromise or arrangement. It is wholly silent as to the nature of the instrument appointing the proxy. We all know that there are two forms in use. There is a general proxy which may appoint a person to vote as he may think fit, and there is a special proxy which may be a proxy to vote for or against, as the case may be, a particular resolution. In what I am going to say in reference to proxies and proxy forms I am confining my observations to the cases before me, namely, to the cases where the companies are not in winding-up, where there is no rule of court applicable to the matter, and where neither the articles of association of the company nor the provisions of the trust deed to secure debentures have any application. It may be pointed out that in 1870 a proxy was simply an agent to vote; no deed was necessary for the appointment of such an agent, he could be appointed in writing in any form which sufficiently denoted the name of the person who was to vote and the person who appointed him; and then I think the matter was left at large, except, perhaps, to this extent, that, having regard to the nature of the meetings contemplated, it seems to be a reasonable inference that the instrument must be one in writing. The power of the court in terms is simply "to summon the meetings in such manner as the court may direct."

I have now to consider certain authorities. Re English, Scottish, and Australian Chartered Bank (2) to which I have already referred, is one in which the Court of Appeal had to consider whether certain novel forms of order, which involved proxies being given in London by persons living in Australia, were invalid. VAUGHAN WILLIAMS J, who had himself, I think, invented the order, observed:

". . . I think that the court has an inherent power to direct the mode in which meetings shall be held, and the mode in which proxies shall be evidenced, and to determine all such questions as whether it is necessary that the proxy shall be produced at the meeting."

When the matter, however, went to the Court of Appeal, it is to be observed that LINDLEY, LOPES and AL SMITH LJJ, I may say, pointedly abstained from taking that view. It was a case where the company had been ordered to be wound up in this country, and all three of the lord justices expressly stated that in their opinion the authority of the court to make this kind of order was derived from s 91 of the Companies Act 1862, which was the Act then in force. Section 91 [now reproduced as s 346(1) of the Companies Act 1948] provides:

"The court may, as to all matters relating to the winding-up of a company, have regard to the wishes of the creditors or contributories of the company, as proved to it by any sufficient evidence, and may, if it thinks fit, for the purpose of

ascertaining those wishes, direct meetings of the creditors or contributories to be called, held, and conducted in such manner as the court directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the court."

The Court of Appeal considered that that provision, read in conjunction with the Joint Stock Companies Arrangement Act 1870, justified the court in making an order providing for special forms of proxies.

There are two Practice Notes which further have to be considered. One is to be found in [1896] WN 56, where VAUGHAN WILLIAMS J directed that:

"proxy papers to be used at meetings to consider schemes of arrangement under the Act of 1870 [ie, the Joint Stock Companies Arrangement Act] should follow the office form settled by the judge, which empowers the proxy 'to vote for me and in my name [blank] the said scheme, either with or without modification, as my proxy may approve',"

and contains opposite the blank a marginal note as follows:

"if for, insert 'for,' if against, insert 'against' and strike out the words after 'scheme' and initial such alterations."

Plainly that is a direction in reference to companies in winding-up because the Joint Stock Companies Arrangement Act, 1870, referred only to those cases. A good many years later, in [1910] WN 154, SWINFEN EADY J directed that:

"In order to insure the issue of proper forms of proxies for meetings ordered to be summoned under s 120 of the Companies (Consolidation) Act 1908 [now s 206 of the Act of 1948], the order directing the meeting to be summoned should invariably provide that:

'the proxies are to be in the form officially authorised by VAUGHAN WILLIAMS J in the previous Practice Direction ([1896] WN 56) or in such other form as may be settled in chambers.'"

It is impossible from that to be sure whether the judge was intending his remarks to be confined to cases where the company was in compulsory or voluntary winding-up or whether he thought it was a proper direction to give in all cases. Section 120 of the Companies (Consolidation) Act 1908, provided that the power to approve a scheme could be exercised whether or not the company was in winding-up.

I do not find that either in the order of the court directing meetings to be summoned, or in the form of proxies settled in chambers following the Practice Notes

that I have referred to, there is anything to preclude a member of the class from making use of such proper proxies, general or special, as he may be advised. In my opinion, s 153 gives a general right of voting by proxy, and the decision of EVE J in Re Magadi Soda Co (3) confined as it is to a case where the company was in winding-up, in no way leads me to doubt the conclusion on this point at which I have arrived. It is not open to the court by Practice Notes - which have no statutory force and very little judicial force, as they are directions given without argument - to preclude people who are given a statutory right to vote by proxy from so exercising their vote. The power to summon a meeting involves a power to fix the date of the meeting, the chairman, and the form of the notice. It may also involve a power to direct and settle a form of notice to be sent out at the expense of the company by the people who are asking the court to summon a meeting under the section. It does not, in my opinion, either expressly or by implication, direct that no other proxy form can be used. It should be added that some of the class may desire to approve the scheme, subject to a specific modification. I do not see why they should be precluded from doing that by a form of proxy which specifies the modification which they desire. It is true that in the proxy form as settled by the court there is a reference to a possible modification, and in that case the directors or other persons to whom the proxies are to be given will apparently be entitled to use their own judgment in the matter, and that may be precisely the thing which the person giving the proxy does not desire. I may mention as an illustration that the scheme may, as one of the schemes before me does, give compensation to directors for what is called loss of office. I can conceive members of the class wishing to vote in favour

of the scheme only if it omitted that provision. In order to do that, if they cannot attend the meeting themselves, they must make out a special form of proxy.

A somewhat different question arises as to the time at which lodgment of the proxies should have been made. It is not necessary for me to decide whether, when the office form of proxy is used, it must be lodged within the time mentioned in the note on the proxy or it will be bad, though I may mention that I see grave objection to the view that if lodged too late it will be bad. I can at least see no sufficient ground for holding that the notes on the form settled in chambers, which, so far as I can see, are not notes made with any judicial authority, preclude other forms from being used if first presented at the meeting itself. As I have already said, I can see no objection to a general form of proxy being used; that is to say, a proxy by which a person appoints another member of the class to represent him or her at the meeting, to listen to all that is said on both sides, and then to vote as he or she may think proper having regard to what was said. I have no doubt that that was constantly done in the old days when the Act of 1870 was in force. I am not prepared, for example, to hold that a wife may not appoint her husband on her behalf to go to the meeting to listen to what is said and to vote accordingly. Further, it does not seem to me that there is any sufficient ground for holding that a member of the class may not use a proxy form with the printed word "against" or the printed word "for" filled up before the proxy form is handed to him. Section 153 affords, I think, no justification for such a view. On the other hand, I agree that when the directors are sending out a proxy form pursuant to a direction of the court, and at the expense of the company, it is highly expedient that they should not fill up the form, but should leave it to be filled up by the creditors or the shareholders who are concerned.

I only have to mention finally with regard to this question of proxies an argument from convenience. It is said that it will be in the highest degree inconvenient if the persons in charge of a meeting are not able to ascertain before the meeting commences what number of proxies have been lodged for or against the resolution. That is an argument at best, I think, of an exceedingly weak character. One does not deprive people of their rights merely because there may be difficulty and inconvenience in determining immediately after the meeting whether a resolution has been passed or not. In this particular case I think the argument has no weight

at all. I can quite understand that in cases where a company is a going concern and where there is a series of resolutions presented to the shareholders it may be very convenient, or even necessary, that the result of one resolution should be definitely determined at once, and that it may also be so in regard to some meetings of a company in liquidation. In a case like the present one, where the question is whether members of a class intend to vote for or against a scheme, I can see no real reason why the proxies should be lodged in time to enable the chairman before the meeting commences to know the result of the meeting, and I can see the disadvantages of such a course. Sitting here I have come across several cases where members of the class have come to a meeting and have been told by the chairman that whatever they say, and however they vote, he has in his pocket sufficient proxies to carry the resolution; and in many cases, my belief is that members of the class have then gone away without voting at all, so that the court has no reliable evidence as to the strength of the opposition. In my opinion, proper proxies may be used at the meeting whether lodged before it or not.

There has been a good deal of discussion in the Dorman, Long Case on the question whether the meetings were properly held under the chairmanship of Mr Mitchell, and whether in any case the resolutions ought not for that reason to be regarded as not having been properly passed. The evidence was conflicting. The voting was by cards, which I do not think were in a satisfactory form, and the chairman left the meeting before the cards had been counted. That, I think, is a matter of very little importance. It is more serious to consider the contention that he left the meeting without explaining to the various people to whom cards had been given how to fill them up. It is true it is suggested that anybody who could read would be very well able to fill up the cards in the light of the instructions that were given upon the cards; but it is, however, to be noted that the chairman himself did not comply with the instructions on the card, and according to the argument at one time put forward the whole of the votes given by the directors in favour of the scheme ought to be rejected. I did not accept that argument, and perhaps I ought to say at once that I think directors, who, pursuant to the order of the court, get proxies for or against the scheme, have no option whether or not they will use them. My opinion is that as the result of the court's order they are bound to use them. No discretion is vested in them in

that matter, and the people who give them are entitled to assume that the proxies will be used. It is true it would be difficult to allow the proxies to have force if none of the persons named as proxy-holders attended the meeting. There is an old authority that you can only vote by proxy if you are a member of the class concerned, and with that authority I do not intend to interfere, but the persons named are persons as regards whom the registrar has been satisfied that one or other of them will be present. Subject to that one possible event of none of them being there, the proxies must be used. However, this question as to how the meeting was conducted does not seem to me to lead to any result, since it appears that, in the event, the great majority of the persons who had given proxies were taken to have voted at the meeting; nor do I think, having regard to what I am going to say on the other matters which are involved in the Dorman Long petition, that it is in the least useful to consider whether on any of the grounds alleged, the meeting itself was not properly conducted; but to avoid misconception I will add that I am quite satisfied, after having seen him in the box, that the chairman intended to conduct, and did his best to conduct, the meeting in a perfectly fair and proper manner.

I now pass to an important question - namely, the question in relation to the explanatory circular sent out by the director. I think I have already observed that there is no obligation under the Act to send out such a circular at all. Perhaps I may remark in passing that that is an additional reason for coming to the conclusion that a member of a class has a right to appoint a general proxy, because, if no explanatory circular is sent, he may be quite unable to understand or form an opinion as to which way he should vote in the matter without attending the meeting, which in a case such as I have here, is an impossible course since there are 9,000 stockholders of this particular class. Of course, there is not a room in the Cannon Street Hotel, where the meetings were held, and probably there is not a room in London, where they could attend and vote. The practice being to send out an explanatory circular in such a case, it is, in my opinion, the duty of the court very carefully to scrutinise the circular when the matters involved are matters of considerable difficulty and doubt. In a case of great complexity it is true that not every relevant fact can be stated. I apprehend that if the circular were to assume such a length as to state all the relevant facts in the Dorman Long petition, it would be so lengthy as to defeat its own object. That is not to say, however, that the creditors or the members of the class concerned ought not to expect such a statement of all the main facts as will enable them to exercise their judgment on the proposed scheme. I am prepared to believe that there are cases where even this is impracticable, but I hesitate to accept the view that if it is impracticable, s 153 cannot be applied. I am not. sure that it is the only alternative, but there is one obvious alternative in such a case, and that is to let the class concerned appoint one or more persons on their behalf to investigate and consider the matter and report to them. If that were done, the explanatory circular might consist merely of the report of the committee so appointed. The present case (I am dealing with Dorman, Long & Co.) is one of singular complexity. It involves in the first place a reduction of capital to the amount of 9,497,468 pounds. Then it involves an amalgamation - I am using the popular phrase here - of the undertaking of the company with the undertaking of the South Durham Steel and Iron Co Ltd, an amalgamation in relation to which the court is asked to exercise certain powers under s 154 of the Act. It involves a drastic alteration of the rights of the Sat per cent debenture stockholders, holders of over 5,000,000 pounds in debentures, and, as if those difficulties were not enough, we have the remarkable feature that Dorman Long owed last week no less than 2,420,000 pounds odd to the four banking companies who had been financing it, that very large sum being secured to the extent of only 1,715,000 pounds odd. Another circumstance is that Dorman Long cannot pay the interest due to their 5 [1]/2 per cent debenture stockholders, while, on the other hand, the South Durham, notwithstanding the unexampled depression in the steel and iron trade, is in a flourishing condition at the present time.

Before dealing with the petition itself, I may say that, in my opinion, it has been clearly established that the position of the shareholders may fairly be described as desperate. The total share capital is 11,248,146 pounds, and that is proposed to be reduced to 1,750,678 pounds by cancellation of lost capital. That alone is sufficiently serious, but the more vital point is that the company at present is commercially insolvent in that it cannot pay its debts as they become due. The position is that the banks may at any time refuse facilities to the company, and, on the other hand, any one of the holders of the 5 [1]/2 per cent debenture stock may apply for a receiver. Those facts are not in dispute, and they have to be borne in mind in considering some of the arguments which have been addressed to me. It should be added that there are 883,918 6 per cent cumulative preference shares of 1 pound each carrying the right to a cumulative preference dividend and priority with regard to a return of capital but without any further right of participation; there are 2,052,746

8 per cent preferred ordinary shares of 1 pound each, carrying the right to a fixed non-cumulative preferential dividend at the rate of 8 per cent per annum and ranking pari passu with the ordinary shares as regards return of capital and participation in the surplus tassels on a winding-up; and, finally, there are 8,311,482 ordinary shares of 1 pound each. So much for the share capital. There are 4 per cent first mortgage perpetual debentures to an amount of 400,000 pounds with a first specific charge on the freehold premises mentioned in a certain trust deed and a floating charge upon all other property and the undertaking of the company with certain exceptions. Their rights are not affected by the scheme. Then we come to the 5 [1]/2 per cent first mortgage debenture stock, that amounts to 5,135,944 pounds 5 [1]/2 per cent first mortgage debenture stock secured by a trust deed dated 26 July 1923, under which Barclays Bank Ltd are the trustees and, stating it very

shortly, the stockholders have a specific charge, subject to the specific charge securing the 4 per cent first mortgage debenture stock and a floating charge upon the undertaking and other property of the company with certain exceptions, subject as to part of such property to the floating charge given to the first mortgage debenture stock.

As everybody knows, the company since its incorporation in 1889 has carried on business as the owner of coal and ironstone mines, blasting furnaces, steel works, constructional works, and a number of other plants, and it has a controlling interest in a number of companies, including Redpath, Brown & Co, who have large interests, and other concerns. For the purpose of economy of time I propose to treat myself as having read the paragraphs of the petition, which state, and I think state fairly, the position of the company .and its operations as the result. of the very serious depression in the coal, steel, iron, and allied trades, and the depreciation in consequence of the fixed assets of the company. Paragraph 16 states:

"With a view to the unified control of practically the whole of the iron and steel industries of the Tees-side area of the north-east coast a provisional agreement dated June 15 1933, was entered into between the company and the South Durham Steel and Iron Co Ltd for the acquisition by the company of the whole of the undertaking and assets of the South Durham Steel and Iron Co Ltd. These assets include upwards of 98 per cent of the share capital of Cargo Fleet Iron Co Ltd."

The paragraph adds this:

"It is confidently expected that by bringing the assets and properties of the two companies under unified control the earning power of the combined companies will be greatly improved."

That was not, I think, seriously challenged before me, and I believe it to be true.

There was an order of the court directing meetings to be summoned, and proxy forms, as I have already said, were settled, and a circular was sent out under date 3 July 1933, by the directors. This circular has been the subject of serious criticism by counsel for opposing debenture holders. I may say here that the resolution as put before the holders of the debenture stock was one which, if passed at all, was passed by a very narrow majority. The other classes concerned carried the resolution put before them by very large majorities. There has been no opposition on their behalf, although I have received a number of letters from the holders of these classes of stock, as to which I would say I have carefully considered what they have urged. I am, however, perfectly convinced that, so far as the shareholders are concerned, the resolutions were not only carried with the requisite majorities, but that the schemes, so far as they were concerned, were beyond all doubt such as reasonable member, of the class would approve.

The position with regard to the whole of the 5 [1]/2 per cent first mortgage debenture stock is, however, a very different one, and it requires a good deal of consideration. Not less than 1,095 holders of that stock, holding admittedly 707,313 pounds of stock, voted in person or by proxy against the scheme, and an additional holding of 24,520 pounds would have defeated that particular resolution. It is said that, if proper proxies had been admitted, the resolution, so far as the debenture stockholders were concerned, would have been defeated. It is evident that the voting on this particular resolution was very close, and, for that and the other reasons I have mentioned, I think it is necessary for the court very

carefully to consider and examine the scheme. The nature of the sacrifices which the debenture stock. holders are asked to consent to is, I think, fairly stated in the circular, and I shall regard myself as having read those paragraphs. The debenture stockholders are asked to agree to the surrender and cancellation of 10s out of each 1 pound nominal amount of stock held by them, and to accept in respect of the stock so surrendered thirty 6 per cent preference shares of 1 pound each, and thirty preferred ordinary shares of 1 pound each in the capital of the company, all credited as fully paid. Here I must. mention one of the necessities of the case: a large amount of further capital is

required for the purpose of the amalgamation and for the purpose of clearing up the difficulties in which Dorman Long are placed, and for that purpose it is proposed to create 2,500,000 pounds worth of prior lien stock charged on the assets to be acquired as the result of the amalgamation and to issue the greater part of the stock, I think 2,250,000 pounds worth of it, at once. The arrears of interest due on the debenture stock are to be cancelled; they are to waive their right to repayment on 1 May 1963, and they approve of the cancellation of the sinking fund obligation and the creation of a new fund to redeem the stock in thirty-seven years. Further than that, it is to be observed that there is being issued to the shareholders in the South Durham 5 [1]/2 per cent debenture stock so surrendered by the present holders, but the stock so surrendered is to be called "A" first mortgage debenture stock, and it is to be a fixed interest-bearing stock. On the other hand, the stock not surrendered is to be called "B" first redeemable stock; on that interest is to be non-cumulative and payable only out of profits to be ascertained as provided by the scheme, and if such interest is paid at the full rate at the end of three consecutive financial years, the interest is to cease to be dependent on the profits. After that the stock is to rank, pari passu, as regards interest and the repayment out of the surplus assets.

I have anxiously considered the terms of the circular, and have weighed the arguments which have been presented to me. In my opinion, the circular was not sufficient in the particular circumstances of this case, and it was in one important respect misleading. The most serious matter, in my opinion, is the reference to the trustees for the stockholders. It is in these terms:

"The terms of the scheme have been referred to the trustees for the stockholders who, after making a careful investigation of the whole position, recommend the proposals for the approval of the stockholders."

The truth of the matter is that there were four banks who had been financing the company, Barclays Bank, the National Provincial Bank, the Midland Bank, and Williams Deacon's Bank. Of those, Barclays Bank were the trustees. They were owed a week ago a sum of 1,411,000 pounds odd, and, as a result of a provisional agreement entered into by the company, partly referred to and explained in the circular under the heading of "Bankers," they are beyond all doubt getting great advantages if the scheme goes through. In my opinion, it was quite wrong to say that the scheme had been referred to the trustees for the stockholders who, after making a careful investigation, "recommend the proposals for the approval of the stockholders," without telling them or reminding them, if they already knew, that Barclays Bank were the trustees, and that they had the strongest interest in recommending the scheme from their own point of view as bankers. This court has known and has referred for hundreds of years to the difficult position of trustees who have an interest that conflicts with their duty. It is idle, I think, to suggest that it is possible for a bank which is owed about one-and-a-half million pounds, only part of it secured, to act impartially in considering such a scheme as that which is now proposed; yet, in my opinion, the ordinary reader of the clause which I have read would necessarily draw the inference that the independent trustees had, after a careful investigation of the whole position, come to the conclusion that the reader should vote for it and that it might properly be approved, or ought to be approved, by the stockholders. It is true that there is the clause in the trust deed, cl 46, which permits Barclays Bank to act as bankers for the company and to make advances and do other things in that capacity. I must express the opinion which I have already expressed during the argument, that that is a most undesirable clause. It is one which I myself would never have approved, nor, I believe, would the stockholders if they had been told it was to be inserted or had any idea as to how it might operate. This question as to the duties of trustees is not a technical matter at all. The greater the complexity of a proposed scheme under which shareholders or debenture stockholders are asked to make sacrifices, the more necessary it is for them to have the assistance of independent trustees

and the more useful such advice is likely to be. There is another great case, which I think has not finally left our

courts, in which a sum of 10,000,000 pounds or so has been lost, and I know well that the views of the trustees in that case were of great assistance in enabling the court to make certain orders which it was asked to make. I think it is most unfortunate that in the present case it has been impossible for the debenture stockholders to have the opinion of a really independent trustee to guide them in the matter which is before them.

That is not, however, the only matter in which I think the circular from the point of view of the debenture holders is open to serious criticism. In my opinion, it was not right, in asking the debenture holders to give up so large a portion of their security, to omit from the circular a statement of the results of the new valuation which it is stated had been made on the basis of the earning power of the company, the statement being that:

"the re-valuation has been confirmed by the well-known valuer, Mr P Michael Faraday, and by Mr John E James, the chairman of the Lancashire Steel Corpn Ltd."

In my opinion, the valuation having been made, the amount of it should have been stated. No figures whatever are given. It is quite true that the valuation by itself, being a valuation of the assets of the company as a going concern, is one which ought not to suggest that that sum is realisable on a forced sale of the assets. I think the circular might well, after having given the figure, have stated reasons for thinking that it could not be properly relied upon in the event of a liquidation, but it is a matter on which, in my opinion, the debenture holders were entitled to be informed.

There is one other matter and that is with reference to the position of the banks. Something is said as to the position of the banks in the circular. In my opinion, the two paragraphs where the position of the banks is explained are not wholly satisfactory, inasmuch as I think it is impossible for a reader to judge how far the scheme is for the benefit of the four banks and what sacrifices they are making in accepting 290,000 preference and preferred ordinary shares without a statement of the total amount due to them. 290,000 pounds is a large sum, but it is small compared with 2,420,000 pounds. Nor, I think, can a reader tell how far the position of the banks is being altered to the advantage of the company when he is told that 1,650,000 pounds is to remain as a sort of outstanding balance of indebtedness at a rate of interest which is not to exceed 4 per cent, unless the reader is also told that there will remain some 700,000 pounds or so, which can be called in at once if the banks think fit to do so. In saying that I do not wish to suggest in the very faintest way that these banks are likely to use their powers to bring down the amalgamated company; anybody who knows anything about business concerns will be quite convinced to the contrary. Nor do I want to suggest that the bankers have driven a hard bargain or have done anything unfair even if such a matter were within my knowledge. Banks are commercial enterprises and they are entitled to do the best they can for the benefit of their own shareholders in negotiating a scheme such as was presented to them by Dorman, Long & Co. In this connection I have to deal with the claim put forward by counsel for opposing debenture holders that this scheme is a scheme for the benefit of Barclays Bank Ltd. What that precisely means I do not know. It may mean that the interests of the stockholders have been disregarded, but I think that is probably higher than it could be put. It may mean that the banks have been unduly favoured in regard to the advantages and disadvantages which the various persons concerned suffer under the scheme. It does not seem to me that if that is the point of view it is a matter which can possibly be weighed in the judicial scale. I am satisfied to say that so far as the advantages obtained by the banks are concerned, in my opinion those advantages are not such that an ordinary business man would not come to the conclusion that they did not in any way prevent him from approving the scheme.

The conclusion to which I have come with regard to the Dorman Long petition

is that I cannot confirm the scheme for the reasons which I have given as to the circular, even if it were made out - and I am not clear that it has been made out - that the requisite majority was obtained at the meeting to which the debenture stockholders were summoned. Having listened with the greatest care to all the criticisms made against the scheme, I have come to the conclusion that there is nothing in it which, if carefully explained, might not be approved by a businessman acting reasonably in the matter. It is, however, for the stockholders to consider whether they will or will not approve it. They must face the position, I think, that the alternative to this or some other scheme is the appointment of a receiver. Persons, some of whom, at least, will be commercial men, will have to consider whether there is any chance of a receiver carrying on successfully, regard being had to the enormous complication of the interests involved

and to the exceedingly difficult commercial times in which we live.

I have now to consider the question whether the petition ought to be dismissed or whether fresh meetings should be summoned. I have criticised the circular in plain language. On the other hand, I think I should say that, apart from that, I am perfectly satisfied that the scheme was put forward in good faith, and, as evidence of the good faith of the board, I would refer to the fact that the board hold very large holdings in debenture stock and shares amounting in nominal value to over 250,000 pounds. Secondly, I attribute great weight to the circumstance that a number of persons representative of the insurance companies and investment trust companies, substantial holders of the 5 [1]/2 per cent debenture stock, have considered the scheme. Here there is what I hope is only a verbal criticism on the circular. The passage, somewhat curiously, abstains from saying that they recommend the scheme to the stockholders. All it says in words is that, after they had considered it, they thought the only alternative was the appointment of a receiver. That phrase might be true, even if they objected very strongly to the scheme. But I hope I am right in taking the view that that is an accidental omission and that these gentlemen, who, as I have said, represent very large holdings, after prolonged discussion with the board, have come to the conclusion that the scheme is one which should be supported. I may add that the investment trust companies hold over 600,000 pounds worth of 5 [1]/2 per cent debenture stock, and the insurance companies hold 460,000 pounds worth of like stock. That makes all together a very large holding.

A third matter might be added. There are some smaller objections to the scheme which I have pointed out in the course of the prolonged hearing of this case. They seem to me objections which might well weigh with a stockholder, and I understand that all of them can be, and some of them will be, met by a modification. If that is so, the new circular, if there is such a circular, sent out to the stockholders, might well indicate that the modifications which have been discussed would be put forward and assented to on behalf of the board.

That, I think, concludes what. I have to say in regard to the Dorman Long petition. I have deliberately abstained from expressing any opinion of my own whether the scheme is one which the stockholders should or should not support, because, in my opinion, that is a matter which is not within the function of the court. It is for the stockholders, I repeat, to deal with the matter, and if I have taken so long in considering the general features of the case, it is because I should be unwilling to let the matter go back for further consideration if the scheme were such that ultimately the court would have to decline to approve it.

Perhaps I should add that I have no power, as I conceive it, to order a fresh meeting, unless I am requested to do so. Nor have I, I think, any power to order a circular to be sent out at all. If I am asked to assent, in the case of the Dorman Long petition, to a fresh meeting being summoned, I should do so only on some sort of understanding that there was to be another explanatory circular issued to the members of that class.

I now come to deal with the South Durham petition, and, with regard to that, I think I can deal with it much more shortly than with the Dorman Long petition. It is a petition presented by a company incorporated in 1898, which up to the

present time has been in a very prosperous condition. The issued capital is 1,237,820 pounds, divided into 6 per cent cumulative preference shares and 6 per cent ordinary shares and "B" ordinary shares, all of 1 pound each. The preference shares are 300,000 in number, the ordinary shares 350,000, and 587,820 "B" ordinary shares have been issued. There are 300,000 pounds worth of 4 [1]/2 per cent perpetual debenture stock secured by a first charge repayable in the event of voluntary winding-up with a premium of 10 per cent.

Each of these two schemes is conditional upon the other scheme being sanctioned, and this one, therefore, takes effect only if the Dorman Long petition is sanctioned. I observe that it has to be confirmed by December 31 next, which is an event which may be difficult now, and would perhaps necessitate, if the matter goes on, a further resolution.

The facts with reference to this petition are well stated in the petition, which I will treat myself as having read. The first question is whether the scheme has been passed at the meetings of the various classes of shareholders who were

concerned. The debenture stockholders, according to the scheme, are to be repaid in cash with a 10 per cent bonus, and it is not surprising that the opposition there was overcome by the numbers of those voting. There were three other classes, namely, the 300,000 preference shares, the 350,000 ordinary shares, and the 587,820 "B" ordinary shares. The vote was close on all those three resolutions, and upon the view I have expressed as to proxies, two of the resolutions, at least, were not passed by the requisite majorities; that is to say, the resolution by the holders of the 300,000 preference shares, and the resolution by the holders of the 350,000 ordinary shares.

The facts with regard to the voting, and the proxy forms which the chairman was advised to reject, are sufficiently set out in para 21 of the petition. A number of proxies against the scheme were rejected by the chairman for the reason that, as printed, they expressly directed Mr Arthur Hyde, the leader of part of the opposition, to vote against the scheme, and did not, as did the form settled in Chambers for sending out by the board, leave it to the person giving the proxy to direct whether his proxy shall vote for the scheme with or without modification, or against the scheme. Upon grounds already indicated I think those proxies were good and ought to have been admitted. They were all lodged within forty-eight hours before the date of the meeting.

I am urged, upon that finding, to dismiss this petition. Having regard to all the circumstances of the case, to the circumstance that the other petition is one on which, as I have said, I am willing to direct other meetings to be summoned, that the interests involved are exceedingly great and widespread, that the joint undertaking is one of vast magnitude, and that many thousands of workmen are employed in the works of the two companies, I do not think it would be right for me to take the easy and simple course of dismissing this petition. The matter has been full argued, and, for the benefit of the various persons concerned, I think I should express my opinion, for what it is worth, on the matters which do not go simply to the question whether the resolutions have met with success or not.

The leading part in the opposition was represented by counsel for Mr Hyde, who sent out a circular asking for proxies against the scheme and giving his reasons against it. I think it is right. to express my opinion that Mr Hyde's circular was a reasonable one, its statements are substantially correct, and, therefore, very proper to be considered.

There are, I think, two questions to be considered, apart from the question as to the resolution, and I have already defined them in dealing with the Dorman Long scheme. Was the scheme fairly put before the shareholders, being the classes here concerned, and was it such a scheme as reasonable men of business might properly and reasonably approve?

I will deal with the second point first. I think there is great weight in the argument put before me on behalf of the company, that the amalgamation is the result of long negotiation by two wholly independent boards of directors, gentlemen

against whom nothing can really be said, beyond this - that, under the schemes as they stand, provision is made for their future remuneration and for compensation on liberal terms for those who do not obtain employment as a result of the amalgamation. The directors have testified that, in their opinion, the scheme is a fair one and beneficial to the company. I am content to believe that that is their true view. I think it is, perhaps, unfortunate that there are provisions for compensation to those members of the board who are not obtaining employment in the amalgamated company, on a generous scale, and I should not be sorry to hear that, upon consideration, some modification is going to be made in those provisions.

With regard to the remuneration to be given to the directors who are going to be employed in the future, it is a true observation that, upon the scheme as it comes before me, some, at any rate, of those directors might be getting something more in future than they have been getting in the past. I am sure that that is not the intention, and, if the matter is further considered, I hope it will be made clear that that is not going to be the case, and that if the scheme goes through, their remuneration is not going to be increased by reason of it.

I might leave the matter of the merits of the scheme there; but I think, having regard to the amount of evidence

given before me, and to all the reports and counter-reports, the valuations and counter-valuations, which I have tried to understand during the last week, I ought to say something in reference to the matters comprised therein.

It seems to me that the opponents of the scheme have not fully appreciated the true nature of the report of Messrs Peat, Marwick, Mitchell & Co, dated 9 August 1932, presented to the directors of the two boards. It is to some extent, I think, the fault of the South Durham board, who have referred to it in their explanatory circular of 30 June 1933, as if the document in question were a valuation of the company's assets. In my view, having carefully considered the matter, I do not think that is a true description of the document, unless, indeed, it is explained as being a very special kind of valuation prepared with a view only to ascertaining the relative values of the assets of the two amalgamating companies. It has to be admitted, as pointed out in Mr. Morgan's critical examination of Messrs Peat, Marwick, Mitchell & Co's report, that the figures contained in it are largely only of the nature of estimates. I do not want it to be supposed that I accept all the views expressed by Messrs Peat, Marwick, Mitchell & Co in this report, and in the subsequent circulars on behalf of the company, or that I reject all the views expressed in Mr Morgan's report on the other side. The opinion I have formed is this, and I think I ought to express it in the circumstances of the case. If the matter is approached by debenture holders with a feeling that times are mending, and that the experience of the years 1931 and 1932 is not likely to be repeated, or, at any rate, not likely to be repeated for any length of time, the views presented by the board of the South Durham company are easily to be understood, and they are to be understood even if full allowance is made for the circumstance that, as things are, Dorman Long are in a very serious financial position, and that unless this or some other scheme is adopted there must be a receiver to carry on its great undertaking. Certainly I am not going to take the view that people ought to approach this matter with a jaundiced eye as to the future. Business men, I think, are entitled to take a hopeful view, and they are not going to be persuaded by anything I say that that may be unwise.

The other points which have been exhaustively argued before me are all of them points on which I think I may fairly come to the conclusion that the board of the company have acted reasonably and have done the best they can far the interests committed to their charge. Here, again, I think the fact that they have very large interests themselves in the matter is almost conclusive evidence of their good faith.

It may be right to observe that if the company desires to have further meetings, it would be proper to vary the form of the circular in some respects and to add some additional information. In particular, I think it would certainly be most

desirable to insert in the circular, what must be almost common knowledge now, that the position of Dorman Long is such that unless there is this or some other scheme, they must face the appointment of a receiver. I can conceive that the directors of South Durham are not very anxious to put that in their circular, but it seems to me that is one of the very reasons why it should be put in, in order that the shareholders should have an opportunity of realising what they are asked to assent to. Further, though it is not a very important matter, I think it would be well if the reference to the re-valuation of the assets and to the confirmation by Messrs Michael Faraday and John James was modified. I need not repeat what I have said with reference to the compensation clause, and I would add what I think, perhaps, I should have said in reference to the other scheme, namely, that both schemes are, of course, subject to modification. I have already expressed my opinion as to the so-called debenture-holders committee, which is a mattes which would certainly require some modification, and with regard to the appointment of a wholly independent trustee for the 5 [1]/2 per cent debenture holders.

My opinion, therefore, is that if I am asked to do so, I ought to direct fresh meetings to be summoned on the present petition, but in this case I think I should have to direct meetings to be held probably of all the classes concerned. In the other case of Dorman Long, I think it would be right if I directed only a meeting of the 5 [1]/2 per cent debenture holders.

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

L.R.C. (1985), ch. C-36

Current to February 3, 2016

Last amended on February 26, 2015

À jour au 3 février 2016

Dernière modification le 26 février 2015

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to February 3, 2016. The last amendments came into force on February 26, 2015. Any amendments that were not in force as of February 3, 2016 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 3 février 2016. Les dernières modifications sont entrées en vigueur le 26 février 2015. Toutes modifications qui n'étaient pas en vigueur au 3 février 2016 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

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An Act to facilitate compromises and arrangements between companies and their creditors

Loi facilitant les transactions et arrangements entre les compagnies et leurs créanciers

Short Title

Short title

1 This Act may be cited as the *Companies' Creditors Arrangement Act*.

R.S., c. C-25, s. 1.

Titre abrégé

Titre abrégé

1 *Loi sur les arrangements avec les créanciers des compagnies.*

S.R., ch. C-25, art. 1.

Interpretation

Definitions

2 (1) In this Act,

aircraft objects [Repealed, 2012, c. 31, s. 419]

bargaining agent means any trade union that has entered into a collective agreement on behalf of the employees of a company; (*agent négociateur*)

bond includes a debenture, debenture stock or other evidences of indebtedness; (*obligation*)

cash-flow statement, in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; (*état de l'évolution de l'encaisse*)

claim means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; (*réclamation*)

collective agreement, in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; (*convention collective*)

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of

Définitions et application

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

accord de transfert de titres pour obtention de crédit Accord aux termes duquel une compagnie débitrice transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible. (*title transfer credit support agreement*)

actionnaire S'agissant d'une compagnie ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette compagnie ou détenant des parts de cette fiducie. (*shareholder*)

administrateur S'agissant d'une compagnie autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre. (*director*)

agent négociateur Syndicat ayant conclu une convention collective pour le compte des employés d'une compagnie. (*bargaining agent*)

biens aéronautiques [Abrogée, 2012, ch. 31, art. 419]

the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; (*compagnie*)

court means

(a) in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,

(a.1) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(c.1) in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice; (*tribunal*)

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

director means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever named called; (*administrateur*)

eligible financial contract means an agreement of a prescribed kind; (*contrat financier admissible*)

equity claim means a claim that is in respect of an equity interest, including a claim for, among others,

compagnie Toute personne morale constituée par une loi fédérale ou provinciale ou sous son régime et toute personne morale qui possède un actif ou exerce des activités au Canada, quel que soit l'endroit où elle a été constituée, ainsi que toute fiducie de revenu. La présente définition exclut les banques, les banques étrangères autorisées, au sens de l'article 2 de la *Loi sur les banques*, les compagnies de chemin de fer ou de télégraphe, les compagnies d'assurances et les sociétés auxquelles s'applique la *Loi sur les sociétés de fiducie et de prêt*. (*company*)

compagnie débitrice Toute compagnie qui, selon le cas :

a) est en faillite ou est insolvable;

b) a commis un acte de faillite au sens de la *Loi sur la faillite et l'insolvabilité* ou est réputée insolvable au sens de la *Loi sur les liquidations et les restructurations*, que des procédures relatives à cette compagnie aient été intentées ou non sous le régime de l'une ou l'autre de ces lois;

c) a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité*;

d) est en voie de liquidation aux termes de la *Loi sur les liquidations et les restructurations* parce que la compagnie est insolvable. (*debtor company*)

contrat financier admissible Contrat d'une catégorie réglementaire. (*eligible financial contract*)

contrôleur S'agissant d'une compagnie, la personne nommée en application de l'article 11.7 pour agir à titre de contrôleur des affaires financières et autres de celle-ci. (*monitor*)

convention collective S'entend au sens donné à ce terme par les règles de droit applicables aux négociations collectives entre la compagnie débitrice et l'agent négociateur. (*collective agreement*)

créancier chirographaire Tout créancier d'une compagnie qui n'est pas un créancier garanti, qu'il réside ou soit domicilié au Canada ou à l'étranger. Un fiduciaire pour les détenteurs d'obligations non garanties, lesquelles sont émises en vertu d'un acte de fiducie ou autre acte fonctionnant en faveur du fiduciaire, est réputé un créancier chirographaire pour toutes les fins de la présente loi sauf la votation à une assemblée des créanciers relativement à ces obligations. (*unsecured creditor*)

créancier garanti Détenteur d'hypothèque, de gage, charge, nantissement ou privilège sur ou contre l'en-

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (*réclamation relative à des capitaux propres*)

equity interest means

(a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; (*intérêt relatif à des capitaux propres*)

financial collateral means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account; (*garantie financière*)

income trust means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act; (*fiducie de revenu*)

initial application means the first application made under this Act in respect of a company; (*demande initiale*)

semble ou une partie des biens d'une compagnie débitrice, ou tout transport, cession ou transfert de la totalité ou d'une partie de ces biens, à titre de garantie d'une dette de la compagnie débitrice, ou un détenteur de quelque obligation d'une compagnie débitrice garantie par hypothèque, gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens de la compagnie débitrice, ou un transport, une cession ou un transfert de tout ou partie de ces biens, ou une fiducie à leur égard, que ce détenteur ou bénéficiaire réside ou soit domicilié au Canada ou à l'étranger. Un fiduciaire en vertu de tout acte de fiducie ou autre instrument garantissant ces obligations est réputé un créancier garanti pour toutes les fins de la présente loi sauf la votation à une assemblée de créanciers relativement à ces obligations. (*secured creditor*)

demande initiale La demande faite pour la première fois en application de la présente loi relativement à une compagnie. (*initial application*)

état de l'évolution de l'encaisse Relativement à une compagnie, l'état visé à l'alinéa 10(2)a) portant, projections à l'appui, sur l'évolution de l'encaisse de celle-ci. (*cash-flow statement*)

fiducie de revenu Fiducie qui possède un actif au Canada et dont les parts sont inscrites à une bourse de valeurs mobilières visée par règlement à la date à laquelle des procédures sont intentées sous le régime de la présente loi, ou sont détenues en majorité par une fiducie dont les parts sont inscrites à une telle bourse à cette date. (*income trust*)

garantie financière S'il est assujetti soit à un intérêt ou, dans la province de Québec, à un droit garantissant le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible, soit à un accord de transfert de titres pour obtention de crédit, l'un ou l'autre des éléments suivants :

a) les sommes en espèces et les équivalents de trésorerie — notamment les effets négociables et dépôts à vue;

b) les titres, comptes de titres, droits intermédiés et droits d'acquérir des titres;

c) les contrats à terme ou comptes de contrats à terme. (*financial collateral*)

intérêt relatif à des capitaux propres

a) S'agissant d'une compagnie autre qu'une fiducie de revenu, action de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle ac-

monitor, in respect of a company, means the person appointed under section 11.7 to monitor the business and financial affairs of the company; (*contrôleur*)

net termination value means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

prescribed means prescribed by regulation; (*Version anglaise seulement*)

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

shareholder includes a member of a company — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; (*actionnaire*)

Superintendent of Bankruptcy means the Superintendent of Bankruptcy appointed under subsection 5(1) of the *Bankruptcy and Insolvency Act*; (*surintendant des faillites*)

Superintendent of Financial Institutions means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; (*surintendant des institutions financières*)

title transfer credit support agreement means an agreement under which a debtor company has provided title to property for the purpose of securing the payment or performance of an obligation of the debtor company in respect of an eligible financial contract; (*accord de transfert de titres pour obtention de crédit*)

unsecured creditor means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall

tion et ne provenant pas de la conversion d'une dette convertible;

b) s'agissant d'une fiducie de revenu, part de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle part et ne provenant pas de la conversion d'une dette convertible. (*equity interest*)

obligation Sont assimilés aux obligations les débentures, stock-obligations et autres titres de créance. (*bond*)

réclamation S'entend de toute dette, de tout engagement ou de toute obligation de quelque nature que ce soit, qui constituerait une réclamation prouvable au sens de l'article 2 de la *Loi sur la faillite et l'insolvabilité*. (*claim*)

réclamation relative à des capitaux propres Réclamation portant sur un intérêt relatif à des capitaux propres et visant notamment :

a) un dividende ou un paiement similaire;

b) un remboursement de capital;

c) tout droit de rachat d'actions au gré de l'actionnaire ou de remboursement anticipé d'actions au gré de l'émetteur;

d) des pertes pécuniaires associées à la propriété, à l'achat ou à la vente d'un intérêt relatif à des capitaux propres ou à l'annulation de cet achat ou de cette vente;

e) une contribution ou une indemnité relative à toute réclamation visée à l'un des alinéas a) à d). (*equity claim*)

surintendant des faillites Le surintendant des faillites nommé au titre du paragraphe 5(1) de la *Loi sur la faillite et l'insolvabilité*. (*Superintendent of Bankruptcy*)

surintendant des institutions financières Le surintendant des institutions financières nommé en application du paragraphe 5(1) de la *Loi sur le Bureau du surintendant des institutions financières*. (*Superintendent of Financial Institutions*)

tribunal

a) Dans les provinces de la Nouvelle-Écosse, de la Colombie-Britannique et de l'Île-du-Prince-Édouard, la Cour suprême;

a.1) dans la province d'Ontario, la Cour supérieure de justice;

be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. (*créancier chirographaire*)

b) dans la province de Québec, la Cour supérieure;

c) dans les provinces du Nouveau-Brunswick, du Manitoba, de la Saskatchewan et d'Alberta, la Cour du Banc de la Reine;

c.1) dans la province de Terre-Neuve-et-Labrador, la Section de première instance de la Cour suprême;

d) au Yukon et dans les Territoires du Nord-Ouest, la Cour suprême et, au Nunavut, la Cour de justice du Nunavut. (*court*)

valeurs nettes dues à la date de résiliation La somme nette obtenue après compensation des obligations mutuelles des parties à un contrat financier admissible effectuée conformément à ce contrat. (*net termination value*)

Meaning of *related* and *dealing at arm's length*

(2) For the purpose of this Act, section 4 of the *Bankruptcy and Insolvency Act* applies for the purpose of determining whether a person is related to or dealing at arm's length with a debtor company.

R.S., 1985, c. C-36, s. 2; R.S., 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 4; 1992, c. 27, s. 90; 1993, c. 34, s. 52; 1996, c. 6, s. 167; 1997, c. 12, s. 120(E); 1998, c. 30, s. 14; 1999, c. 3, s. 22, c. 28, s. 154; 2001, c. 9, s. 575; 2002, c. 7, s. 133; 2004, c. 25, s. 193; 2005, c. 3, s. 15, c. 47, s. 124; 2007, c. 29, s. 104, c. 36, ss. 61, 105; 2012, c. 31, s. 419; 2015, c. 3, s. 37.

Définition de *personnes liées*

(2) Pour l'application de la présente loi, l'article 4 de la *Loi sur la faillite et l'insolvabilité* s'applique pour établir si une personne est liée à une compagnie débitrice ou agit sans lien de dépendance avec une telle compagnie.

L.R. (1985), ch. C-36, art. 2; L.R. (1985), ch. 27 (2e suppl.), art. 10; 1990, ch. 17, art. 4; 1992, ch. 27, art. 90; 1993, ch. 34, art. 52; 1996, ch. 6, art. 167; 1997, ch. 12, art. 120(A); 1998, ch. 30, art. 14; 1999, ch. 3, art. 22, ch. 28, art. 154; 2001, ch. 9, art. 575; 2002, ch. 7, art. 133; 2004, ch. 25, art. 193; 2005, ch. 3; art. 15, ch. 47, art. 124; 2007, ch. 29, art. 104, ch. 36, art. 61 et 105; 2012, ch. 31, art. 419; 2015, ch. 3, art. 37.

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

Application

3 (1) La présente loi ne s'applique à une compagnie débitrice ou aux compagnies débitrices qui appartiennent au même groupe qu'elle que si le montant des réclamations contre elle ou les compagnies appartenant au même groupe, établi conformément à l'article 20, est supérieur à cinq millions de dollars ou à toute autre somme prévue par les règlements.

Affiliated companies

(2) For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

Application

(2) Pour l'application de la présente loi :

a) appartiennent au même groupe deux compagnies dont l'une est la filiale de l'autre ou qui sont sous le contrôle de la même personne;

b) sont réputées appartenir au même groupe deux compagnies dont chacune appartient au groupe d'une même compagnie.

Company controlled

(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

(a) securities of the company to which are attached more than fifty per cent of the votes that may be cast

Application

(3) Pour l'application de la présente loi, ont le contrôle d'une compagnie la personne ou les compagnies :

a) qui détiennent — ou en sont bénéficiaires — , autrement qu'à titre de garantie seulement, des valeurs

to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

Subsidiary

(4) For the purposes of this Act, a company is a subsidiary of another company if

(a) it is controlled by

(i) that other company,

(ii) that other company and one or more companies each of which is controlled by that other company, or

(iii) two or more companies each of which is controlled by that other company; or

(b) it is a subsidiary of a company that is a subsidiary of that other company.

R.S., 1985, c. C-36, s. 3; 1997, c. 12, s. 121; 2005, c. 47, s. 125.

mobilières conférant plus de cinquante pour cent du maximum possible des voix à l'élection des administrateurs de la compagnie;

b) dont lesdites valeurs mobilières confèrent un droit de vote dont l'exercice permet d'élire la majorité des administrateurs de la compagnie.

Application

(4) Pour l'application de la présente loi, une compagnie est la filiale d'une autre compagnie dans chacun des cas suivants :

a) elle est contrôlée :

(i) soit par l'autre compagnie,

(ii) soit par l'autre compagnie et une ou plusieurs compagnies elles-mêmes contrôlées par cette autre compagnie,

(iii) soit par des compagnies elles-mêmes contrôlées par l'autre compagnie;

b) elle est la filiale d'une filiale de l'autre compagnie.

L.R. (1985), ch. C-36, art. 3; 1997, ch. 12, art. 121; 2005, ch. 47, art. 125.

PART I

Compromises and Arrangements

Compromise with unsecured creditors

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.

R.S., c. C-25, s. 4.

Compromise with secured creditors

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

PARTIE I

Transactions et arrangements

Transaction avec les créanciers chirographaires

4 Lorsqu'une transaction ou un arrangement est proposé entre une compagnie débitrice et ses créanciers chirographaires ou toute catégorie de ces derniers, le tribunal peut, à la requête sommaire de la compagnie, d'un de ces créanciers ou du syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 4.

Transaction avec les créanciers garantis

5 Lorsqu'une transaction ou un arrangement est proposé entre une compagnie débitrice et ses créanciers garantis ou toute catégorie de ces derniers, le tribunal peut, à la requête sommaire de la compagnie, d'un de ces créanciers ou du syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou

company, to be summoned in such manner as the court directs.

R.S., c. C-25, s. 5.

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 122.

Compromises to be sanctioned by court

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, and, if the court so directs, on the company;

catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 5.

Transaction — réclamations contre les administrateurs

5.1 (1) La transaction ou l'arrangement visant une compagnie débitrice peut comporter, au profit de ses créanciers, des dispositions relativement à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.

Restriction

(2) La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

Pouvoir du tribunal

(3) Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

Démission ou destitution des administrateurs

(4) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie débitrice est réputé un administrateur pour l'application du présent article.

1997, ch. 12, art. 122.

Homologation par le tribunal

6 (1) Si une majorité en nombre représentant les deux tiers en valeur des créanciers ou d'une catégorie de créanciers, selon le cas, — mise à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant des réclamations relatives à des capitaux propres — présents et votant soit en personne, soit par fondé de pouvoir à l'assemblée ou aux assemblées de créanciers respectivement tenues au titre des articles 4 et 5, acceptent une transaction ou un arrangement, proposé ou modifié à cette ou ces assemblées, la transaction ou l'arrangement peut être homologué par le tribunal et, le cas échéant, lie :

tors, whether secured or unsecured, as the case may be, and on the company; and

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

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

a) tous les créanciers ou la catégorie de créanciers, selon le cas, et tout fiduciaire pour cette catégorie de créanciers, qu'ils soient garantis ou chirographaires, selon le cas, ainsi que la compagnie;

b) dans le cas d'une compagnie qui a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité* ou qui est en voie de liquidation sous le régime de la *Loi sur les liquidations et les restructurations*, le syndic en matière de faillite ou liquidateur et les contributeurs de la compagnie.

Modification des statuts constitutifs

(2) Le tribunal qui homologue une transaction ou un arrangement peut ordonner la modification des statuts constitutifs de la compagnie conformément à ce qui est prévu dans la transaction ou l'arrangement, selon le cas, pourvu que la modification soit légale au regard du droit fédéral ou provincial.

Certaines réclamations de la Couronne

(3) Le tribunal ne peut, sans le consentement de Sa Majesté, homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'homologation, de toutes les sommes qui étaient dues lors de la demande d'ordonnance visée aux articles 11 ou 11.02 et qui pourraient, de par leur nature, faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités ou autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités ou autres charges afférents, laquelle somme :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu au-

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

quel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale a institué un régime provincial de pensions au sens de ce paragraphe.

Défaut d'effectuer un versement

(4) Lorsqu'une ordonnance comporte une disposition autorisée par l'article 11.09, le tribunal ne peut homologuer la transaction ou l'arrangement si, lors de l'audition de la demande d'homologation, Sa Majesté du chef du Canada ou d'une province le convainc du défaut de la compagnie d'effectuer un versement portant sur une somme visée au paragraphe (3) et qui est devenue exigible après le dépôt de la demande d'ordonnance visée à l'article 11.02.

Restriction — employés, etc.

(5) Le tribunal ne peut homologuer la transaction ou l'arrangement que si, à la fois :

a) la transaction ou l'arrangement prévoit le paiement aux employés actuels et anciens de la compagnie, dès son homologation, de sommes égales ou supérieures, d'une part, à celles qu'ils seraient en droit de recevoir en application de l'alinéa 136(1)d) de la *Loi sur la faillite et l'insolvabilité* si la compagnie avait fait faillite à la date à laquelle des procédures ont été introduites sous le régime de la présente loi à son égard et, d'autre part, au montant des gages, salaires, commissions ou autre rémunération pour services fournis entre la date de l'introduction des procédures et celle de l'homologation, y compris les sommes que le voyageur de commerce a régulièrement déboursées dans le cadre de l'exploitation de la compagnie entre ces dates;

b) il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa a).

Restriction — régime de pension

(6) Si la compagnie participe à un régime de pension réglementaire institué pour ses employés, le tribunal ne peut homologuer la transaction ou l'arrangement que si, à la fois :

a) la transaction ou l'arrangement prévoit que seront effectués des paiements correspondant au total des

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

sommes ci-après qui n'ont pas été versées au fonds établi dans le cadre du régime de pension :

(i) les sommes qui ont été déduites de la rémunération des employés pour versement au fonds,

(ii) dans le cas d'un régime de pension réglementaire régi par une loi fédérale :

(A) les coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur est tenu de verser au fonds,

(B) les sommes que l'employeur est tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension*,

(C) les sommes que l'employeur est tenu de verser à l'administrateur d'un régime de pension agréé collectif au sens du paragraphe 2(1) de la *Loi sur les régimes de pension agréés collectifs*,

(iii) dans le cas de tout autre régime de pension réglementaire :

(A) la somme égale aux coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur serait tenu de verser au fonds si le régime était régi par une loi fédérale,

(B) les sommes que l'employeur serait tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension* si le régime était régi par une loi fédérale,

(C) les sommes que l'employeur serait tenu de verser à l'égard du régime s'il était régi par la *Loi sur les régimes de pension agréés collectifs*;

b) il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

R.S., 1985, c. C-36, s. 6; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 123; 2004, c. 25, s. 194; 2005, c. 47, s. 126, 2007, c. 36, s. 106; 2009, c. 33, s. 27; 2012, c. 16, s. 82.

Court may give directions

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.

R.S., c. C-25, s. 7.

Scope of Act

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.

R.S., c. C-25, s. 8.

Non-application du paragraphe (6)

(7) Par dérogation au paragraphe (6), le tribunal peut homologuer la transaction ou l'arrangement qui ne prévoit pas le versement des sommes mentionnées à ce paragraphe s'il est convaincu que les parties en cause ont conclu un accord sur les sommes à verser et que l'autorité administrative responsable du régime de pension a consenti à l'accord.

Paiement d'une réclamation relative à des capitaux propres

(8) Le tribunal ne peut homologuer la transaction ou l'arrangement qui prévoit le paiement d'une réclamation relative à des capitaux propres que si, selon les termes de celle-ci, le paiement intégral de toutes les autres réclamations sera effectué avant le paiement de la réclamation relative à des capitaux propres.

L.R. (1985), ch. C-36, art. 6; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 123; 2004, ch. 25, art. 194; 2005, ch. 47, art. 126, 2007, ch. 36, art. 106; 2009, ch. 33, art. 27; 2012, ch. 16, art. 82.

Le tribunal peut donner des instructions

7 Si une modification d'une transaction ou d'un arrangement est proposée après que le tribunal a ordonné qu'une ou plusieurs assemblées soient convoquées, cette ou ces assemblées peuvent être ajournées aux conditions que peut prescrire le tribunal quant à l'avis et autrement, et ces instructions peuvent être données tant après qu'avant l'ajournement de toute ou toutes assemblées, et le tribunal peut, à sa discrétion, prescrire qu'il ne sera pas nécessaire d'ajourner quelque assemblée ou de convoquer une nouvelle assemblée de toute catégorie de créanciers ou actionnaires qui, selon l'opinion du tribunal, n'est pas défavorablement atteinte par la modification proposée, et une transaction ou un arrangement ainsi modifié peut être homologué par le tribunal et être exécutoire en vertu de l'article 6.

S.R., ch. C-25, art. 7.

Champ d'application de la loi

8 La présente loi n'a pas pour effet de limiter mais d'étendre les stipulations de tout instrument actuellement ou désormais existant relativement aux droits de créanciers ou de toute catégorie de ces derniers, et elle est pleinement exécutoire et effective nonobstant toute stipulation contraire de cet instrument.

S.R., ch. C-25, art. 8.

This Act is Current to February 10, 2016

CLASS PROCEEDINGS ACT

[RSBC 1996] CHAPTER 50

Contents

Part 1 — Definitions

Definitions

1 In this Act:

"certification order" means an order certifying a proceeding as a class proceeding;

"class proceeding" means a proceeding certified as a class proceeding under Part 2;

"common issues" means

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

"court", except in sections 36 (4) and 37, means the Supreme Court;

"defendant" includes a respondent;

"plaintiff" includes a petitioner.

Part 2 — Certification

Plaintiff's class proceeding

2 (1) One member of a class of persons who are resident in British Columbia may commence a proceeding in the court on behalf of the members of that class.

(2) The person who commences a proceeding under subsection (1) must make an application to a judge of the court for an order certifying the proceeding as a class proceeding and, subject to subsection (4), appointing the person as representative plaintiff.

(3) An application under subsection (2) must be made

(a) within 90 days after the later of

(i) the date on which the last response to civil claim was served, and

(ii) the date on which the period prescribed by the Supreme Court Civil Rules for service of the last response to a notice of civil claim expires without that pleading having been served, or

(b) at any other time, with leave of the court.

(4) The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.

Defendant's class proceeding

3 A defendant to 2 or more proceedings may, at any stage of one of the proceedings, make an application to a judge of the court for an order certifying the proceedings as a class proceeding and appointing a representative plaintiff.

Class certification

4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of 2 or more persons;

(c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a representative plaintiff who

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Certification application

5 (1) An application for a certification order under section 2 (2) or 3 must be supported by an affidavit of the applicant.

(2) A copy of the notice of application and supporting affidavit must be filed and

(a) served by ordinary service on all persons by whom or on whose behalf a pleading has been filed in the proceeding, and

(b) served by personal service on any other persons named in the style of proceedings.

(3) Unless otherwise ordered, there must be at least 14 days between

(a) the service of a notice of application and supporting affidavit, and

(b) the day named in the notice of application for the hearing.

(4) Unless otherwise ordered, a person to whom a notice of application and affidavit is served under this section must, not less than 5 days or such other period as the court may order before the date of the hearing of the application, file an affidavit and serve a copy of the filed affidavit by ordinary service on all persons by whom or on whose behalf a pleading has been filed in the proceeding.

(5) A person filing an affidavit under subsection (2) or (4) must

(a) set out in the affidavit the material facts on which the person intends to rely at the hearing of the application,

(b) swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding, and

(c) provide the person's best information on the number of members in the proposed class.

(6) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

(7) An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding.

Subclass certification

6 (1) Despite section 4 (1), if a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court must not certify the proceeding as a class proceeding unless there is, in addition to the representative plaintiff for the class, a representative plaintiff who

(a) would fairly and adequately represent the interests of the subclass,

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding, and

(c) does not have, on the common issues for the subclass, an interest that is in conflict with the interests of other subclass members.

(2) A class that comprises persons resident in British Columbia and persons not resident in British Columbia must be divided into subclasses along those lines.

Certain matters not bar to certification

7 The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

(d) the number of class members or the identity of each class member is not known;

(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

Contents of certification order

8 (1) A certification order must

(a) describe the class in respect of which the order was made by setting out the class's identifying characteristics,

(b) appoint the representative plaintiff for the class,

(c) state the nature of the claims asserted on behalf of the class,

(d) state the relief sought by the class,

(e) set out the common issues for the class,

(f) state the manner in which and the time within which a class member may opt out of the proceeding,

(g) state the manner in which and the time within which a person who is not a resident of British Columbia may opt in to the proceeding, and

(h) include any other provisions the court considers appropriate.

(2) If a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion

of the court, the protection of the interests of the subclass members requires that they be separately represented, the certification order must include the same information in relation to the subclass that, under subsection (1), is required in relation to the class.

(3) The court, on the application of a party or class member, may at any time amend a certification order.

Refusal to certify

9 If the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for that purpose, the court may

(a) order the addition, deletion or substitution of parties,

(b) order the amendment of the pleadings, and

(c) make any other order that it considers appropriate.

If conditions for certification not satisfied

10 (1) Without limiting section 8 (3), at any time after a certification order is made under this Part, the court may amend the certification order, decertify the proceeding or make any other order it considers appropriate if it appears to the court that the conditions mentioned in section 4 or 6 (1) are not satisfied with respect to a class proceeding.

(2) If the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties and may make any order referred to in section 9 (a) to (c) in relation to each of those proceedings.

Part 3 — Conduct of Class Proceedings

Division 1 — Role of Court

Stages of class proceedings

11 (1) Unless the court otherwise orders under section 12, in a class proceeding,

(a) common issues for a class must be determined together,

(b) common issues for a subclass must be determined together, and

(c) individual issues that require the participation of individual class members must be determined individually in accordance

with sections 27 and 28.

(2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

Court may determine conduct of proceeding

12 The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

Court may stay any other proceeding

13 The court may at any time stay any proceeding related to the class proceeding on the terms the court considers appropriate.

Applications

14 (1) The judge who makes a certification order is to hear all applications in the class proceeding before the trial of the common issues.

(2) If a judge who has heard applications under subsection (1) becomes unavailable for any reason to hear an application in the class proceeding, the chief justice of the court may assign another judge of the court to hear the application.

(3) A judge who hears applications under subsection (1) or (2) may but need not preside at the trial of the common issues.

Division 2 — Participation of Class Members

Participation of class members

15 (1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.

(2) Participation under subsection (1) must be in the manner and on the terms, including terms as to costs, that the court considers appropriate.

Opting out and opting in

16 (1) A member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

(2) Subject to subsection (4), a person who is not a resident of British

Columbia may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt in to that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.

(3) A person referred to in subsection (2) who opts in to a class proceeding is from that time a member of the class involved in the class proceeding for every purpose of this Act.

(4) A person may not opt in to a class proceeding under subsection (2) unless the subclass of which the person is to become a member has or will have, at the time the person becomes a member, a representative plaintiff who satisfies the requirements of section 6 (1) (a), (b) and (c).

(5) If a subclass is created as a result of persons opting in to a class proceeding under subsection (2), the representative plaintiff for that subclass must ensure that the certification order for the class proceeding is amended, if necessary, to comply with section 8 (2).

Discovery

17 (1) Parties to a class proceeding have the same rights of discovery under the Supreme Court Civil Rules against one another as they would have in any other proceeding.

(2) After discovery of the representative plaintiff or, in a proceeding referred to in section 6, one or more of the representative plaintiffs, a defendant may, with leave of the court, discover other class members.

(3) In deciding whether to grant a defendant leave to discover other class members, the court must consider the following:

(a) the stage of the class proceeding and the issues to be determined at that stage;

(b) the presence of subclasses;

(c) whether the discovery is necessary in view of the defences of the party seeking leave;

(d) the approximate monetary value of individual claims, if any;

(e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered;

(f) any other matter the court considers relevant.

(4) A class member is subject to the same sanctions under the Supreme Court Civil Rules as a party for failure to submit to discovery.

Examination of class members before an application

18 (1) A party must not require a class member, other than a representative plaintiff, to be examined as a witness before the hearing of any application, except with leave of the court.

(2) Section 17 (3) applies to a decision whether to grant leave under subsection (1) of this section.

Division 3 — Notices

Notice of certification

19 (1) Notice that a proceeding has been certified as a class proceeding must be given by the representative plaintiff to the class members in accordance with this section.

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.

(3) The court must make an order setting out when and by what means notice is to be given under this section and in doing so must have regard to the following:

(a) the cost of giving notice;

(b) the nature of the relief sought;

(c) the size of the individual claims of the class members;

(d) the number of class members;

(e) the presence of subclasses;

(f) whether some or all of the class members may opt out of the class proceeding;

(g) the places of residence of class members;

(h) any other relevant matter.

(4) The court may order that notice be given by

(a) personal delivery,

(b) mail,

(c) posting, advertising, publishing or leafleting,

(d) individually notifying a sample group within the class, or

(e) any other means or combination of means that the court considers appropriate.

(5) The court may order that notice be given to different class members by different means.

(6) Unless the court orders otherwise, notice under this section must

(a) describe the proceeding, including the names and addresses of the representative plaintiffs and the relief sought,

(b) state the manner in which and the time within which a class member may opt out of the proceeding,

(c) state the manner in which and the time within which a person who is not a resident of British Columbia may opt in to the proceeding,

(d) describe the possible financial consequences of the proceeding to class members and subclass members,

(e) summarize any agreements respecting fees and disbursements

(i) between the representative plaintiff and the representative plaintiff's solicitors, and

(ii) if the recipient of the notice is a member of a subclass, between the representative plaintiff for that subclass and that representative plaintiff's solicitors,

(f) describe any counterclaim being asserted by or against the class or any subclass, including the relief sought in the counterclaim,

(g) state that the judgment on the common issues for the class, whether favourable or not, will bind all class members who do not opt out of the proceeding,

(h) state that the judgment on the common issues for a subclass, whether favourable or not, will bind all subclass members who do not opt out of the proceeding,

(i) describe the rights, if any, of class members to participate in the proceeding,

(j) give an address to which class members may direct inquiries about the proceeding, and

(k) give any other information the court considers appropriate.

(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements.

Notice of determination of common issues

20 (1) When, in a class proceeding, the court determines common issues for the class or a subclass, the representative plaintiff for the class or subclass must give notice to the members of the class or subclass in accordance with this section.

(2) Section 19 (3) to (5) applies to notice given under this section.

(3) Notice under this section must

(a) state that common issues have been determined,

(b) identify the common issues that have been determined and explain the determinations made,

(c) if common issues have been determined in favour of the class or subclass,

(i) state that members of the class or subclass may be entitled to individual relief,

(ii) describe the steps that must be taken to establish an individual claim, and

(iii) state that failure on the part of a member of the class or subclass to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court,

(d) give an address to which members of the class or subclass may direct inquiries about the proceeding, and

(e) give any other information that the court considers appropriate.

Notice to protect interests of affected persons

21 (1) At any time in a class proceeding, the court may order any party to give notice to the persons that the court considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.

(2) Section 19 (3) to (5) applies to notice given under this section.

Approval of notice by the court

22 A notice under this Division must be approved by the court before it is given.

Giving of notice by another party

23 The court may order a party to give the notice required to be given by another party under this Act.

Costs of notice

24 (1) The court may make any order it considers appropriate as to the costs of any notice under this Division, including an order apportioning costs among parties.

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass.

Part 4 — Orders, Awards and Related Procedures

Division 1 — Order on Common Issues and Individual Issues

Contents of order on common issues

25 An order made in respect of a judgment on common issues of a class or subclass must

(a) set out the common issues,

(b) name or describe the class or subclass members to the extent possible,

(c) state the nature of the claims asserted on behalf of the class or subclass, and

(d) specify the relief granted.

Judgment on common issues is binding

26 (1) A judgment on common issues of a class or subclass binds every member of the class or subclass, as the case may be, who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that

(a) are set out in the certification order,

(b) relate to claims described in the certification order, and

(c) relate to relief sought by the class or subclass as stated in the certification order.

(2) A judgment on common issues of a class or subclass does not bind a party to the class proceeding in any subsequent proceeding between the party and a person who opted out of the class proceedings.

Determination of individual issues

27 (1) When the court determines common issues in favour of a class or subclass and determines that there are issues, other than those that may be determined under section 32, that are applicable only to certain individual members of the class or subclass, the court may

(a) determine those individual issues in further hearings presided over by the judge who determined the common issues or by another judge of the court,

(b) appoint one or more persons including, without limitation, one or more independent experts, to conduct an inquiry into those individual issues under the Supreme Court Civil Rules and report back to the court, or

(c) with the consent of the parties, direct that those individual issues be determined in any other manner.

(2) The court may give any necessary directions relating to the procedures that must be followed in conducting hearings, inquiries and determinations under subsection (1).

(3) In giving directions under subsection (2), the court must choose the least expensive and most expeditious method of determining the individual issues that is consistent with justice to members of the class or subclass and the parties and, in doing so, the court may

(a) dispense with any procedural step that it considers unnecessary, and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

(4) The court must set a reasonable time within which individual members of the class or subclass may make claims under this section in respect of the individual issues.

(5) A member of the class or subclass who fails to make a claim within the time set under subsection (4) must not later make a claim under this section in respect of the issues applicable only to that member except with leave of the court.

(6) The court may grant leave under subsection (5) if it is satisfied that

(a) there are apparent grounds for relief,

(b) the delay was not caused by any fault of the person seeking the relief, and

(c) the defendant would not suffer substantial prejudice if leave were granted.

(7) Unless otherwise ordered by the court making a direction under subsection (1) (c), a determination of issues made in accordance with subsection (1) (c) is deemed to be an order of the court.

Individual assessment of liability

28 Without limiting section 27, if, after determining common issues in favour of a class or subclass, the court determines that the defendant's liability to

individual class members cannot reasonably be determined without proof by those individual class members, section 27 applies to the determination of the defendant's liability to those class members.

Division 2 — Aggregate Awards

Aggregate awards of monetary relief

29 (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if

(a) monetary relief is claimed on behalf of some or all class members,

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

(2) Before making an order under subsection (1), the court must provide the defendant with an opportunity to make submissions to the court in respect of any matter touching on the proposed order including, without limitation,

(a) submissions that contest the merits or amount of an award under that subsection, and

(b) submissions that individual proof of monetary relief is required due to the individual nature of the relief.

Statistical evidence may be used

30 (1) For the purposes of determining issues relating to the amount or distribution of an aggregate monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

(2) A record of statistical information purporting to be prepared by or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada may be admitted as evidence without proof of its authenticity.

(3) Statistical information must not be admitted as evidence under this section unless the party seeking to introduce the information

(a) has given to the party against whom the statistical evidence is to be used a copy of the information at least 60 days before that information is to be introduced as evidence,

(b) has complied with subsections (4) and (5), and

(c) introduces the evidence by an expert who is available for cross-examination on that evidence.

(4) Notice under this section must specify the source of any statistical information sought to be introduced that

(a) was prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada,

(b) was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public, or

(c) was derived from reference material generally used and relied on by members of an occupational group.

(5) Except with respect to information referred to in subsection (4), notice under this section must

(a) specify the name and qualifications of each person who supervised the preparation of the statistical information sought to be introduced, and

(b) describe any documents prepared or used in the course of preparing the statistical information sought to be introduced.

(6) Unless this section provides otherwise, the law and practice with respect to evidence tendered by an expert in a proceeding applies to a class proceeding.

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure.

Average or proportional share of aggregate awards

31 (1) If the court makes an order under section 29, the court may further order that all or a part of the aggregate monetary award be applied so that some or all individual class or subclass members share in the award on an average or proportional basis if

(a) it would be impractical or inefficient to

(i) identify the class or subclass members entitled to share in the award, or

(ii) determine the exact shares that should be allocated to individual class or subclass members, and

(b) failure to make an order under this subsection would deny recovery to a substantial number of class or subclass members.

(2) If an order is made under subsection (1), any member of the class or subclass in respect of which the order was made may, within the time specified in the order, apply to the court to be excluded from the proposed distribution and to be given the opportunity to prove that member's claim on an individual basis.

(3) In deciding whether to exclude a class or subclass member from an average distribution, the court must consider

(a) the extent to which the class or subclass member's individual claim varies from the average for the class or subclass,

(b) the number of class or subclass members seeking to be excluded from an average distribution, and

(c) whether excluding the class or subclass members referred to in paragraph (b) would unreasonably deplete the amount to be distributed on an average basis.

(4) An amount recovered by a class or subclass member who proves that member's claim on an individual basis must be deducted from the amount to be distributed on an average basis before the distribution.

Individual share of aggregate award

32 (1) When the court orders that all or a part of an aggregate monetary award under section 29 (1) be divided among individual class or subclass members on an individual basis, the court must determine whether individual claims need to be made to give effect to the order.

(2) If the court determines under subsection (1) that individual claims need to be made, the court must specify the procedures for determining the claims.

(3) In specifying the procedures under subsection (2), the court must minimize the burden on class or subclass members and, for that purpose, the court may authorize

(a) the use of standard proof of claim forms,

(b) the submission of affidavit or other documentary evidence,

and

(c) the auditing of claims on a sampling or other basis.

(4) When specifying the procedures under subsection (2), the court must set a reasonable time within which individual class or subclass members may make claims under this section.

(5) A class or subclass member who fails to make a claim within the time set under subsection (4) must not later make a claim under this section except with leave of the court.

(6) Section 27 (6) applies to a decision whether to grant leave under subsection (5) of this section.

(7) The court may amend a judgment given under section 29 (1) to give effect to a claim made with leave under subsection (5) of this section if the court considers it appropriate to do so.

Distribution

33 (1) The court may direct any means of distribution of amounts awarded under this Division that it considers appropriate.

(2) In giving directions under subsection (1), the court may order that

(a) the defendant distribute directly to the class or subclass members the amount of monetary relief to which each class or subclass member is entitled by any means authorized by the court, including abatement and credit,

(b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class or subclass members until further order of the court, or

(c) any person other than the defendant distribute directly to each of the class or subclass members, by any means authorized by the court, the amount of monetary relief to which that class or subclass member is entitled.

(3) In deciding whether to make an order under subsection (2) (a), the court

(a) must consider whether distribution by the defendant is the most practical way of distributing the award, and

(b) may take into account whether the amount of monetary relief to which each class or subclass member is entitled can be determined from the records of the defendant.

(4) The court must supervise the execution of judgments and the distribution of awards under this division and may stay the whole or any

part of an execution or distribution for a reasonable period on the terms it considers appropriate.

(5) The court may order that an award made under this Division be paid

(a) in a lump sum, promptly or within a time set by the court, or

(b) in installments, on the terms the court considers appropriate.

(6) The court may

(a) order that the costs of distributing an award under this Division, including the costs of any notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment, and

(b) make any further or other order it considers appropriate.

Undistributed award

34 (1) The court may order that all or any part of an award under this Division that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class or subclass members, even though the order does not provide for monetary relief to individual class or subclass members.

(2) In deciding whether to make an order under subsection (1), the court must consider

(a) whether the distribution would result in unreasonable benefits to persons who are not members of the class or subclass, and

(b) any other matter the court considers relevant.

(3) The court may make an order under subsection (1) whether or not all the class or subclass members can be identified or all their shares can be exactly determined.

(4) The court may make an order under subsection (1) even if the order would benefit

(a) persons who are not class or subclass members, or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding.

(5) If any part of an award that, under section 32 (1), is to be divided among individual class or subclass members remains unclaimed or otherwise undistributed after a time set by the court, the court may order that that part of the award

(a) be applied against the cost of the class proceeding,

(b) be forfeited to the government, or

(c) be returned to the party against whom the award was made.

Division 3 — Termination of Proceedings and Appeals

Settlement, discontinuance, abandonment and dismissal

35 (1) A class proceeding may be settled, discontinued or abandoned only

(a) with the approval of the court, and

(b) on the terms the court considers appropriate.

(2) A settlement may be concluded in relation to the common issues affecting a subclass only

(a) with the approval of the court, and

(b) on the terms the court considers appropriate.

(3) A settlement under this section is not binding unless approved by the court.

(4) A settlement of a class proceeding or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class proceeding, but only to the extent provided by the court.

(5) In dismissing a class proceeding or in approving a settlement, discontinuance or abandonment, the court must consider whether notice should be given under section 20 and whether the notice should include

(a) an account of the conduct of the proceeding,

(b) a statement of the result of the proceeding, and

(c) a description of any plan for distributing any settlement funds.

Appeals

36 (1) Any party may appeal to the Court of Appeal from

(a) an order certifying or refusing to certify a proceeding as a class proceeding,

(b) an order decertifying a proceeding,

(c) a judgment on common issues, and

(d) an order under division 2 of this Part, other than an order that determines individual claims made by class or subclass members.

(2) If a representative plaintiff does not appeal as permitted by subsection (1) within the time limit for bringing an appeal set under section 14 (1) (a) of the *Court of Appeal Act* or if a representative plaintiff abandons an appeal under subsection (1), any member of the class or subclass for which the

representative plaintiff had been appointed may apply to a justice of the Court of Appeal for leave to act as the representative plaintiff for the purposes of subsection (1).

(3) An application by a class or subclass member for leave to act as the representative plaintiff under subsection (2) must be made within 30 days after the expiry of the appeal period available to the representative plaintiff or by such other date as the justice may order.

(4) With leave of a justice of the Court of Appeal, a class or subclass member, a representative plaintiff or a defendant may appeal to that court any order

(a) determining an individual claim made by a class or subclass member, or

(b) dismissing an individual claim for monetary relief made by a class or subclass member.

Part 5 — Costs, Fees and Disbursements

Costs

37 (1) Subject to this section, neither the Supreme Court nor the Court of Appeal may award costs to any party to an application for certification under section 2 (2) or 3, to any party to a class proceeding or to any party to an appeal arising from a class proceeding at any stage of the application, proceeding or appeal.

(2) A court referred to in subsection (1) may only award costs to a party in respect of an application for certification or in respect of all or any part of a class proceeding or an appeal from a class proceeding

(a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,

(b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or

(c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.

(3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.

(4) Class members, other than the person appointed as representative

plaintiff for the class, are not liable for costs except with respect to the determination of their own individual claims.

Agreements respecting fees and disbursements

38 (1) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff must be in writing and must

(a) state the terms under which fees and disbursements are to be paid,

(b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding, and

(c) state the method by which payment is to be made, whether by lump sum or otherwise.

(2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the application of the solicitor.

(3) An application under subsection (2) may,

(a) unless the court otherwise orders, be brought without notice to the defendants, or

(b) if notice to the defendants is required, be brought on the terms respecting disclosure of the whole or any part of the agreement respecting fees and disbursements that the court may order.

(4) Interest payable on fees under an agreement approved under subsection (2) must be calculated

(a) in the manner set out in the agreement, or

(b) if not so set out, at the interest rate, as that term is defined in section 7 of the *Court Order Interest Act*, or at any other rate the court considers appropriate.

(5) Interest payable on disbursements under an agreement approved under subsection (2) must be calculated

(a) in the manner set out in the agreement, or

(b) if not so set out, at the interest rate, as that term is defined in section 7 of the *Court Order Interest Act*, or at any other rate the court considers appropriate, on the balance of disbursements incurred as totalled at the end of each 6 month period following the date of the agreement.

(6) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

(7) If an agreement is not approved by the court or if the amount owing to a solicitor under an approved agreement is in dispute, the court may

(a) determine the amount owing to the solicitor in respect of fees and disbursements,

(b) direct an inquiry, assessment or accounting under the Supreme Court Civil Rules to determine the amount owing,

(c) direct that the amount owing be determined in any other manner, or

(d) make any other or further order it considers appropriate.

Part 6 — General

Limitation period for a cause of action not included in a class proceeding

38.1 (1) If a person has a cause of action, a limitation period applicable to that cause of action is suspended for the period referred to in subsection (2) in the event that

(a) an application is made for an order certifying a proceeding as a class proceeding,

(b) when the proceeding referred to in paragraph (a) is commenced, it is reasonable to assume that, if the proceeding were to be certified,

(i) the cause of action would be asserted in the proceeding, and

(ii) the person would be included as a member of the class on whose behalf the cause of action would be asserted, and

(c) the court makes an order that

(i) the application referred to in subsection (1) (a) be dismissed,

(ii) the cause of action must not be asserted in the proceeding, or

(iii) the person is not a member of the class for which the proceeding may be certified.

(2) In the circumstances set out in subsection (1), the limitation period applicable to a cause of action referred to in that subsection is suspended for the period beginning on the commencement of the proceeding and ending on the date on which

(a) the time for appeal of an order referred to in subsection (1) (c) expires without an appeal being commenced, or

(b) any appeal of an order referred to in subsection (1) (c) is finally disposed of.

Limitation periods

39 (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a proceeding that is certified as a class proceeding under this Act is suspended in favour of a class member on the commencement of the proceeding and resumes running against the class member when any of the following occurs:

(a) the member opts out of the class proceeding;

(b) an amendment is made to the certification order that has the effect of excluding the member from the class proceeding;

(c) a decertification order is made under section 10;

(d) the class proceeding is dismissed without an adjudication on the merits;

(e) the class proceeding is discontinued or abandoned with the approval of the court;

(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

(2) If there is a right of appeal in respect of an event described in subsection (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

Supreme Court Civil Rules

40 The Supreme Court Civil Rules apply to class proceedings to the extent that those rules are not in conflict with this Act.

Application of Act

41 This Act does not apply to

(a) a proceeding that may be brought in a representative capacity under another Act,

(b) a proceeding required by law to be brought in a representative capacity, and

(c) a representative proceeding commenced before this Act comes into force.

Offence Act

42 Section 5 of the *Offence Act* does not apply to this Act.

Power to make regulations

43 The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.
